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## Undercover Anti-Populism

### Cover Page Footnote

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## UNDERCOVER ANTI-POPULISM

Larry D. Kramer\*

Larry Sager established himself as one of the nation's preeminent scholars of constitutional law more than twenty-five years ago, with the publication of his now classic *Fair Measure: The Legal Status of Underenforced Norms*.<sup>1</sup> Countless articles of equal interest and importance followed, on topics ranging from religious liberty to group deliberation to congressional control of Supreme Court jurisdiction. What Sager writes is, in fact, very nearly required reading for those of us who toil in the fields of constitutional law and theory. But this is the book we have been waiting for. This is the book that lays out and articulates the project that has defined the arc of Sager's long and distinguished career. *Justice in Plainclothes* finally offers us the mature Sager on constitutional interpretation, neatly packaged in a single, continuous text.<sup>2</sup> Carefully crafted and elegantly written, it presents the full flowering of Sager's thinking about the Constitution, honed and refined by almost four decades of work and contemplation.

*Justice in Plainclothes* is not a long book. But its size is deceptive, and its text is rich with nuance and complexity. The book is a worthy product of Sager's long labor, and one could easily spend two or three times the number of pages he wrote unpacking its ideas and considering its subtleties. Yet while there is much that is good here, and much to be learned, I want in this short Essay to focus on the premise of Sager's argument with which I disagree most—a postulate that is central to both our projects but about which we reach essentially the opposite conclusion. I mean, of course, the role of ordinary citizens in interpreting the Constitution, or what I (and others) have referred to as “popular constitutionalism.”<sup>3</sup>

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1. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978). Sager updated his thesis fifteen years later in Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993).

2. Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (2004).

3. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

## I.

The basic principle of popular constitutionalism can be briefly stated. It is, in a nutshell, the idea that ordinary citizens are our most authoritative interpreters of the Constitution: that their views about the meaning of the Constitution, collectively expressed, reflect the highest authority when it comes to resolving disagreements about what the document permits, forbids, or requires. To someone who embraces popular constitutionalism, it is not enough to say that ordinary citizens can change the text through amendment, whether under the process specified in Article V or via some more informal route, since the undoubted popular authority to *make* constitutional law neither diminishes nor excludes any concurrent power to *interpret* it. Nor is it enough to say that ordinary citizens can have views and express their discontent by agitating for change—not if this still means that the final say is formally lodged in some outside body whose mind the community must persuade. Hence, popular constitutionalism can conveniently be contrasted with legal constitutionalism, which formally makes the Supreme Court the final repository of interpretive authority and limits popular participation in amending the Constitution, trying to persuade the Justices to alter their opinions, or seeking to change the Court's membership through appointments if and when Justices die or retire.

There is a sense in which Sager seems at first to embrace a quite robust commitment to popular constitutionalism. He emphasizes, for example, how the domain of constitutional justice does not encompass “all of political justice”—leaving many, perhaps most, of its demands to be worked out in ordinary politics.<sup>4</sup> And carrying forward the thesis from his original *Fair Measure* article, Sager argues that this is true even for a multitude of questions within the narrower arena of “constitutional justice.”<sup>5</sup> Indeed, Sager devotes three full chapters, nearly a third of his book, to explaining the “thinness” of the adjudicated Constitution, stressing not just that the Constitution is significantly “underenforced” by courts, but that it is appropriately so.<sup>6</sup>

Upon further reflection, however, one comes to see that Sager's apparent embrace of democratic authority is largely rhetorical—at least when viewed in light of the kinds of questions that have actually comprised (and still comprise) our nation's long-running debate over judicial authority. Take Sager's recognition of a domain of political justice beyond the reach of the Constitution, one that is necessarily left to politics.<sup>7</sup> This might be seen as an important concession to

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4. Sager, *supra* note 2, at 132.

5. *Id.* at 84-128.

6. *Id.* at 12-42.

7. *Id.* at 7-8.

popular authority were there anyone who contended otherwise: anyone, that is, who claimed that judges had the power and responsibility to decide every question of justice broadly conceived. So far as I am aware, however, no one at any time or anywhere has ever made such a claim. Sager thus concedes to democratic politics only that which everyone on both sides of the debate has always conceded. Actually, he concedes less than most, for while recognizing the existence of this domain of political justice outside the Constitution, Sager defines it narrowly by relocating certain major questions, like the right to minimum welfare,<sup>8</sup> within the Constitution's boundaries. He is not alone in taking this step, of course, though plainly this is a position held by only a minority of constitutional lawyers and scholars.<sup>9</sup> What is significant, though, because it reflects a general pattern in Sager's thinking, is that he predictably chooses the position that enlarges the set of issues arguably subject to judicial supervision.

