IN DEFENSE OF LEGISLATURES

LAW AND DISAGREEMENT by Jeremy Waldron. New York: Oxford University Press, 1999. 332 pp.

THE DIGNITY OF LEGISLATION by Jeremy Waldron. Cambridge, UK: Cambridge University Press, 1999. 242 pp.

It is not every day that a scholar stoops to defend legislatures. Oh sure, lots of political theorists rush to the defense of democracy in the abstract, but they often have little to say about actual democratic practice. By contrast, empirical political scientists (and "positive political theorists") have lavished attention on the institutions of democratic governance such as legislatures (particularly Congress). But even in their admiration for the functionality of legislatures, it is hard to find much genuine praise. Of course, the general public's view of legislatures, and particularly Congress, is one of nearly undiluted contempt. Although most view democracy as a good thing, legislatures are more likely to be regarded as a necessary evil that should be kept under a watchful eye.

Given this context, Jeremy Waldron's efforts to defend legislatures as a positive good is extremely welcome. More particularly, Waldron is concerned with developing a vision of liberal democracy separated from the legal constitutionalism of the American model. If we have at least recognized the tensions between legal constitutionalism and democracy, Waldron suggests, we have still failed to appreciate the additional tensions between legal constitutionalism and liberalism and the related affinities between liberalism and democracy. The two works under review are motivated by a very concrete political debate over the proper scope of judicial review in a liberal democracy. Although a recurrent subject of political debate in the American context, the issue has taken on a particular urgency in Britain where the practice of judicial review is making gradual headway. This political context imparts a radical edge to Waldron's arguments that is missing from most American debates in constitutional theory over judicial review.[1] Waldon's liberalism is characterized by legislative rather than judicial supremacy, and he flatly

AUTHOR'S NOTE: I thank Paul Safier for his helpful comments.

POLITICAL THEORY, Vol. 28 No. 5, October 2000 690-702

opposes the constitutionalization of rights and the institution of judicial review. He is particularly strong in highlighting the inescapability of political disagreement over fundamental principles and the importance of a healthy political culture in sustaining a liberal polity. Waldron makes an extremely important and engaging argument, and there is no question that those concerned with constitutional theory as well as those concerned with political philosophy and jurisprudence will benefit greatly from these books.

The two books are intended to be complementary parts of a single theoretical project. Certainly, they develop similar themes and build on each other nicely, although neither work is necessary for a full appreciation of the other. *Law and Disagreement* is the more important of the two works. It develops analytically a distinctive approach to the normative foundations of legislation as a form of lawmaking and its place within a theory of politics and jurisprudence. *The Dignity of Legislation* supplements that argument with more sustained explorations of themes of disagreement, collective decision making, and law in the works of Aristotle, John Locke, and Immanuel Kant, with sidelong looks at Thomas Hobbes, the Marquis de Condorcet, John Stuart Mill, and H.L.A. Hart along the way.

THE CIRCUMSTANCES OF POLITICS

In these books, Waldron takes issue with the dominant emphasis of contemporary Anglo-American political philosophy, which has been centrally concerned with developing theories of justice. At least since the publication of John Rawls's *A Theory of Justice*, political philosophers have been unwilling to "simply confront disagreements about justice as a spectator." They have instead engaged "in these disagreements *as a participant*, and as an uncompromising opponent of conceptions" of justice other than their own. Waldron's central goal in these books is to initiate a new conversation among political philosophers, to persuade them to theorize about politics as well as about justice and rights.[2]

In sum, Waldron would like political philosophers to pay more attention to constitutional theory, which has traditionally been concerned with problems of political authority, the tensions between liberalism and democracy, and the institutional foundations of politics. Political theorists have spent most of their time arguing about the substance of politics, trying to identify the right answers to all the philosophically interesting policy questions. As Waldron points out, not only is this debate subject to declining marginal returns, but it proceeds on the unstated but faintly disreputable starting point of "here is what I would do if I ran the world." Unfortunately, much of American consti-

tutional theory proceeds from the same starting point, although here the favored organ of the dictatorship of the philosophers is the Supreme Court.[3] What is needed, however, is not just a list of preferred public policies or judicial doctrines but a sophisticated analysis of institutional purpose, design, and maintenance. Such an analysis would link political philosophy to an empirical research agenda on how better political decisions can be made and how the conditions of a good political life can better be sustained while still addressing important normative questions about political authority and decision making. Waldron's effort to develop "a jurisprudential model that is capable of making normative sense of legislation as a genuine form of law, of the authority that it claims, and of the demands that it makes on the other actors in a legal system" is a useful and important contribution to that project.[4]

