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Tom Donnelly

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# Popular Constitutional Argument

Tom Donnelly\*

*Critics have long attacked popular constitutionalists for offering few clues about how their theory might work in practice—especially inside the courts. These critics are right. Popular constitutionalism—as a matter of both theory and practice—remains a work in progress. In this Article, I take up the challenge of developing an account of (what I call) popular constitutional argument. Briefly stated, popular constitutional argument is a form of argument that draws on the American people’s considered judgments as a source of constitutional authority—akin to traditional sources like text, history, structure, and doctrine. Turning to constitutional theory, I situate popular constitutional argument within contemporary debates over judicial restraint, living constitutionalism, popular sovereignty theory, and originalism. And turning to constitutional practice, I offer the interpreter a concrete framework for crafting popular constitutional arguments—cataloguing the various indicators of public opinion that have played a role in recent Supreme Court decisions. These indicators include measures associated with the president, Congress, state and local governments, the American people’s actions and traditions, and public opinion polls. Throughout, I use illustrative examples to show the various ways in which popular constitutional argument already operates at the Supreme Court—appealing to jurists from across the ideological spectrum. While this Article begins to explore how popular constitutionalism might operate inside the courts, much work remains.*

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## INTRODUCTION

Popular constitutionalism is simple to describe in theory, but difficult to apply in practice. In theory, it is a gloss on America’s rule of recognition—popular sovereignty.<sup>1</sup> This concept is central to

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1. See H.L.A. HART, THE CONCEPT OF LAW 74 (2d ed. 1994) (considering the American electorate as an “extraordinary and ulterior legislature” bound to uphold the Constitution).

America's constitutional self-identity and is captured by some of the central phrases in the American constitutional canon, including the Preamble ("We the People of the United States . . . do ordain and establish this Constitution") and the Gettysburg Address ("government of the people, by the people, for the people").

In the United States, no single government official or level of government is sovereign—not the president, Congress, the Supreme Court, the government of New Jersey, or the Mercer County Commission.<sup>2</sup> Of course, the U.S. Constitution provides a framework for government and includes some of the American people's most cherished rights, including free speech and religious liberty. The Constitution also includes a formal amendment process. For the Founding Generation, this mechanism ensured that the American people could update their charter in a regular, orderly way—correcting deficiencies, big and small, without recourse to violence or revolution.

Many contemporary interpretive debates turn on how best to read the Constitution's text as it exists. For instance, what sorts of laws violate the First Amendment's protections for free speech or religious liberty? How broadly does Article I's commerce power sweep? And what activities can the president carry out unilaterally under Article II's commander-in-chief power? These are important interpretive disputes, and they often turn on which sources of authority America's rule of recognition identifies.

However, some disputes are more fundamental still—with scholars debating whether the written Constitution remains the ultimate source of constitutional authority or whether courts (and officials) should recognize acts of popular sovereignty outside of it. Most dramatically, these extraconstitutional acts might include a new American Revolution—overthrowing the existing Constitution and replacing it with a new one. However, these theoretical (and historical) debates often turn on actions taken *within* the existing constitutional system, transforming the Constitution's meaning outside of the formal Article V amendment process—often through social movements, elections, public debates, judicial appointments, landmark statutes, and transformative Supreme Court opinions.

For popular constitutionalists (and their key forerunners like Bruce Ackerman), the core issue is popular sovereignty itself. For these theorists, the key *practical* issue is how best to identify *when* the

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2. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 135–36 (1999) (“[N]o organ of the government is authorized to speak in the name of the people.”).

American people have spoken, determine *what* they have said, and figure out *how* best to apply the American people's commands in concrete cases. In short, while Americans have long valued the role of the Supreme Court in our constitutional system, popular constitutionalists argue that the American people must play a central role in constitutional development.

Even so, criticisms of popular constitutionalism abound, and they are as obvious as they are plentiful. Some critics attack the theory as vague.<sup>3</sup> Others as meaningless.<sup>4</sup> And still others as dangerous.<sup>5</sup> Each set of criticisms raises its own set of challenges for popular constitutionalism.

Two questions remain: *Can popular constitutionalism survive this onslaught by its critics? And if it can, how might the theory work in practice?*

Popular constitutionalism is often associated with the most virulently anti-court rhetoric of its proponents. For some popular constitutionalists, judicial review must go.<sup>6</sup> For others, judicial review may stay, but, even then, the American people and their elected leaders must be prepared to strike back against an aggressive Supreme Court—at times, using blunt court-curbing measures like jurisdiction stripping and court packing.<sup>7</sup> This version of popular constitutionalism—though frequently discussed—has managed to attract few adherents due to its fixation with the Supreme Court and judicial overreach. But courts could actually play a constructive role in realizing popular sovereignty today. Judicial popular constitutionalism is one way of making popular constitutionalism work.<sup>8</sup>

Even when popular constitutionalists turn to the courts for help, challenges remain. For instance, how might a popular constitutionalist interpret the Constitution? Should she rely on

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3. See, e.g., Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 656 (2005) (book review) (arguing that popular constitutionalist Larry Kramer failed to identify how his theory might work in practice).

4. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1621 (2005) (book review) (“The idea that the people themselves are a corporate body or organic unity is a fiction.”).

5. Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 690 (“Popular constitutionalism’s central flaw is its failure to recognize that the protection of minorities and their rights cannot rely on the majority.”).

6. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154 (1999).

7. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249 (2004).

8. See Tom Donnelly, *Judicial Popular Constitutionalism*, 30 CONST. COMMENT. 541 (2015) (book review).

judicial restraint?<sup>9</sup> Moments of heightened popular sovereignty?<sup>10</sup> The results of the most recent opinion poll? Patterns of popular lawmaking at the national, state, and local levels?<sup>11</sup> The specific contours of popular constitutional analysis remain underexplored, but some scholars have made a start.