To be fair, Sager is explicit in stating that the constitutional right to minimum welfare is, for the most part, a prescription properly underenforced by the judiciary.<sup>10</sup> The qualifying phrase "for the most part" matters, however, because locating a right within the sphere of constitutional justice opens the door to a range of judicial policing around the edges, what Sager calls "the Court's secondary enforcement role"<sup>11</sup>—a kind of slow-creeping judicial regulation that, in the mode of a landfill, gradually expands as courts create solid ground for themselves and use that ground to generate a steadily widening body of judicial doctrine.<sup>12</sup>

Nor can the underenforcement thesis itself be portrayed as a real concession or commitment to popular participation in constitutional decision making, not when viewed against the background of our actual practices and debates. Consider, first, that the domain of constitutional justice Sager says should not be controlled by courts is defined entirely by the limits of judicial competence. If courts *can* adjudicate a question of constitutional principle, then they should do so—and, in Sager's world, their decision should trump that of anybody and everybody else. Underenforcement is confined to principles of constitutional justice that are so "wrapped in complex choices of strategy and responsibility" that judges are incapable of resolving them in a principled manner, though even then any judicial hesitation exists only "in the first instance" and Sager counsels courts to step in

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8. *Id.* at 87, 95-102.

9. See William E. Forbath, *The New Deal Constitution in Exile*, 51 *Duke L.J.* 165 (2001); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 *Fordham L. Rev.* 1893 (2001).

10. Sager, *supra* note 2, at 87.

11. *Id.* at 100.

12. *Id.* at 95-102.

and police popular institutions to the full extent possible.<sup>13</sup> The determination and definition of where judicial competence ends, moreover, is entirely in the courts' own hands, leaving judges alone to decide where the proper boundary lies between the adjudicated and the unadjudicated Constitution. Add to this Sager's admonition that the amendment process be made as difficult as possible and phrased so as to maximize judicial discretion,<sup>14</sup> and the picture begins coming into focus. Underenforcement is a device for urging politicians to recognize some responsibility to treat certain issues as constitutional (though Sager suggests, wrongly in my view, that attaching the label "constitutional" to a political issue is not likely to have much effect).<sup>15</sup> It is, in addition, a justification for further judicial intervention around the edges of issues beyond judicial competence. The one thing it is *not*, however, is an argument for limiting or in any way curtailing judicial authority along the lines proposed by skeptics of judicial review.

Americans have been fighting about the proper scope of judicial authority over the Constitution from the beginning. The arguments on both sides of the debate were, in fact, fully developed by the time of Thomas Jefferson's election or, at the very latest, by the time of Andrew Jackson's, and surprisingly little has been added since that time. Sager's position represents the far end of one side in this debate: the side supporting broad judicial authority. Any appearance to the contrary comes from his explaining that position by imagining a still more extreme position that no judge and only a handful of philosophers have ever advocated. Sager would thus concede to politics and deny to courts mainly that which has always or almost always been conceded to politics. He would give to courts not only that which has been most frequently addressed by courts, but virtually the entire territory that has been subject to dispute. Indeed, he offers a variety of arguments—from secondary judicial enforcement to cramped use of Article V—designed specifically to enlarge the territory subject to judicial control as far as possible (or as far as possible without breaking utterly from past practice). Sager's theory thus justifies a very strong version of judicial power, and so by the same token reflects a correspondingly strong repudiation of popular constitutionalism.

One sees the heavy anti-populist tilt in Sager's argument most clearly in his chapter on amendments and the "birth logic" of a constitution.<sup>16</sup> The appropriate role for citizens, Sager argues there, is to adopt a constitution that articulates basic principles at a very high level of generality. Having done so, he continues, the popular

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13. *Id.* at 87.

14. *Id.* at 164, 169-71.

15. *See id.* at 94.

16. *Id.* at 161-93.

decision-making group<sup>17</sup> that wrote the Constitution should bind both their own hands and those of posterity by making it as difficult as possible to modify or further specify the principles, leaving the remainder of the work—the task of actually implementing and applying the Constitution over time and in particular contexts—to the judiciary.<sup>18</sup> Sager calls this a “partnership” between judges and citizens.<sup>19</sup> If so, the judges become by this means distinctly senior partners, with everyone else as junior co-venturers possessing little or no practical authority to gainsay their superiors’ decisions.

Consider how this is meant to work in practice. No one disagrees or would disagree with the sorts of generalities Sager means for the people at large to include in the body of the constitution, certainly not if articulated at the level of abstraction he deems appropriate. No one would argue with the idea that a constitution should guarantee “liberty” or “equality” or “free speech” and the like. But the meaningful and important work all involves the application of these broad principles in concrete circumstances, something Sager urges should be centralized in the judiciary. In practice then, Sager’s prescription amounts to a straightforward delegation of ruling authority to an elite over whom the public is meant to have as little control as possible (short of creating a true formal aristocracy).