If Waldron's philosophical target in these books is the post-Rawlsian approach to theorizing about justice, his institutional target is the judiciary. Just as political philosophers have been enthralled with their own visions of a well-ordered society, so "contemporary philosophers of law . . . are intoxicated with courts."[5] On one hand, there has been a jurisprudential bias toward the judge-made common law. Even in the "age of statutes" and decades after the Legal Realists, the common law still seems somehow more rational, more coherent, more natural than the statutory law of legislatures. On the other hand, since the advent of the Warren Court, scholars have tended to identify with the countermajoritarian possibilities of a Supreme Court empowered to right wrongs and strike down statutes in violation of considered principles of right and justice. Waldron laments the fact that "people have become convinced that there is something *disreputable* about a system in which an elected legislature, dominated by political parties and making its decisions on the basis of majority-rule, has the final word on matters of right and principle."[6]

As Waldron notes, many legal scholars glorify the power of judicial review by denigrating the quality of legislatures. The legislative process is represented as "a discreditable mess" so as to silence "misgivings about the 'counter-majoritarian difficulty' that judicial review is sometimes thought to involve." One might think that this point would be followed up with an argument based on a more accurate description of both the legislative and the judicial process, but it is not. Instead, Waldron explains that

> what I want to do is apply the canon of symmetry in the other direction. I want to ask: What would it be like to develop a rosy picture of legislatures and their structures and processes that matched, in their normativity and perhaps in their naïvety, the picture of courts—'forum of principle' etc.—that we present in the more elevated moments of our constitutional jurisprudence?[7]

I am not at all sure that this is the best way of proceeding if our goal is to develop a comparative analysis of different institutions of political decision making. Admittedly, before embarking on a thoroughly comparative project, Waldron wishes to clarify the types of claims of authority that legislatures might make. Nonetheless, this starting point would seem to leave Waldron a long distance from his ultimate goal and to encourage a certain inattentiveness to the distinctive institutional features of legislatures. Surely what we need are not additional rosy pictures but a more realistic portrait of legislatures that recognizes that they are not "a discreditable mess" and can themselves be an important forum of principle. Waldron gives no sustained attention to the actual track record of either courts or legislatures in advancing liberal principles or as forums of principled deliberation.[8] Perhaps more problematically, Waldron does not consider the possibility that different political institutions may serve different functions within a coherent political system. Waldron is very good at elaborating the normative virtues of an institution like a legislature, but he seems blind to the possibility that these are partial virtues that should be integrated into an institutionally diverse constitutional order.

Fortunately, Waldron does not really keep to his own description of his central question. He instead develops a careful, inventive, and compelling analysis of the authority of legislatures and why legislation might be "an important and dignified mode of governance."[9] This is not so much a credulous image of legislatures as an explanation of why we in fact value legislatures despite their many failings. In doing so, he upsets our standard assumptions about the inevitability and rightness of judicial review and asks us to rethink the foundations of our political order. His signal contribution is his emphasis on the reality of political disagreement and the constitutional implications that follow from that fact. Individuals disagree with one another, not only because they have divergent interests but also because they have divergent opinions. A critical question for political philosophy is how political life should be conducted in the presence of fundamental disagreement.

> We may say . . . that the felt need among members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are *the circumstances of politics*.[10]

The dignity of legislation arises in part from the fact that it marks a significant achievement in a manner appropriate to these sorts of circumstances, the triumph of peaceful deliberation and respectful cooperation in the face of fundamental disagreement.

The unavoidable presence of political disagreement requires that political theory dispense with approaches to politics based on the assumption of agreement, consensus, or unity. Waldron is incisive in exposing the ubiquity and perniciousness of those sorts of assumptions throughout legal and political philosophy, from the homogeneous populations of civic republicanism to the endless debates of deliberative democracy to the inability of the Rawlsian "original position" to accommodate reasonable disagreement about the principles of justice to the consensual constitutional agreements of contractarian theories. The authority of law depends on its ability to command respect and obedience without reference to substantive, and controversial, conceptions of justice.