One strand of scholarship discusses the normative tradeoffs of using public opinion as an explicit part of constitutional analysis.<sup>12</sup> For instance, Richard Primus argues, “[T]he strongly held view of the public is sometimes an ingredient of the right answer to a constitutional question, just like text, precedent, history, structure, social science, and normative theory.”<sup>13</sup> While conceding that popular authority remains “controversial” within constitutional theory, Primus adds that this form of analysis may promote important values like “democracy, the rule of law, and public identification with the regime.”<sup>14</sup> At the same time, Primus acknowledges that popular constitutional analysis still awaits a comprehensive framework (and defense).<sup>15</sup>

Another strand of scholarship studies the relationship between the Supreme Court, the elected branches, and the American people.<sup>16</sup>

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9. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

10. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

11. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1032 (2004) [hereinafter Post & Siegel, *Departmentalism*].

12. See Andrew B. Coan, *Well, Should They? A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 215 (2007); Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 2–3 (2007) [hereinafter Primus, *Double-Consciousness*]; Richard Primus, Response, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1214 (2010) [hereinafter Primus, *Public Consensus*].

13. Primus, *Double-Consciousness*, *supra* note 12, at 2.

14. *Id.* at 7, 9.

15. See Primus, *Public Consensus*, *supra* note 12, at 1218 (conceding that he has been unable to offer a “complete exposition of this perspective”); see also Coan, *supra* note 12, at 237 (describing his own account as a “preliminary sketch”).

16. See, e.g., JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 1* (2011) (exploring the “attitude members of the public must have toward the constitutional project in order for it to be legitimate”); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1345 (2006) [hereinafter Siegel, *De Facto*]; Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008) [hereinafter Siegel, *Dead*] (discussing two possible explanations for the *Heller* decision, each of which turns on the opinions of the American public in a different era).

These scholars argue that the Supreme Court's decisions often track public opinion—whether because of the Supreme Court nomination process, social movement activism, public challenges to the Court's authority, court-curbing measures in Congress, or changes in the attitudes of the Justices themselves. This scholarship establishes that public opinion may exert some control on constitutional doctrine over time—often indirectly. However, work remains to explore popular constitutional argument as a matter of *explicit* constitutional practice and to determine whether (and when) it may be an appropriate source of authority in the courts.

Finally, still another strand *does* describe the Supreme Court's use of public opinion as an explicit part of its decisionmaking process.<sup>17</sup> For instance, Corinna Barrett Lain's pioneering work explores the areas in which the Supreme Court has explicitly taken public opinion into account in constitutional doctrine through the use of state legislation counts—in other words, through “evolving standards” defined by the state laws on the books.<sup>18</sup> However, no scholar has yet attempted to disaggregate the various forms of popular constitutional argument and show how they function—often in tandem—as part of constitutional practice. State legislation counting is an important form of popular constitutional argument; however, it is only one form among many available to the popular constitutional interpreter.

In this Article, I seek to take up *both* the descriptive *and* normative challenges of developing an account of (what I call) *popular constitutional argument*. Briefly stated, popular constitutional argument is an argument that draws on the American people's considered judgments as a form of authority for reaching a given constitutional conclusion. By “considered judgment,” I mean something approaching a popular constitutional consensus—one that unites the American people and is the product of deliberation and debate.<sup>19</sup> This type of constitutional argument takes many different forms as a matter of constitutional practice, but the *source* of authority—the considered judgments of the American people—remains the same.

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17. See, e.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT (2008).

18. Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 UCLA L. REV. 365, 401 (2009).

19. For simplicity's sake, I will refer to the American people's considered judgment on a given issue as a “popular constitutional consensus.” However, I also take seriously Justin Driver's argument that constitutional historians often oversimplify constitutional consensus. See Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011).

Throughout, I take as my model Philip Bobbitt's influential account of conventional constitutional arguments.<sup>20</sup> Building from Bobbitt, I explore the use of popular constitutional argument in theory and practice. While Primus is right that popular constitutional argument remains controversial among many lawyers and scholars,<sup>21</sup> I place these arguments in context and show how they have been used in the courts as a form of constitutional reasoning akin to other traditional sources of legal authority like text, history, structure, doctrine, and prudence. I suggest that what may be missing as a matter of constitutional theory and methodology is evident in constitutional practice.

Of course, popular constitutional argument is in tension with traditional conceptions of judicial review as a safeguard against majoritarian tyranny.<sup>22</sup> This is especially true in the case of minority-protective provisions, such as the First Amendment and the Equal Protection Clause. In addition, recourse to "the People" is vague and subject to abuse: it is another means by which judges can draw on external sources of authority to promote their own notions of superior policymaking and moral judgment.<sup>23</sup> And yet, popular constitutional consensus is sometimes a useful corrective for representative deficiencies in the elected branches.<sup>24</sup> As early as the Marshall Court, in one of the first Supreme Court blockbusters, the Court itself rested its decision on "settled . . . public opinion."<sup>25</sup>

In this Article, I explore the challenges of applying popular constitutionalism in the courts and then build a framework for understanding and using popular constitutional argument in practice. This Article proceeds as follows. In Part I, I attempt to bring some coherence to the popular constitutionalism literature, explore the various criticisms of the theory, and offer some tentative responses. In Part II, I introduce popular constitutional argument and situate it within the broader constitutional theory literature, including

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20. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

21. Primus, *Double-Consciousness*, *supra* note 12, at 7.

22. Chemerinsky, *supra* note 5, at 690.

23. See Alexander & Solum, *supra* note 4, at 1623 ("You can call a court 'The People's Court' or a mob 'The People's Army,' but fancy names cannot transform new government institutions into *the people themselves*.").

24. See Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989, 992–93 (2013) (discussing the realignment of political parties during the twentieth century and resultant legislative difficulties in the early twenty-first century); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 *GEO. L.J.* 113, 148–52 (2012) (discussing functional and political impediments to majoritarian change).