What is striking about this formulation is its inconsistency with what most of us regard as the basic touchstone for measuring legitimacy in a system of self-government—namely, the right to govern oneself. Sager argues persuasively that there is no necessary symmetry between the process for creating a constitutional system and that for changing it. If, as he says, an autocratic Queen Liza created a democratic order and then suffered a change of heart, we would not say she could unilaterally reassert her authority simply because it was by her authority that the democratic order was created in the first place.<sup>20</sup> But isn’t that because, in our normal hierarchy of principles, the more democratic authority trumps the less democratic one?<sup>21</sup>

Hence, reverse Sager’s hypothetical and suppose that a democratic polity decided to anoint Queen Liza. There is little doubt, I think, that this same polity *could* reverse its decision, and could do so based

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17. *Id.* at 161-63.

18. *Id.*

19. *Id.* at 14-22.

20. *Id.* at 165-66.

21. This was, in fact, among the arguments offered by Federalists in response to Anti-Federalist charges that the rule for adopting the Constitution was “illegal” because it was inconsistent with the requirement of unanimity in the Articles of Confederation: the Articles had been adopted only by the state legislatures, whereas the Constitution was being ratified by the people themselves. *See* The Federalist No. 22, at 145-46 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); The Federalist No. 43, at 297-98 (James Madison) (Jacob E. Cooke ed., 1961); James Madison, *Vices of the Political System of the United States*, in 9 The Papers of James Madison 346, 353 (Robert A. Rutland et al. eds., 1975).

on original authority, because the original democratic authority would be deemed normatively superior to Queen Liza's autocratic power, from whatever source derived.

Yet this is precisely what Sager means to deny. His argument in favor of restricting the power to control the judiciary through amendment is that a democratic authority has set up an autocratic one and, in doing so, should be understood to have all but completely precluded itself from taking that authority back. Instead of Queen Liza, we have Queens Sandra and Ruth—working with Kings William, John, Antonin, Anthony, David, Clarence, and Steven. The domain over which these nine Kings and Queens govern is, to be sure, smaller than that of Queen Liza. In Sager's world, they rule only over the most important questions of liberty and freedom. But having allegedly given them power, Sager argues that there is no necessary logic or authority that would entitle us to take it back.

## II.

It is noteworthy in this respect that Sager does not defend his theory as the best one that could be devised. Nor does he advocate it as something that should be followed by everyone everywhere. One suspects this might be his view, but Sager's actual claims are more modest, and his text reflects a genuine uncertainty about the reach of his theory outside the setting of American law today. As the book's subtitle makes clear, his is a theory of American constitutional "practice": an effort to provide an attractive account for a course of conduct or activity that already exists.

In making this move, Sager is relying on a familiar method of legal justification, the one we teach implicitly by spending so much time with students on the common law. We look to what courts actually do; we put a heavy thumb on the scale in favor of existing practice, simply because it *is* existing practice; and we offer the best theoretical justification for that practice, with the expectation that this should guide future action. The "best" account, in this model, is whichever one offers the most normatively attractive justification that also fits the practice.

Tricky questions arise around the edges: What if not all of the practice can be fit into the theory offered to explain it? How should we choose among competing theories if one is marginally stronger as a normative matter, while another does a marginally better job of capturing what courts do? What if the best normative justification is still unattractive, or there is a competing justification that is much more attractive but that requires substantially changing the practice? As all lawyers know, there are no simple answers to these questions, which ultimately call for judgment and depend on one's ability to persuade. The general approach, in any event, is the distinctly legal version of a widely accepted form of philosophical pragmatism. It



calls upon us to explain an established practice in the most sensible and coherent manner possible—which is precisely what Sager attempts to do in *Justice in Plainclothes*.

A common objection to this form of argument concerns defining whose practice or practices we are talking about. In ordinary legal contexts, the practice in question typically is that of a particular court or courts, meaning there is neither confusion nor disagreement about precisely whose behavior and understanding an author is trying to explain. Most discussions of judicial review, for example, take the U.S. Supreme Court and its decisions as both starting and ending points. But Sager's goal is more ambitious, and he wants a theory that encompasses more than just what the Court does. "What makes a constitution interesting," he observes at the outset, "is what a people do with it."<sup>22</sup> Sager wants a theory that describes and justifies the constitutional practices of the broader American political culture. Courts have a central place in Sager's theory because this is his understanding of the broader culture. But he is attempting to do more than offer the best justification for what the Court is doing from the Court's own perspective. He means to encompass the way in which Americans generally understand our Constitution, including why we might permit judges to exercise a power of review at all. Hence, Sager's emphasis on the several "partnerships" that he says comprise our constitutional practice.