> Legal philosophy needs to put this prospect of disagreement in the core, not at the periphery, of its theory of legislation. To ignore it or wish it away, is like wishing away scarcity in the foundations of a theory of justice.[11]

Waldron quite rightly insists that the central question of constitutional theory must be, who decides? Politics, unlike many other social practices, requires decision. Given that disagreement is inescapable, it is not possible to hedge the issue of who decides. If legislatures do not exercise judgment and decide a given political question, then some other institution will, and that decision will be just as controversial and just as contestable as the one that would have been made by the legislature. Similarly, it does no good to give free rein to democratic procedures *except* when some set of particularly important set of principles are at stake (such as rights) or when the democratic procedures yield wrong answers (such as rights violations), for it is precisely the content of that set of principles or right answers that is controversial. Shifting the responsibility for such decisions to an institution such as the Supreme Court does not eliminate the need for a substantively controversial decision; it merely ensures that the decision will be made by a different, and smaller, group of people.[12]

A central theme of these two books is that collective decision making is good. Waldron offers a variety of reasons for thinking this to be true. Most basically, he makes what he regards as an Aristotelian point that the quality of the decision is likely to be higher the larger the number of individuals participating in the decision making, "the wisdom of the multitude." Especially in the context of judgments on political principle, diverse perspectives are also likely to be helpful. Two heads are better than one, even if the one is pretty good. Similarly, Waldron recognizes the benefits of collective deliberation in reaching solutions. People reason better through discussion than through solitary meditation, and legislatures put a premium on discussion.

His most important justification for the primacy of legislatures, however, does not turn on the quality of the decisions reached but on the nature of those making the decisions. Democratic decision making alone adequately respects the dignity of the individual as a rights bearer. This is a particularly interesting argument since it moves beyond the common antagonism posited between democracy and liberalism and grounds our concern for both protecting individual rights and fostering democratic decision making on a common philosophical foundation. "In general, the attribution of rights to individuals is an act of faith in the agency and capacity for moral thinking of each of those individuals." Ultimately, "it is precisely because I see each person as a potential moral agent, endowed with human dignity and autonomy, that I am willing to entrust the people *en masse* with the burden of self-government." We are obliged to consult each individual on the basic principles of government not because an individual vote is likely to have a decisive impact on political outcomes, but in order to avoid "the insult, dishonour, or denigration that is involved when one person's views are treated as of less account than the views of others on a matter that affects him as well as the others."[13]

Waldron demonstrates that this approach to thinking about democratic decision making can be very fruitful in justifying basic institutional features of legislatures and in advancing debates over statutory interpretation. Notably, it provides a principled justification for majority rule that applies in a variety of settings, from mass referenda to intimate legislative committees, and that focuses on the decision rule and not just the process of argument. What is crucial about legislation is that each individual participant's opinion was counted and given due respect. In doing so, legislatures do not paper over differences but rather assert authority despite continuing disagreement. The technicalities associated with parliamentary procedures and the identification of the eventual legislative decisions are likewise integral to an adequate theory of legislation. Assemblies need mechanisms for distinguishing between mere opinion and authoritative law, and legislative texts and the procedures by which they are brought to a vote are essential to that lawmaking function. The text alone gains majority support despite continuing disagreement among legislators, and thus the text alone has the authority of law—not the "legislative intent" expressed in floor debates or committee hearings, not the principles of justice favored by individual judges or legislative advocates. We recognize the authority of legislation not because we necessarily agree with its substance but because we respect the "conditions of fairness in which a common solution was arrived at among those who disagreed about what it ought to be."[14]

TAKING INSTITUTIONS SERIOUSLY

Waldron's arguments are subtle, clear, and have far-reaching implications for political and legal philosophy. He offers fascinating insights into the problem of legal authority and the normative underpinnings of collective decision making. It is hoped that his emphasis on pervasive and deep political disagreement will provoke others to follow his lead in thinking about how we construct institutions to operate within a context of disagreement and to supplement our substantive theories of justice with constitutional theories of politics. Certainly, Waldron has raised an important and compelling challenge to advocates of judicial review and those who minimize the importance of democratic decision making.