25. *United States v. Hudson & Goodwin*, 11 U.S. 32, 32 (1812).



contemporary debates over judicial restraint, living constitutionalism, popular sovereignty theory, and originalism.

In Part III, I explore popular constitutional argument in practice, cataloguing the forms of popular constitutional argument—in other words, the indicators of public opinion that have played a role in recent constitutional practice at the Supreme Court. These indicators include measures associated with the president, Congress, state and local governments, the American people's actions and traditions, and public opinion polls. In Part IV, I consider how to craft popular constitutional arguments, including some of the factors that make strong (and weak) ones—most notably, patterns of constitutional convergence (and divergence), related historical narratives, levels of deliberation, and evidence of interbranch custom. I also explore the relationship between popular constitutionalism and precedent. Finally, in Part V, I end with a case study—the Supreme Court's recent landmark decision in *Obergefell v. Hodges*<sup>26</sup>—placing popular constitutional argument in dialogue with Justice Kennedy's majority opinion and Chief Justice Roberts's dissent.

In the end, my goal is *not* to offer a comprehensive account of every instance of popular constitutional argument at the Supreme Court or to provide a full-throated defense of this form of argument as the best way to interpret the Constitution. Instead, I seek to use illustrative examples to show the various ways in which this form of argument has operated at the Court and appealed to jurists from across the ideological spectrum, warts and all.

#### I. POPULAR CONSTITUTIONALISM AND ITS CRITICS (AND THERE ARE MANY!)

Popular constitutionalism has spawned a sprawling literature and a wide range of critics. Before building an account of popular constitutional argument, it is useful to first map the various strands of popular constitutionalism and then highlight key criticisms of the larger theory.

Critics raise many legitimate objections to popular constitutionalism—many of which inform the account of popular constitutional argument that follows. Nevertheless, the theory can survive this critical onslaught.

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26. 135 S. Ct. 2584 (2015).

*A. The Varieties of Popular Constitutionalism*

Broadly speaking, it is possible to separate popular constitutionalism into two branches: one *descriptive* and the other *normative*. The descriptive literature explores the relationship between the Supreme Court, the elected branches, social movements, and public opinion.<sup>27</sup> Many of these works build from Robert Dahl's keen insight decades ago that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."<sup>28</sup>

Some of this scholarship brings together political scientists and legal scholars, examining the American people's views on specific constitutional issues and their support for different constitutional methodologies.<sup>29</sup> Other strands include works of constitutional history, studying how the Constitution *outside* the courts (e.g., social movements, elected officials, political parties, and the general public) influences decisionmaking *inside* the courts, whether through entrepreneurial lawyering, political threats, landmark statutes, judicial appointments, court-curbing measures, or larger trends in public opinion.<sup>30</sup> Some of these historical narratives are sanguine, highlighting how popular constitutional views filter into Supreme Court decisionmaking.<sup>31</sup> Others are pessimistic, arguing that the twentieth century witnessed the triumph of judicial supremacy.<sup>32</sup>

While Larry Kramer looks to constitutional history to tell a story of popular constitutional decline, much of this descriptive literature seeks to establish that constitutional doctrine does *not*

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27. See, e.g., FRIEDMAN, *supra* note 16.

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

29. See PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 901 (2005); Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 361 (2011).

30. See, e.g., BALKIN, *supra* note 16, at 1; FRIEDMAN, *supra* note 16; KRAMER, *supra* note 7; ROSEN, *supra* note 16; Balkin & Levinson, *supra* note 16, at 1066–83; Joseph Blocher, Response, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. FORUM 108 (2011); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. FORUM 197 (2013); Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609 (2017); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837 (2009); Siegel, *De Facto*, *supra* note 16, at 1345; Siegel, *Dead*, *supra* note 16, at 192. *But see* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516 (2010) (arguing that elite opinion matters more to the Justices than the views of the American people as a whole).

31. See, e.g., BALKIN, *supra* note 16, at 2; FRIEDMAN, *supra* note 16, at 374–85; ROSEN, *supra* note 16, at 4.

32. See, e.g., KRAMER, *supra* note 7, at 214–15, 249.

impose elite judicial values on the rest of the country, but instead tracks public opinion over time—especially on the constitutional issues most important to the American people.<sup>33</sup> In the end, this descriptive work has done much to explain why doctrine often tracks public opinion.

The normative literature—probably the most visible (and certainly the most *criticized*) of the popular constitutionalism scholarship—argues that the American people must have the ultimate authority over constitutional meaning. These accounts are largely characterized by attacks on the Supreme Court and judicial supremacy.<sup>34</sup> Normative popular constitutionalists fear that the American people have lost their confidence as constitutional interpreters and that the Supreme Court has seized power.<sup>35</sup> In the process, the American people have lost their capacity for self-governance and delegated constitutional decisionmaking to elite lawyers.<sup>36</sup> In response, this scholarship often explores possible remedies, focusing on pathways of *institutional* reform.

The most radical theorists argue for an end to judicial review.<sup>37</sup> Others promote blunt court-curbing measures like court packing and jurisdiction stripping.<sup>38</sup> In previous work, I have sought a middle ground: an approach that respects the value of legal consensus, while offering a popular check on bare majoritarian decisionmaking at the Supreme Court—what I call “the People’s veto,” the popular

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33. See, e.g., FRIEDMAN, *supra* note 16, at 14 (“On issue after contentious issue—abortion, affirmative action, gay rights, and the death penalty to name a few—the [modern] Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup Poll.”); ROSEN, *supra* note 16, at 3 (“On a range of issues during the 1980s and 1990s, the moderate majority on the Supreme Court represented the views of a majority of Americans more accurately than the polarized party leadership in Congress.”).

34. See, e.g., KRAMER, *supra* note 7, at 247–48 (arguing the American people should “lay claim to the Constitution” and “publicly repudiat[e] Justices who say that they, not we, possess ultimate authority to say what the Constitution means”).