The problem is that once we move outside the narrowly circumscribed world of judges, it is no longer clear whether Sager's references to "our constitutional practice"<sup>23</sup> are accurate or even meaningful. His description of how the Constitution is interpreted and applied, for example, probably does correspond to the beliefs of many in the professional elite. But there is by now a quite substantial empirical literature suggesting that Americans outside the profession have widely disparate beliefs as to the nature, exercise, and distribution of authority in our constitutional culture—beliefs that they act upon and that have a substantial effect in shaping the law.<sup>24</sup> There exists, this literature suggests, no single practice to be explained, but rather a wide variety of practices which are not all consistent, which co-exist, and which come into direct conflict only rarely.<sup>25</sup>

This is, as I mentioned above, a familiar sort of objection. But let's put it aside and assume for the moment that Sager's description of "our constitutional practice" is accurate as respects most Americans today. What if, as I argue in my book, this is just a temporary,

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22. Sager, *supra* note 2, at 1.

23. *Id.* at 12-14.

24. I surveyed this literature briefly in Larry D. Kramer, *Popular Constitutionalism*, *Circa 2004*, 92 Cal. L. Rev. 959, 967-85 (2004).

25. *Id.*

politically and historically contingent, turn-of-the-wheel? What if the evolution of “our constitutional practice” has been cyclical rather than linear, with alternating rules and principles exercising a dominant influence at different times? I want especially to focus on what I take to be the critical difference between Sager’s account and mine, namely, the role of ordinary citizens in determining constitutional meaning. As I tried to show, two major positions on this question have competed for preeminence practically from the beginning.<sup>26</sup> On one side, we have had the Jeffersonian view, which triumphed decisively in the critical election of 1800 and dominated politics in the early republic.<sup>27</sup> Adherents of this view agreed that courts could exercise a power of judicial review, but with no notion that judicial decisions were supreme, judges were expected—indeed, were required at risk of punishment—to defer to clearly expressed and settled popular opinion as mediated through the complex federal political structure. On the other side was the Federalist position that emerged over the course of the 1790s,<sup>28</sup> of which Sager is a direct descendant. Like Sager, adherents of this position pressed the need for judicial supremacy over a substantial domain of what they now urged for the first time should be understood as “legal” questions suited for final determination in and by courts.

These two positions have existed in a dialectical tug of war throughout American history. Struggle has not been constant, but has instead consisted of periodic confrontations or blowups occurring after years or sometimes decades during which active backers of the two perspectives jostled for position while ordinary citizens remained largely indifferent or unconcerned. The Jeffersonian position—popular constitutionalism—appears to have been the dominant public understanding during most of these latent periods, even as judicial supremacy was favored by, and within, the legal profession.<sup>29</sup> Certainly popular constitutionalism was the clear victor each time matters came to a head. Yet the end of one cycle simply began another in which the Court and its supporters eventually renewed their efforts to establish judicial supremacy.<sup>30</sup> Resurgent claims of judicial authority, in turn, gave rise to a new wave of criticism, as opponents of the judiciary pushed back by advocating a revived or restored commitment to popular constitutionalism.<sup>31</sup> And so it has gone, round and round.<sup>32</sup>

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26. See Kramer, *supra* note 3, at 105-44.

27. *Id.* at 105-14.

28. *Id.* at 128-44.

29. *Id.* at 207.

30. *Id.*

31. *Id.*

32. *Id.* at 207-26.

This matters, I think, because it undercuts the normative structure of Sager's argument. If today's practice is but the latest in a sea-sawing battle over constitutional authority, if it is a contingent political development still contested by a competing approach that can equally be defended as normatively attractive, then more is required to make the theory persuasive than showing that what we are doing at this particular moment is defensible. The implicit weight attached to the fact that something is our practice dissipates if that practice has been varying and continues to be up for grabs. At the very least, we need some sort of straight up comparison with the alternative practice and its normative justification.

### III.

What should such a comparison look like? At one time, debates about judicial supremacy were framed as a choice between principles of democracy, on the one hand, and fidelity to law and justice, on the other. Opponents of judicial review denounced the practice as inconsistent with self-government,<sup>33</sup> while its proponents urged that, in a conflict between democracy and justice, the latter should prevail.<sup>34</sup> More recently, defenders of judicial power have started describing supremacy as an aspect of democratic theory. To be legitimate, they say, democracy requires decisions made after a certain kind of deliberation, which courts can do with and for the American people better than other available institutions. The choice, in other words, is between two versions of democracy: one that utilizes courts to advance the cause of political justice, and another that leaves this cause to the hazards of popular politics.<sup>35</sup>

Though much could be said both for and against this latter position, I will not take up the cudgels here. For while Sager makes occasional gestures in this direction, he relies mainly on a bolder and more innovative claim, one that confronts proponents of the democratic principle head-on and insists that they are overstating their position. The object of government, Sager says, is political justice. And while

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33. See, e.g., Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 BYU L. Rev. 517 (1997); Robert H. Bork, *The Judge's Role in Law and Culture*, 1 Ave Maria L. Rev. 19 (2003).