There are, nonetheless, problems with these books. Waldron is clear on the constitutional issue that he sees as being directly before him: whether Britain should adopt a constitutional Bill of Rights and some form of judicial review. But on other issues of constitutional design, he can be quite obscure. Waldron focuses his argument on legislatures and legislation, but his analysis of collective decision making, voting, and majority rule often explicitly drifts beyond the confines of legislative assemblies to include political institutions ranging from multimember courts to mass elections. Although the points Waldron makes on these excursions are often valuable, they blur the specific virtues of legislatures. At various junctures, Waldron's emphasis on consulting all those whose interests are affected by a political decision and his defense of the value of political participation even in the context of "millions of votes" seem to suggest that a system that mixed elements of direct democracy would be more virtuous than a system of pure legislative supremacy.[15] Waldron has almost nothing to say in these books about representative democracy or the representative quality of legislatures, other than to assume that an ideal legislature would in fact be "representative." Likewise, Waldron does not consider efforts to protect individual rights through the design of the legislature itself, such as bicameralism or the manipulation of the size of constituencies. In striving to paint a rosy picture of legislatures, Waldron's analysis suffers from an unwillingness to consider basic aspects of institutionalized politics.

To evaluate the quality of legislatures as a mechanism for making important political choices, we will need a more detailed analysis of the political incentives typically faced by legislators and whether those are conducive to the type of principled decision making that Waldron assumes is possible. Waldron briefly notes James Madison's concern that large legislative assemblies could be subject to "the confusion and intemperance of a multitude," but neither grapples with that point nor addresses Madison's other concerns

about how a badly designed legislature could actually hamper good decision making.[16] Notably, Madison is particularly concerned about the problem of representation and accountability in legislatures. There is the obvious problem of how to make government officials responsive to their constituents, of course, but it should also be emphasized that the mechanisms of political accountability have independent effects on legislative behavior. As Madison argued in Federalist Ten, the size of the constituency could affect what the duty to be representative dictated—in particular, he posited that small, relatively homogeneous constituencies would force legislators to aggressively pursue the narrow material interests of the electorate.[17] The ability of political parties to select legislative candidates has also tended to distort legislative decision making by accentuating the relatively extreme primary electorates over the more moderate and diverse general electorate. Current debates over legislative term limits and campaign finance reform highlight the gap between the interests of legislators and those of their constituents. Not only is there some slack in the relationship between the people and their legislative agents, which the agent might exploit to act in nonrepresentative ways, but legislators develop a distinct interest in retaining their institutional position as legislators, which in turn affects their behavior, for example by encouraging risk aversion and blame avoidance.

Waldron's general analysis of legislatures provides a foundation for the further exploration of some of these more particular issues, but these issues also suggest that Waldron is not sufficiently sensitive to the ways in which institutional form matters. In these books, he often treats institutions as largely indistinguishable except for the number of individuals included within them, as if a legislature were simply a statistical sample of the general population rather than a distinct organization. But institutions also develop distinct missions, cultures, modes of behavior, norms, and such, which affect both the behavior of individuals within those institutions and their collective output.[18] Not only might a small group reach a different decision than a large group, but a group of judges might reach a different decision than a group of legislators (or educators or economists). Even reasonably responsive legislators may behave differently than normal citizens when addressing public issues. Madison thought that distinction could be an advantage; Ross Perot would disagree. It is not clear what Waldron would think.

Taking institutions seriously becomes particularly important in evaluating the justifications for judicial review and engaging in the type of comparative institutional analysis that Waldron advocates. Waldron considers essentially two types of justifications for constitutional rights and judicial review: the problem of majority tyranny and the strategy of precommitment. His arguments against each are straightforward and related. Employing an independ-

ent judiciary as a check against majority tyranny is only reasonable if we can identify when majorities might be tyrannical, but that judgment requires a substantive theory of rights and justice that we do not have. "The point to remember here is that nothing tyrannical happens to me merely by virtue of the fact that *my opinion* is not acted upon by a community of which I am a member." Similarly, constitutional precommitment arguments assume that we can tell the difference between "Peter sober" and "Peter drunk" in a political context. As Waldron persuasively argues, however, political decisions do not involve just Peter but also Paul and Mary. Constitutional precommitments are usually more about trying to privilege a particular, contestable political vision over that of the current political minority than trying to safeguard a universally accepted theory of justice against future weaknesses of will. In either case,

> judges disagree among themselves along exactly the same lines as the citizens and representatives do, and that judges make their decisions, too, in the courtroom by majority voting. The citizens may well feel that if disagreements on these matters are to be settled by counting heads, then it is their heads or those of their accountable representatives that should be counted.[19]