35. See, e.g., RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 71–73 (1994); Larry D. Kramer, Lecture, “*The Interest of the Man*”: *James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 697 (2006) (“Today, we have for all practical purposes turned the Constitution over to the Supreme Court.”); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006).

36. See, e.g., KRAMER, *supra* note 7, at 7–8 (“Law is set aside for a trained elite of judges and lawyers whose professional task is to implement the formal decisions produced in and by politics.”).

37. See, e.g., TUSHNET, *supra* note 6, at 154.

38. See, e.g., KRAMER, *supra* note 7, at 249 (“Justices can be impeached, the Court’s budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures.”); Kramer, *supra* note 35, at 748 (discussing the use of such measures throughout American history).

reconsideration of constitutional decisions.<sup>39</sup> (I haven't found any takers, either!) Given these blunt remedies, it is little wonder that popular constitutionalism has faced widespread criticism.<sup>40</sup>

Finally, another set of scholars, sometimes styling themselves “*democratic* constitutionalists,” has offered a friendly addendum to popular constitutionalism. This scholarship—associated, most prominently, with Robert Post and Reva Siegel—responds to specific efforts by the Supreme Court to cut back on Congress's authority under the Reconstruction Amendments' Enforcement Clauses.<sup>41</sup> Rather than calling for court curbing or an end to judicial review, Post and Siegel offer a defense of robust congressional enforcement powers—a means of promoting constitutional dialogue between Congress, the courts, and the American people.<sup>42</sup>

What—if anything—unites these various strands of popular constitutionalism? As I have argued elsewhere, popular constitutionalists are united by a “populist sensibility”—a shared belief that popular constitutional consensus should shape contemporary constitutional meaning.<sup>43</sup> Even so, criticisms of popular constitutionalism abound.

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39. Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 162. For other efforts in a similar mold, see Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 973 (2010) (proposing that judicial review take place only at the trial court level); and Stephen Gardbaum, *The New Commonwealth Model*, 49 AM. J. COMP. L. 707, 710 (2001) (evaluating the new commonwealth model of constitutionalism). For a classic account of constitutional amendment outside of Article V, see Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

40. For an incomplete list of Kramer's critics, see Alexander & Solum, *supra* note 4, at 1594; Chemerinsky, *supra* note 5, at 675; Neal Devins, *The D'oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1341 (2019); William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 968 (2006); Morton J. Horwitz, *A Historiography of The People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 813 (2006); Hulsebosch, *supra* note 3, at 656; Robert Kaczorowski, *Popular Constitutionalism Versus Justices in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1438 (2005); L.A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 857 (2005) (book review); Lawrence G. Sager, *Courting Disaster*, 73 FORDHAM L. REV. 1361, 1362 (2005); and Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009).

41. See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7–8 (2003); Post & Siegel, *Departmentalism*, *supra* note 11, at 1029; Post & Siegel, *Legislative Constitutionalism*, *supra* note 11, at 1945–47; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) [hereinafter Post & Siegel, *Roe Rage*].

42. See Post & Siegel, *Roe Rage*, *supra* note 41, at 379.

43. Donnelly, *supra* note 39, at 161.

*B. Popular Constitutionalism's Critics*

Critics have attacked popular constitutionalism since its inception on a variety of fronts. The theory's first problem is conceptual. Popular constitutionalists remain divided over many fundamental issues. For instance, they disagree over what to do with judicial review. Some wish to preserve it.<sup>44</sup> Others wish to abolish it.<sup>45</sup> And for scholars open to preserving judicial review (especially those like Larry Kramer, who remain critical of judicial overreach<sup>46</sup>), the question remains how best to reap the benefits of judicial review while minimizing the dangers of judicial supremacy.

Popular constitutionalists also disagree on constitutional history. Some argue that the countermajoritarian difficulty is no difficulty at all and that the Supreme Court's constitutional decisions tend to track public opinion.<sup>47</sup> Others counter that the Supreme Court has increased its power over time and that the American people and their elected officials have acquiesced to judicial supremacy.<sup>48</sup> These competing narratives lead to radically different normative prescriptions. Given these conceptual issues, one might even question whether there is a distinct (and coherent) popular constitutionalism literature at all.

Even if we grant that popular constitutionalism means (constitutional) power to the people, this vision raises its own set of problems, beginning with a simple (but difficult) one: *Who are the people, and how do we know if they have spoken?*<sup>49</sup> Some critics argue that this challenge dooms popular constitutionalism from the start.<sup>50</sup>

For these critics, the American people do not exist as such, and they certainly do not speak with a clear voice. As a result, any attempt to divine the public's views is simply too subjective an exercise.<sup>51</sup> How should we define public opinion for purposes of constitutional decisionmaking? Should we look to public opinion polls, the positions of the leading political parties, the results of recent elections, the

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44. See, e.g., KRAMER, *supra* note 7, at 253 (concluding that retaining judicial review but abolishing judicial supremacy would strike the correct balance).

45. See, e.g., TUSHNET, *supra* note 6, at 154–76; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006).

46. KRAMER, *supra* note 7, at 247–48.

47. See, e.g., FRIEDMAN, *supra* note 16, at 374–76.

48. See, e.g., KRAMER, *supra* note 7, at 7.

49. WHITTINGTON, *supra* note 2, at 112.

50. See Alexander & Solum, *supra* note 4, at 1621 (“From the founding era to today, the people have been too numerous and diverse to speak with a single voice.”).

51. David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 691 (2017) (book review).

activities of social movements, mechanisms of direct democracy, or laws at the federal, state, and local levels? And what level of public consensus does popular constitutionalism require on an issue?<sup>52</sup> A mere majority? A supermajority? Near unanimity? There is no set answer to these questions.