34. Ronald Dworkin, the best and most famous exponent of this view, at one point flatly asserted that "[t]he United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions." Ronald Dworkin, *Law's Empire* 356 (1986). Democracy was important, Dworkin acknowledged, but so too was justice, and surely it made sense to think that democracy should yield when the two collided; limiting ordinary politics was a good thing if the limits were in the service of a more just society. *Id.*

35. This was Dworkin's position in his most recent work in this vein. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 15-19 (1996). For another work that takes a similar approach, see Christopher L. Eisgruber, *Constitutional Self-Government* 71-73, 77-78 (2001).

democracy is surely an aspect of political justice, it just as surely is not the whole of it. With respect to certain kinds of decisions—those that are “preference-driven” and do not depend on principle, as well as some matters of principle that are deeply entangled in questions of policy—political justice demands a commitment to democratic decision making.<sup>36</sup> But for other decisions, and in particular for the crucial determinations about liberty and equality that lie at the heart of constitutional justice, democracy has no special claim to priority. Such decisions should be made by whichever institution or institutions in society will give the best answers.

At this point, any differences between Sager’s theory and those of his predecessors vanish, and the question comes down to a simple, pragmatic assessment of who will make the best decisions. Whatever the theoretical relationship between judicial supremacy, political justice, and democracy—whether the principles stand in opposition or are aspects of each other—the argument for conferring special authority on the judiciary rests on a simple claim that judges can and will do a better job than the rest of us. Or, to be more accurate, that the judicial process is a superior process for making decisions about constitutional principle than the political process.

This point, which is crucial, is too often obscured by the elaborate theorizing of writers on both sides of the debate. But the choice among dueling theories ultimately boils down to nothing more than an empirical question of comparative institutional capability. Like all advocates of judicial power, Sager believes that the judiciary can and will deliberate about political justice (or at least the subset of political justice encompassed in the “liberty bearing” provisions of our Constitution) better than the available alternatives.<sup>37</sup> This is the heart of the matter; everything else is decoration.

I addressed this claim of relative judicial superiority at some length in both my book and a subsequent article,<sup>38</sup> and so will confine myself here to a brief recapitulation of points previously made. The first thing to note is that there is no reliable evidence to support the proposition that the judiciary does a better job than the political branches when addressing matters of political justice. It is, of course, unclear exactly what proof of such a proposition would look like, but certainly nothing in our history or in the history of other countries without judicial review supports a claim that courts are superior. If anything, the record of courts relative to legislatures in this country supports the opposite conclusion. It is only by foreshortening history and treating the anomalous Warren Court as if it were the norm that any claim on behalf of the judiciary can be maintained. But if

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36. Sager, *supra* note 2, at 139-40.

37. *Id.* at 70.

38. See Kramer, *supra* note 3, at 233-48; Kramer, *supra* note 24, at 985-1008.

predictions about institutional capacity are needed, why look at *Brown* and *Roe* rather than at the 150 or so laws struck down by judges anxious to stymie progressive reform during the three decades of the *Lochner* era? Are the accomplishments of the Court in the 1960s and 70s typical, or should we think instead of the dismantling of Reconstruction; of *Dred Scott*; of the federalist era, judicially-inspired sedition campaign; or of the current Court's systematic hobbling of federal power to remedy discrimination?

Nor does the claim for courts find more or better support in the experience of other nations. On the contrary, as Jeremy Waldron has noted, the many societies that lack judicial review—think of England, New Zealand, the Netherlands, Sweden, and France—“seem to be at least as free and as just as the United States.”<sup>39</sup> Sager claims at several points in his argument that there is a trend for other countries to follow the example of the United States by creating constitutional courts with powers similar to ours.<sup>40</sup> But he ignores critical differences in the structure of these courts that make such comparisons misleading. Other nations that adopt judicial review carefully regulate their courts to ensure greater political control. In recognition that constitutional adjudication is not a normal function for the judiciary, they remove their constitutional courts from the ordinary judicial process and limit their jurisdiction exclusively to deciding constitutional questions. Given the high political station thus accorded, additional safeguards have then been added to ensure an appropriate level of political accountability. Appointment to the bench typically requires a supermajority in one or both houses of the legislature, guaranteeing that constitutional courts have a mainstream ideology, while the judges serve terms that are limited and staggered to ensure a regular turnover. In addition, the constitutions themselves are much more easily amendable than ours. The combined effect of these innovations is to relieve the pressure a doctrine of judicial review creates by reducing the likelihood of breaches between the constitutional court and the political branches, and by making political correctives easier to implement when such breaches occur. In the end, any resemblance between judicial review in these foreign courts and in ours is more superficial than real.