These are important arguments, but it is notable that they treat the court and the legislature as institutionally equivalent: it is just a matter of whose heads will be counted. But even though both judges and legislators settle their arguments by voting, they do not approach matters of right and justice in the same way. Likewise, Waldron does not explore the possibility that disagreements over basic principles might be structured in particular, and politically relevant, ways. Even those who support a given political principle may prefer to have some specialized entity charged with safeguarding it rather than leaving it in the hands of a general political institution like a legislature that is buffeted by multiple competing pressures and has its own distinct interests.[20] If constitutions are more like contracts among distinct political groups than promises made by a unified community to its future self, then constitutional commitments may also be a sensible strategy within the context of disagreement. Constitutional commitments may be the price that has to be paid to achieve some greater political good, as the Northern states did on slavery and the Federalists did on the Bill of Rights. Every act of lawmaking involves a precommitment that can be quite difficult to change, whether embedded in a judicially enforceable constitutional text or not. The fact that we might have difficulty changing old political settlements after we have changed our minds about their desirability would seem to be an argument against politics and law as much as it is against constitutionalism.[21]

The judiciary is largely motivated by a different set of concerns than is the legislature. Although judges might disagree among themselves over matters of political principle just as legislators do, legislators may not bother with such issues at all or give them due regard when they do. Questions such as whether indigent criminal defendants should be entitled to free legal counsel may be of intense interest to those directly involved but are unlikely to rise to the top of a legislative agenda. Much of the activity of the Warren and Burger Courts involved forcing just such disagreements about rights onto the national political agenda, in areas ranging from desegregation to the rights of criminal defendants to religious liberty to sexual liberty.

Legislatures also create accountability problems that might best be ameliorated through the creation of constitutional rights and judicial review. A central concern is that legislators may act to entrench themselves in office and in doing so cease to be fully representative of the larger populace and violate rights that the broader citizenry would prefer be upheld. The Federalist Congress passed the Alien and Sedition Acts in no small part to protect itself against the insurgent electoral threat of the Jeffersonians. There is no question that the Sedition Act represented genuine disagreements over fundamental political principles, but it is also true that there are institutional reasons why those holding office might be more likely to favor restricting political speech than would the average citizen.[22] Although there are genuine principled disagreements over the most appropriate way to apportion seats in a legislature, there is reason to believe that incumbent state legislators are more likely to favor the status quo than would other members of the political community. More broadly, calculations of immediate political interest may lead legislators to avoid engaging in disputes over political principle at all, even when such disputes are politically important and relevant to the larger political community. Elected politicians have often taken pains to duck divisive issues, from slavery and abortion to monetary and fiscal policy.[23] It is an open question whether politicians are more likely to face up to such disagreements in the absence of judicial review. Legislatures cannot simply be treated as bodies of collective decision making. They are also institutions centrally concerned with political agenda setting, representation, resource redistribution, and government administration, and these additional functions affect their design, behavior, and authority.

Federalism also adds an extra dimension of complexity to the problem of constitutionalism. Waldron ignores the complications caused by a federal structure, which is understandable given his interest in the domestic case of Britain, but constitutional reforms have often been provoked by the problems of vertical and horizontal coordination of multiple political units. In Britain itself, the debate over judicial review is carried out in the shadow of the Euro-

pean Court of Justice. In the American context, the general power of the Court to review state laws has been widely accepted, but it has been the particular use of that power that has created precisely the types of controversies that concern Waldron. These cases involve conflicts not only between legislative and judicial authority but also between national and local political communities (and Waldron gives us no help in identifying the boundaries of the relevant "political community"). We need to recall E. E. Schattschneider's central insight into the dynamics of political disagreement: "the outcome of all conflict is determined by the *scope* of its contagion."[24] Converting a "local" problem into a "national" problem may result in a different resolution of a disagreement about rights than would be the case if the matter were resolved locally. Judicial review may serve as a vehicle for expanding the scope of a political conflict beyond the confines of a single institution and introducing additional players and perspectives, especially if we recognize that judicial opinions are often not the last word in a political dispute.

Waldron offers a serious challenge to the reigning orthodoxies in both constitutional theory and political philosophy, and he indicates ways of bridging those two literatures that are likely to be beneficial to each. His argument is particularly valuable in developing the normative significance of legislatures, emphasizing the ubiquity of political disagreement and political choice in all forms of lawmaking, and in highlighting the importance of political culture in maintaining political rights. As Waldron concludes, "I think that in political philosophy we should be as interested in the conditions of political culture—the array of current understandings—as we are in having our own cherished principles institutionalized."[25] It may well be that this new political philosophy will have to be centrally concerned with institutions and how they operate, but it will be substantially less confident in its ability to transcend the condition of politics and impose the right answers to difficult political questions.