And even if we do settle these preliminary issues, there is still the question of measurement and implementation. For popular constitutionalism to work, we must have institutions capable of channeling the American people's constitutional views.<sup>53</sup> However, all institutions are flawed. Each raises its own principal-agent problems.<sup>54</sup> For instance, elected officials may act without a genuine popular mandate<sup>55</sup> by following a narrow agenda that serves only a small (but powerful) faction<sup>56</sup> or acting to aggrandize their own power at the expense of the public interest.<sup>57</sup> Furthermore, with no single institution perfectly reflecting public opinion at the national level, political actors—whether elected officials, movement leaders, or interest groups—will each claim to speak for the American people.<sup>58</sup>

During times of ordinary politics, these concerns may be fairly innocuous and ultimately settled by some combination of public discourse, elections, and court cases. However, in their most extreme form, these concerns—which date at least as far back as Carl Schmitt<sup>59</sup>—provide a means for populist leaders to claim the authority to speak for the “real” people of the nation,<sup>60</sup> apart from (and in the face of) empirical or institutional expressions of the public's will to the

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52. Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1777–82 (2011).

53. Alexander & Solum, *supra* note 4, at 1621; see Grewal & Purdy, *supra* note 51, at 691 (discussing the inadequacy of such channeling).

54. Alexander & Solum, *supra* note 4, at 1622–23 (“Once popular will is given institutional form, we simply have another group of officials, thus giving rise to the same agency problems that motivate the call for popular constitutionalism.”).

55. See Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1015 (2004) (noting that “public officials have no mandate, accountability, or democratic mechanism for expression of public ‘constitutional’ will”).

56. See *id.* (“Legislatures are heavily influenced by vested, special interests . . .”)

57. Cf. Alexander & Solum, *supra* note 4, at 1637 (arguing that the judiciary serves as a mechanism of “popular enforcement of the Constitution against blatant usurpations of authority” by political actors); Chemerinsky, *supra* note 55, at 1015.

58. See Grewal & Purdy, *supra* note 51, at 690 (explaining that “absent univocal sovereign action,” public actors will “appeal[] to the original and continuing constitutional authority of the people”).

59. See JAN-WERNER MÜLLER, WHAT IS POPULISM? 27 (2016); Christoph Möllers, “We Are (Afraid of) the People”: *Constituent Power in German Constitutionalism*, in THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 87, 104 (Martin Loughlin & Neil Walker eds., 2007) (noting Carl Schmitt's contributions to popular constitutionalism).

60. See MÜLLER, *supra* note 59, at 101.

contrary.<sup>61</sup> This is the danger of popular sovereignty without proper institutional mechanisms.<sup>62</sup> Unfortunately, all institutions suffer a similar flaw. They are *not* the people—just imperfect reflections of them. But criticisms of popular constitutionalism do not stop there.

Even if we bracket these institutional concerns, and even if we measure and implement the public's current views correctly, it is still fair to ask whether the public's views are even worth following. For many critics of popular constitutionalism, this is the central flaw of the theory—not the *institutions*, but *the people themselves*.<sup>63</sup>

This critique turns on some combination of perceived public apathy and ignorance. Surveys show that the American people know (and care) little about the Constitution's text and history, the Supreme Court itself, or the issues on the Supreme Court's agenda.<sup>64</sup> With little interest and little knowledge, the American people may provide judges and elected officials with few—if any—popular constitutional understandings to implement. Moreover, these low levels of interest and knowledge leave any remaining popular constitutional views suspect. Critics fear that these views may be the product of elite manipulation, not deliberation and debate.<sup>65</sup> They question whether the American people have the analytical skills, ability to weigh competing claims, and capacity for long-term thinking necessary to form proper constitutional conclusions.<sup>66</sup>

And even when individuals do reach considered judgments on an issue, there is still no guarantee that the American public as a whole will reach anything like a consensus.<sup>67</sup> Our society is deeply divided on many issues—many of them constitutional ones of great salience. When the public lacks a consensus, there is simply no popular view for institutions to translate into public action.<sup>68</sup>

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61. See *id.* at 102 (explaining that populists are “immune to empirical refutation” because they often try to “play off the ‘real people’ or ‘silent majority’ against elected representatives and the official outcome of a vote”).

62. See Grewal & Purdy, *supra* note 51, at 690 (“Lacking the imprimatur of any procedure by which the people can be said to have acted in its sovereign capacity, appeals to the constitutional demands of a multitude are always susceptible to charges of opportunism and self-serving interpretation.”).

63. See, e.g., KRAMER, *supra* note 7, at 241–42 (describing the “Anti-Populist” critique of popular constitutionalism).

64. Devins, *supra* note 40, at 1340; Primus, *Public Consensus*, *supra* note 12, at 1222; Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1635, 1656–59 (2012).

65. See Gewirtzman, *supra* note 29, at 899 (“Moreover, popular interpretive opinions are often based on limited information, and are highly susceptible to manipulation by elites.”).

66. Serota, *supra* note 64, at 1659.

67. Primus, *Double-Consciousness*, *supra* note 12, at 3.

68. See Alexander & Solum, *supra* note 4, at 1623 (discussing the low likelihood that the public could come to a consensus on even a simple constitutional question).

Furthermore, even when the public does reach a consensus, it may be difficult to determine whether they've reached a *constitutional* consensus rather than one based on policy or morality.<sup>69</sup> Finally, even if the American people have reached a constitutional consensus and public officials can implement it, there is still the greatest danger of all: the threat of majoritarian tyranny.

This concern turns on widespread fear of the repressive tendencies of the American people themselves.<sup>70</sup> For these critics, the Constitution is designed to restrict the majority's will, limit governmental power, and protect individual rights.<sup>71</sup> Judicial review serves these purposes by enforcing constitutional limits;<sup>72</sup> popular constitutionalism risks subverting them.<sup>73</sup> These critics leverage the judiciary's (perceived) institutional advantages—whether that's the judiciary's political insulation<sup>74</sup> or capacity for principled reasoning.<sup>75</sup> These critics also agree that the Constitution's meaning should not fluctuate with public opinion<sup>76</sup>—or, even worse, bend to the public's will during times of emergency. For these critics, popular constitutionalism threatens constitutionalism itself.