But Sager does not rely on historical experience to defend the institutional superiority of the judiciary. Rather, like most writers in this vein, he relies on impressionistic descriptions of the legislative and judicial processes. The judiciary is well suited to address questions of constitutional justice, Sager says, because judges “are considerably more detached from the pressure of public opinion than are regularly elected public officials” and because judges “are obliged to give each

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39. Jeremy Waldron, *Law and Disagreement* 288 (1999).

40. *See, e.g.*, Sager, *supra* note 2, at 199.

other and the broader audience of their opinions reasons for their decisions.”<sup>41</sup> Combine with this “the collegial, deliberative nature of constitutional tribunals in our legal system” and the fact that courts specialize in constitutional adjudication, Sager concludes, and one has a solid basis for entrusting the Constitution to courts.<sup>42</sup>

Even on its own terms, this reasoning rests on a variety of controversial, yet undefended, assumptions. To take just one example, consider Sager’s point about judges being detached from public opinion. It is almost reflexive among constitutional lawyers to assume that this is a good thing. But why? A conventional originalist might say that detachment is good because the Constitution is a piece of positive law whose full meaning was deposited in the text by enactment and is recoverable only through a technical process of legal interpretation. But that is not Sager’s answer, and he emphatically rejects such reasoning. Yet once we understand the Constitution as calling for a more fluid and open-ended process of moral reasoning, public opinion no longer seems so obviously inappropriate. Why isn’t it an argument in favor of political resolution that legislators are more likely to respond to public opinion when addressing questions of constitutional principle, particularly given our usual epistemic principle that hard choices are best made by those with a sufficient stake in the matter?<sup>43</sup> The answer must be, though this remains implicit, that “the public” does not reason about these questions properly; that when my mother (or yours) makes a judgment about a woman’s right to get an abortion, it is an emotional or irrational response and does not evidence a process of moral reasoning worthy of respect. Not as worthy as that of the Justices, in any event.

Putting aside the normative questions raised by assumptions like these, how accurate is the underlying portrayal? Judicial supremacists tend toward hyperbole in their depictions of courts and legislatures, and Sager is no exception. His judiciary is an intellectual debating society where judges sit studiously pondering and discussing weighty questions of principle before crafting careful explanations that reflect deeply on the theoretical and philosophical dilemmas they have faced. Yet the judiciary is a far more complex institution than such stories would have it. No less than legislators, judges are subject to influences and incentives that skew their judgment. A desire to expand their own authority and responsibility is an obvious example.<sup>44</sup> More complicated, as Keith Whittington explains, the Supreme Court is itself enmeshed in and dependent upon “its own set of interest groups, from corporate litigants to public interest legal groups, that seek to influence its decisions” and that play a critical role in setting

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41. *Id.* at 74-75.

42. *Id.* at 75.

43. Waldron, *supra* note 39, at 253.

44. Mark Tushnet, *Taking the Constitution Away from the Courts* 26 (1999).

the Court's agenda, framing the issues, and giving shape to the arguments.<sup>45</sup> "Judicial politics is not the same as legislative politics," he concedes, "but the reasoning of judicial constitutional interpretation is deeply contested and implicated in the same considerations as extrajudicial constitutional interpretation."<sup>46</sup>

Still, the main criticism should not be that judges are somehow really just like politicians. They are not. Politicians are unquestionably influenced more and more directly by "outside actors" than are judges. A lot more. This is the whole basis and reason for arguing that we should prefer legislators to judges on democratic grounds. Legislatures do not perfectly mirror or translate popular will, and courts are to some extent responsive to democratic pressures. But it would be ludicrous to treat the two as comparable in this respect.