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NOTES

1. As Alexander Bickel, who helped launch the current literature in constitutional theory, noted, "It is late for radical changes. . . . Judicial review is a present instrument of government. It represents a choice that men have made." The task of constitutional theory is to justify that choice. Alexander Bickel, *The Least Dangerous Branch* (Indianapolis, IN: Bobbs-Merrill, 1962), 14, 16. But cf. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999).

2. Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999), 159. See also John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

3. The broader approach to constitutional theory has been maintained in a variety of scholarly communities, although primarily outside of American law schools, from the British jurisprudential school that is of central importance to Waldron, to the "Princeton school" of constitutional studies nurtured by Walter Murphy, to the Political Economy for a Good Society group, to the "constitutional political economy" of public choice scholars. See also Sotirios A. Barber and Robert P. George, eds., *Constitutional Theory and Constitutional Studies* (forthcoming); Stephen L. Elkin and Karol Edward Soltan, eds., *A New Constitutionalism* (Chicago: University of Chicago Press, 1993); Charles K. Rowley, *Constitutional Political Economy in a Public Choice Perspective* (Boston: Kluwer Academic, 1997).

4. Jeremy Waldron, *The Dignity of Legislation* (Cambridge, UK: Cambridge University Press, 1999), 1.

5. Waldron, *Law and Disagreement*, 9.

6. Waldron, *Dignity of Legislation*, 4.

7. Waldron, *Law and Disagreement*, 31, 32 (footnote omitted).

8. The oversight is particularly unfortunate since a number of theoretically driven, empirical studies along these lines have been done. For example, Donald Morgan, *Congress and the Constitution* (Cambridge, MA: Harvard University Press, 1966); Susan R. Burgess, *Contest for Constitutional Authority* (Lawrence: University Press of Kansas, 1992); Wayne D. Moore, *Constitutional Rights and Powers of the People* (Princeton, NJ: Princeton University Press, 1996); Bruce Ackerman, *We the People*, vol. 2 (Cambridge, MA: Harvard University Press, 1998); John J. Dinan, *Keeping the People's Liberties* (Lawrence: University Press of Kansas, 1998); Keith E. Whittington, *Constitutional Construction* (Cambridge, MA: Harvard University Press, 1999).

9. Waldron, *Dignity of Legislation*, 5.

10. Waldron, *Law and Disagreement*, 102.

11. Ibid., 93. It is a virtue of the legislative process that it "openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among" the members of the community. Waldron, *Dignity of Legislation*, 2.

12. "It looks as though it is disagreement all the way down, so far as constitutional choice is concerned." Waldron, *Law and Disagreement*, 295.

13. Ibid., 222-23, 238 (footnote omitted).

14. Ibid., 85. Importantly, Waldron insists that the precise conditions of fairness are as much subject to political disagreement as any other political problem and have to be worked out in the same way. Once we get to the level of practical decisions, there are no uncontroversial conditions of democracy that could simply be entrusted to the judiciary to impose.

15. Waldron, *Law and Disagreement*, 109.

16. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), no. 55, 342; Waldron, *Law and Disagreement*, 52.

17. Hamilton et al., *Federalist Papers*, no. 10, 83.

18. For example, James G. March and Johan P. Olsen, *Rediscovering Institutions* (New York: Free Press, 1989); Howard Gillman, "The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making," in *Supreme Court Decision-Making*, ed. Cornell W. Clayton and Howard Gillman (Chicago: University of Chicago Press, 1999).

19. Waldron, *Law and Disagreement*, 13, 15.

20. This concern with limiting the legislature is central to many popular sovereignty accounts of constitutionalism. For example, Bruce Ackerman, *We the People*, vol. 1 (Cambridge,

MA: Harvard University Press, 1991); Keith E. Whittington, *Constitutional Interpretation* (Lawrence: University Press of Kansas, 1999), 110-59.

21. Such considerations might even work against an argument for legislative supremacy. Courts can provoke as well as block reform, and cases such as *Griswold*, in which the Court struck down an eighty-six-year-old law against the use of contraceptives in Connecticut, are prime examples of the judiciary overcoming legislative inertia on behalf of current majorities.

22. I do find it important, however, that the Federalist view of free speech and the conditions of democracy were rejected through political, not judicial, means.

23. See especially, Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993): 35.

24. E. E. Schattschneider, *The Semi-Sovereign People* (Hinsdale, IL: Dryden, 1960), 2.

25. Waldron, *Law and Disagreement*, 310.

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