Of course, popular constitutionalists like Larry Kramer tell happy stories of powerful presidents and the American people standing together to check an evil (or ignorant) Supreme Court. But the American people (and their elected leaders) sometimes err.<sup>77</sup> Sometimes the people themselves (and their elected leaders)—and *not* the Supreme Court—promote constitutional evil, with the Supreme Court playing a mere supporting role (think, for example, of the collapse of Reconstruction).<sup>78</sup> While the courts are far from perfect, they offer an additional check when the American people go astray.<sup>79</sup>

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69. *Id.*; Devins, *supra* note 40, at 1341.

70. See Chemerinsky, *supra* note 55, at 1025 (arguing that civil liberties and rights “should not depend on the wishes of the majority”).

71. See Primus, *Public Consensus*, *supra* note 12, at 1219.

72. Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067, 1071 (2008) (arguing that “judicial review, robustly practiced, is an indispensable mechanism for protecting the individual rights guaranteed by the Constitution”).

73. See Chemerinsky, *supra* note 55, at 1013 (“Popular constitutionalism would mean that courts would be far less available to protect fundamental rights.”).

74. See CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3 (2001) (“What distinguishes the justices from the people's other representatives is their life tenure and their consequent disinterestedness, not their legal acumen.”); Chemerinsky, *supra* note 55, at 1019 (advancing the view that while the judiciary is not completely apolitical, “judicial review is not the product of lobbying or direct pressure from special interests”).

75. RONALD DWORKIN, A MATTER OF PRINCIPLE 32, 71 (1985).

76. Primus, *Double-Consciousness*, *supra* note 12, at 7.

77. Primus, *Public Consensus*, *supra* note 12, at 1221.

78. See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 930 (1996) (“The abandonment of Reconstruction, and certain of the ‘national security’



Even if the threat of majoritarian tyranny is overstated, popular constitutionalism might still undermine constitutional law's settlement function.<sup>80</sup> Constitutional issues often divide the American people. Judicial review provides a mechanism for settling some of these issues and providing some stability and predictability in the law.<sup>81</sup> Critics fear that popular constitutionalism may lead to divergent constitutional conclusions within different governmental institutions, leading to conflicts—between the nation and the states, and between institutions within each level of government—that undermine the rule of law and sow discord throughout American society.<sup>82</sup>

Finally, returning to popular constitutional argument *inside* the courts, it is worth asking whether the courts can even play a constructive role in translating popular constitutional meaning into constitutional doctrine. Nothing in a judge's training suggests that she will have any expertise in divining public opinion.<sup>83</sup> Even worse, popular constitutional argument may give judges a new warrant to read their own views into those of the American people, thus providing a new avenue for judicial adventurism.<sup>84</sup>

Critics have attacked popular constitutionalism on many fronts. Before building an account of popular constitutional argument, it is important to first offer a (tentative) response to these critics.

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excesses of the Cold War era, may be examples of profound and long-lasting changes in popular sentiment that judges should have rejected.”).

79. See Chemerinsky, *supra* note 55, at 1021 (arguing that court interventions have been necessary to end to racial, religious, and political persecution that resulted from “‘popular constitutionalism,’ but hardly the kind that any of us wants to preserve or promote”). But see Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2648 (2014) (noting that courts are powerless to provide this check for duly adopted constitutional amendments, even those that would violate the American “constitutional identity”).

80. See Alexander & Solum, *supra* note 4, at 1629 (“The ‘rule of law’ provides very great goods, including predictability, certainty, and stability.”).

81. See *id.*; Chemerinsky, *supra* note 55, at 1014 (noting the “stabilizing effect of binding decisions by the judicial branch”); Primus, *Double-Consciousness*, *supra* note 12, at 3, 15 (“Part of the aspiration of the rule of law is government by stable, impersonal norms that do not vary with passing fads or with the popularity of particular litigants.”).

82. See Alexander & Solum, *supra* note 4, at 1635 (arguing that with popular constitutionalism, “[t]he boundaries [of federal power] are unlikely to be crisp,” and Congress is unlikely to take effective direction from vague standards such as “necessary and proper”); Chemerinsky, *supra* note 55, at 1015 (expressing concern over the possibility that popular constitutionalism “weaken[s] constitutional limits on the actions of elected and unelected” and may create “discordant constitutional interpretations across the branches of the federal government and the states”).

83. Primus, *Double-Consciousness*, *supra* note 12, at 3, 13.

84. *Id.* at 13.

*C. The Value of Popular Constitutionalism*

The popular constitutionalism literature includes various strands. Even so, the theory's key proponents coalesce around three reasons for valuing popular—as opposed to judicial—meaning.

First, American constitutional history is dominated by an ongoing debate over rights and the proper scope of government. Disagreement is pervasive and unavoidable.<sup>85</sup> It is not the product of duplicity, ignorance, a failure of legal reasoning, or simple prejudice.<sup>86</sup> The Constitution simply raises difficult questions.<sup>87</sup> For constitutional theorists, the key question is who should be called on to resolve these disputes. Popular constitutionalists agree that the American people should play an important role in this process.<sup>88</sup>

Second, the judiciary does not have a monopoly on constitutional wisdom. This rationale often turns on a critique of the Supreme Court's institutional setting and its role in history. For instance, some popular constitutionalists argue that the Supreme Court's institutional advantages are often overstated.<sup>89</sup> The Justices rarely deliberate together about their cases.<sup>90</sup> Oral arguments and weekly conferences are short.<sup>91</sup> The Justices often read little more than the parties' briefs and bench memoranda written by their clerks.<sup>92</sup> And the Justices' clerks often write the first draft of the Court's opinions.<sup>93</sup> As Kramer concludes, "This does not mean that the Justices are not in control, but there is a considerable gap between this kind of control and the stories told to justify judicial supremacy."<sup>94</sup>

Popular constitutionalists also look to American history and conclude that the Supreme Court has often fallen short of its defenders' expectations.<sup>95</sup> These scholars look to decisions like *Dred Scott v. Sandford*,<sup>96</sup> *Plessy v. Ferguson*,<sup>97</sup> and *Korematsu v. United*

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85. Waldron, *supra* note 45, at 1368.