The main criticism is, rather, that judges are just like judges, which is to say that they are not at all like philosophers or academics. Even ignoring what we know about how undeliberative the judicial process really is and pretending that judges are more involved in crafting opinions than we know to be the case, articulating, even contemplating, visions of justice just is not a big part of the job. Analyzing precedent; examining antecedent practices; making crude, seat-of-the-pants judgments about policy and consequences—these describe a typical day's work at the Court. Sometimes, to be sure, the Justices (or their clerks) throw some fancy sounding rhetoric into the opinions, but the Court's deliberations are almost wholly technical and legalistic. To take an obvious example, compare the opinion in *Brown*<sup>47</sup> with the congressional debate over the Civil Rights Act of 1964.<sup>48</sup> As instances of serious deliberation about matters of principle, the comparison is not even close. The same thing could be said for almost any issue that comes up in both the Court and Congress, whether it be abortion, the death penalty, gay rights, euthanasia, or whatever. One may not like what the legislators have to say, though it seems hard to me to say that discussions in Congress compare unfavorably with those of the Court on issues like gay rights, abortion, race, or other current problems. Be that as it may, in terms of focus, emphasis, and amount of energy expended, congressional debates are explicitly about substantive values to a much greater extent than judicial opinions or deliberations.

There is nothing wrong with this. We expect and want our courts to be technical and legalistic. Laymen and first-year law students

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45. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. Rev. 773, 817 (2002).

46. *Id.* at 817-18.

47. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

48. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections and titles of the U.S.C.).

sometimes bridle at law's technicality, angrily resisting it as an effort to mystify and confuse them. But of course, it is not. There are good reasons for most of law's complexity, reasons that explain why we need a body of lawyers and judges with the necessary experience and training to run the age-old machinery of the law. This is why we do not want our lawyers and judges pretending that they are somehow specially suited to engage in deliberations about morality and principle for the rest of us. The needs and demands of law serve to divert judges from making decisions based on abstract principles in much the same way as the needs and demands of politics do for politicians. The particular distortions differ, but the consequences are just the same in limiting the space available to think about or act on these sorts of considerations. This is not a formalist claim that judges are constrained by some inherent quality of legal doctrine; that would be silly, especially as applied to the Supreme Court. It is, rather, a claim about the *culture* of judging, which structures how judges approach their jobs just as the culture of politics does for politicians, and not only pushes judges toward the technical and legalistic, but generally keeps them there.

Turning to Congress, the portrayal of legislators as sating a single-minded obsession with re-election by becoming willing puppets of narrow interest groups is scarcely less distorted on its side than the picture of judges as black-robed philosophers. As Mark Tushnet notes, scholars who study Congress generally agree that while legislators are naturally concerned with re-election, they have other things on their minds as well—not the least of which is making a difference and building a reputation by creating good public policy.<sup>49</sup> Political debates on matters of constitutional principle are common in Congress because voters care about such matters, and an important element of any legislator's job consists of explaining decisions to constituents back home.<sup>50</sup>

The point is not that it is the members of Congress rather than judges who turn out to be our great moral reasoners. To accomplish anything, legislators must work with interest groups. This has important benefits that legal commentators tend too easily to overlook, such as providing legislators with much needed information, helping them to understand and anticipate how legislation will affect relevant groups, reducing uncertainty about how different laws might be received by voters, and helping to communicate relevant information to the public.<sup>51</sup> But the process inevitably requires all

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49. Tushnet, *supra* note 44, at 65-66; *see also* Richard L. Hall, *Participation in Congress* (1996).

50. *See* John W. Kingdon, *Congressmen's Voting Decisions* 47 (3d ed. 1989); Whittington, *supra* note 45, at 821.

51. *See* Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* 87-118 (1999); John Mark Hansen, *Gaining Access: Congress and the Farm*



sorts of compromises. Conscientious legislators must struggle against politics to find space for completely principled decision making, space that is rarely if ever unconstrained in the real world. Yet to say that legislators do not operate in some Habermasian ideal speech situation is not to say that the legislative process is therefore non-deliberative or devoid of principle. Congressional decisions still turn on whether appropriate justifications can be found for a vote, such as justifications that are persuasive, that a legislator believes he or she can publicly offer to constituents back home, and that are consistent with or reasonably distinguishable from other positions he or she has taken.<sup>52</sup>

None of this argues conclusively against the doctrine of judicial supremacy. It simply calls into question assumptions about judges and legislators that commentators like Sager take for granted. Yet given our actual historical experience, not to mention the experience of other democracies that have flourished without judicial review, how confident should we be that it is necessary to assign the Court this high political authority? How significant is the difference, really, between the Court and Congress? Even assuming that the Court is less affected (or, more plausibly, *differently* affected) by short-term political pressures, what about the pressures that do distort its decision making—ideology, lack of information, ignorance of consequences, the confounding effects of law's technicality, and the like? And even if these distortions are for some reason less worrisome, how should we weigh any residual difference against the superior democratic pedigree attached to decisions made by other political institutions? Is it not significant in this respect that the Court itself is invariably as divided as the rest of the country on controversial questions? Given divisions on problems that simply do not have clear answers, why should we prefer a majority of nine to a majority of the larger population?