86. KRAMER, *supra* note 7, at 236.

87. *Id.*; see also JEREMY WALDRON, LAW AND DISAGREEMENT 231 (1999) (explaining that constitutional rights issues raise "complicated" questions about which even the "best intellects of our society" do not agree).

88. See, e.g., KRAMER, *supra* note 7, at 247–48.

89. *Id.* at 240.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. See TUSHNET, *supra* note 6, at 153.

96. 60 U.S. 393 (1856).

97. 163 U.S. 537 (1896).

*States*<sup>98</sup> and ask whether the courts have actually tried to protect minority rights and individual liberties over time.<sup>99</sup> Others track Gerald Rosenberg’s argument—an argument reinforced by recent quantitative scholarship<sup>100</sup>—that even when courts act, they often fail to significantly alter the status quo in the absence of political will or a strong constitutional culture.<sup>101</sup> In the end, popular constitutionalists of many stripes believe that the case for judicial supremacy is overstated.

Third, the American people and their constitutional understandings have often transformed doctrine. Popular constitutionalists look to our constitutional tradition and argue that it teaches a simple, but profound, lesson: constitutional doctrine remains open to transformation. As Jack Balkin explains, “Opinions and views that were once ‘off-the-wall’ later become orthodox, and the settled assumptions of one era become the canonical examples of bad interpretation in another.”<sup>102</sup> Claims that were frivolous in the 1940s or even the 1990s—for example, that the Fourteenth Amendment protects marriage equality—are now enshrined in constitutional doctrine. These transformations often turn on something other than mere legal expertise.

Over time, new constitutional rights take on increased prominence. Old principles are applied in new ways. Societal developments force us to confront new evils—or to confront old ones through a new constitutional lens. Legal reasoning alone is often insufficient to address these societal shifts. Responding to societal changes, public debates, and shifts in public opinion, the American people (and their leaders) often drive constitutional change. In the process, popular constitutional actors often expand the “constitutional imagination” by offering new ways of reading the Constitution that challenge constitutional orthodoxy.<sup>103</sup> Following a period of deliberation and debate, the Supreme Court often translates these new popular readings into official constitutional doctrine. These new readings may require a threshold level of constitutional knowledge or commitment; however, they often turn on something other than the

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98. 323 U.S. 214 (1944).

99. See Waldron, *supra* note 45, at 1377.

100. Adam S. Chilton & Mila Versteeg, *Courts’ Limited Ability to Protect Constitutional Rights*, 85 U. CHI. L. REV. 293, 297, 309 (2018).

101. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 5–6 (1991).

102. BALKIN, *supra* note 16, at 1.

103. Martin Loughlin, *The Constitutional Imagination*, 78 MOD. L. REV. 1, 3, 12–13 (2015).

constitutional niceties tested in surveys about the public's knowledge.<sup>104</sup>

In the end, even if popular constitutionalists unite around these three insights, scholars have still focused little on questions of methodology.<sup>105</sup>

For a popular constitutionalist like Mark Tushnet, the methodological answer is easy. The Supreme Court does not do much to promote liberty and equality.<sup>106</sup> We have no reason to think that it will be any better at promoting these values than the elected branches.<sup>107</sup> So, let's just abolish judicial review and focus on enforcing the (thin) Constitution through the elected branches. However, for those who wish to preserve a role for judges in constitutional disputes, the question remains: How does a popular constitutionalist approach constitutional interpretation?

One response might be to simply let the system continue to operate as it has been operating for centuries, and the invisible hand of public opinion will continue to guide official constitutional doctrine. Some popular constitutionalists (for example, Barry Friedman) might argue that this is the lesson of history.<sup>108</sup> However, popular constitutionalists owe judges more guidance than that. While I provided some clues about these methodological issues elsewhere,<sup>109</sup> the challenge remains: what does popular constitutional argument look like both in theory and in practice? I offer a more complete response in the remainder of this Article.

My goal is to outline an approach to popular constitutional argument that is responsive to traditional constitutional theory, consistent with well-established constitutional practice, and resonant with popular constitutionalism's various strands—even the anti-court account of the theory's most famous proponent, Larry Kramer. Kramer's work is *both* descriptive *and* normative. It is history with

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104. See TUSHNET, *supra* note 6, at 11 (arguing that the American people can—and do—enforce a “thin Constitution,” which includes the Constitution’s “fundamental guarantees of equality, freedom of expression, and liberty”).

105. See Primus, *Public Consensus*, *supra* note 12, at 1214 (explaining that even with these insights, “the need to answer the normative question about the sources of judicial authority remains”); Sherry, *supra* note 40, at 463 (“It is hard to know how popular constitutionalism would work, since few (if any) of its advocates make any concrete suggestions about how to implement popular constitutional interpretation.”).

106. See TUSHNET, *supra* note 6, at 129–53.

107. See *id.* at 154–76.

108. For additional scholarship establishing a link between public opinion and constitutional doctrine, see generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); and Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

109. Donnelly, *supra* note 8.

considerable normative bite. While Kramer attacks the rise of judicial supremacy, he does not reject judicial review. His goal is to promote deliberative democracy—a system that checks “the fleeting passions . . . of the moment,” refines public debate, and enforces the American people’s considered views about the Constitution.<sup>110</sup> The question remains as to how that system might work—especially inside the courts.

## II. POPULAR CONSTITUTIONAL ARGUMENT IN CONSTITUTIONAL THEORY

In his classic book, *Constitutional Fate*, Philip Bobbitt draws on the “legal grammar that we all share” to derive a set of legitimate arguments from constitutional theory and practice.<sup>111</sup> Bobbitt explains that “the Court hears arguments, reads arguments, and ultimately must write arguments, all within certain conventions.”<sup>112</sup> However, these conventions are far from settled.<sup>113</sup> New constitutional arguments emerge, and others recede.<sup>114</sup> Some become more powerful, and others become less persuasive. Building from Bobbitt, I explore the use of popular constitutional argument in theory and practice.