#### IV.

Bear in mind that I am not suggesting that courts be excluded from the process of deciding constitutional questions. Popular constitutionalism rejects only the idea of judicial supremacy, which is overlaid atop judicial review to discourage and minimize opposition to the Court's decisions. The difference between Sager's position and mine is thus ultimately a matter of degree. Conceptually, it turns on the role one imagines for popular authority when it comes to questions of constitutional interpretation. In practice, it affects the

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Lobby, 1919-1981 (1991); John R. Wright, *Interest Groups and Congress: Lobbying, Contributions, and Influence* (1996); Richard A. Smith, *Advocacy, Interpretation, and Influence in the U.S. Congress*, 78 *Am. Pol. Sci. Rev.* 44 (1984).

52. R. Douglas Arnold, *The Logic of Congressional Action* 64-87 (1990); Richard F. Fenno Jr., *Home Style: House Members in Their Districts* 141-57 (1978); Kingdon, *supra* note 50, at 47-54.

nature of any public debate and the sorts of tools available to oppose or pressure the Court. In Sager's world, these tools are limited to efforts to persuade the Justices to change their minds and the appointments process. In my world, political responses like those used by past Presidents such as Jefferson, Jackson, Lincoln, and Roosevelt remain legitimate.

As I explained in my book, this would not mean more conflict, nor would it significantly alter the day-to-day business of deciding cases. It would, however, produce a new and different political equilibrium, one in which the Court is more attentive and responsive to the views of other actors with regard to the proper meaning of the Constitution. Supreme Court decisions could still be expected to settle most constitutional disputes. Courts do come last, after all, and their rulings will be final as a practical political matter except where opposition is strong enough to overcome the many institutional hurdles our system puts in the way of those seeking to upset an existing state of affairs. Once the Court has ruled, moreover, these hurdles consist of more than just getting by both houses of Congress (with a filibuster-proof majority in the Senate) and the President. They now include getting agreement that the difference is important enough to challenge the Court, which can itself become a quite significant impediment.

The potential usefulness of the judiciary in a separation-of-powers scheme is not difficult to comprehend, and politicians and ordinary citizens alike can and do appreciate that there are advantages in giving the Court some leeway to act as a check on politics. This includes understanding that many benefits of judicial involvement are systemic and long term, and so may require accepting individual decisions with which one disagrees. It takes a lot to persuade a majority in this country that particular rulings are wrong enough to overcome this presumption. The upshot is that the Court's conduct must be quite provocative and very unpopular, usually over a sustained period, before it will produce actual legislative or executive countermeasures.

It does not follow that nothing is at stake in the choice between a system of judicial supremacy and one based on departmental or coordinate construction. In the latter system, the authority of judicial decisions formally and explicitly depends on reactions from the other branches and, through them, from the public. This, in turn, can make an enormous difference in how the Justices behave. There may be political obstacles to punishing the Court that make it possible even without judicial supremacy for the Justices to have their way most of the time. But the obstacles are smaller—smaller by precisely the weight conferred on Supreme Court decisions by the doctrine of judicial supremacy, which, if that doctrine is widely accepted, can be considerable.

## V.

I said above that the difference between Sager's position and mine is ultimately a matter of degree. One might wonder whether this difference is important enough to worry about. Most people clearly believe that it is—believe, in other words, that the decision to promote or defend an idea of judicial supremacy matters. When Sager describes a domain of constitutional justice that he urges should be defined by courts, he means to discourage other actors in our system from interfering (again, by any means other than trying to persuade the Justices or replacing them when opportunities to do so arise). In Sager's constitutional system, the Justices are *supposed* to have the final say, and this institutional prerogative is itself an argument for the other branches to defer. In my constitutional system, the Justices have to earn their claim to have the final say and are neither final nor infallible beyond their ability to claim the confidence of a watchful public in going about their business. This may reflect a difference in shades of gray rather than black versus white, but it does reflect a difference, and an important one at that.

So how do we choose? Earlier, I criticized Sager for relying on impressionistic descriptions of the judicial and legislative process, but it cannot have escaped anyone's notice that I've offered no hard facts to refute him. Nor can I do so, for the problem of proof here is intractable. The debate may turn on a question that looks straightforwardly empirical, but at every critical juncture, the arguments needed to reach judgment rest on controversial assumptions—assumptions about whose truth, if we are being honest, it is difficult to have too firm a conviction because they depend on the sort of "facts" that can never be tested or proved. As I urge in *The People Themselves*, the choice one makes on this issue does not turn on evidence or logic, much as intellectuals on both sides of the question might want to believe otherwise. It turns—no less today than it did in 1800—on differing empirical hunches about popular government and the political trustworthiness of ordinary people.

*Notes & Observations*