In this Part, I introduce what I mean by popular constitutional argument and situate it within ongoing debates in constitutional theory, including contemporary debates over judicial restraint, living constitutionalism, popular sovereignty theory, and originalism. I turn to constitutional practice in Part III.

### *A. Popular Constitutional Argument: The Basics*

Popular constitutional argument draws on the American people’s views as a form of authority for reaching a given constitutional conclusion. However, the popular constitutional interpreter does not settle for vague claims of popular authority or a single public opinion poll asking a constitutional question. Instead, she looks to a series of concrete indicators of public opinion to guide her analysis.

To craft a persuasive popular constitutional argument, the interpreter must seek out the American people’s *considered* judgments—not through the bare assertions of a single elected official

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110. Kramer, *supra* note 35, at 730.

111. BOBBITT, *supra* note 20, at 6.

112. *Id.* at 6–7.

113. *Id.* at 8.

114. *Id.* at 175.

or the results of the most recent Gallup poll, but through a set of indicators showing evidence that the American people have reached something approaching a popular consensus on a given issue.<sup>115</sup> These indicators might take a variety of forms, including measures associated with the president, Congress, state and local governments, the American people's actions and traditions, and public opinion polls. The interpreter might also consider factors such as patterns of constitutional convergence (or divergence), related historical narratives, levels of deliberation, and evidence of interbranch custom. Despite the distinct contours of each specific popular constitutional argument, the source of authority remains the same—the considered judgments of the American people.

To make popular constitutional argument work, the interpreter will likely need any or all of the following: a textual hook (e.g., the Equal Protection Clause), a doctrinal hook (e.g., a suspect class meriting heightened scrutiny), and a shift in how the public views the world (e.g., the LGBT community is like other groups protected by the Fourteenth Amendment). The interpreter will then need to look to indicators of public opinion to determine whether a new popular constitutional consensus has emerged and, if so, how that might transform constitutional doctrine (and reinforce—or challenge—the interpreter's own independent constitutional conclusions).

The interpreter might use popular constitutional consensus in a variety of ways. First, she might use it to check the representative branches when their laws and actions fail to reflect the public's views—perhaps due to some flaw in the system. Second, she might use it to reinforce her own independent constitutional conclusions, check some of her own constitutional pathologies, or argue that her opponents are making the countermajoritarian difficulty worse. Third, she might use it to evaluate existing constitutional doctrine—either as a way of legitimating a well-established line of cases, as a way of arguing that a particular case should be overturned, or as a way of justifying an entirely new doctrinal framework for a given constitutional issue. In fact, popular constitutional consensus may be especially useful in justifying the persistence of a doctrinal approach that is difficult to justify as an original matter but has long since become settled (and accepted) law (e.g., the *Miranda* rule).<sup>116</sup>

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115. By developing a robust account of popular constitutional argument, I am heeding Justice Goldberg's warning not to leave "judges . . . at large" to decide fundamental rights "in light of their personal and private notions." *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

116. See *infra* notes 264–266 and accompanying text.

Of course, popular constitutionalism's critics may be right. The American people may know very little about most constitutional provisions, issues, and cases.<sup>117</sup> And even when the American people reach considered judgments at the individual level, high-profile constitutional issues often divide the public.<sup>118</sup> When the American people either hold no view or remain divided, then the interpreter must turn to other constitutional arguments—whether that is another constitutional modality or even a simple commitment to judicial restraint as the next best way of realizing popular judgments.

Furthermore, even if a public consensus emerges, many other questions remain.<sup>119</sup> Which indicators of public opinion should the interpreter privilege? What threshold of popular support should the interpreter require before enforcing popular constitutional conclusions? Should the interpreter limit popular constitutional argument to certain provisions—for instance, open-ended provisions (possibly) tied to unenumerated rights, such as the Ninth Amendment or the Fourteenth Amendment's Privileges or Immunities Clause? Should she exclude minority-protective provisions like the First Amendment or the Equal Protection Clause? And what sorts of popular conclusions should count—explicitly *constitutional* conclusions or a broader range of public views, including policy preferences and moral views that bear on the application of key constitutional provisions? While I will not be able to resolve all of these questions in this Article, I seek to provide a framework for beginning to resolve them, both in theory and practice.

For now, I offer a few preliminary thoughts. To begin, certain constitutional provisions and doctrinal tests may be more consistent with popular constitutional argument than others. For instance, the Constitution's text includes broadly worded provisions that raise questions that could theoretically turn on popular judgments, including whether a law is "necessary and proper" (Article I, Section 8), a "search or seizure" is "unreasonable" (Fourth Amendment), government compensation for seized property is "just" (Fifth Amendment), a trial is "speedy" (Sixth Amendment), bail or a government fine is "excessive" (Eighth Amendment), a punishment is "cruel and unusual" (Eighth Amendment), an unenumerated right is fundamental (e.g., the Ninth Amendment or the Fourteenth Amendment), or a Bill of Rights provision should be incorporated

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117. Alexander & Solum, *supra* note 4, at 1625; Serota, *supra* note 64, at 1656–59.

118. See Hasen, *supra* note 24, at 992–93 (discussing party realignment in the wake of the Civil Rights Movement and its relationship with increasingly polarized political parties).

119. Grewal & Purdy, *supra* note 51, at 705.

against the states (e.g., Fourteenth Amendment). Similarly, certain doctrinal tests might offer a tighter theoretical link to the public's views—most notably, whether a law or governmental practice serves a sufficiently “compelling interest” to survive heightened scrutiny.

In addition, it is possible to distinguish between at least three different modes of popular constitutional opinion. First, the public might hold direct constitutional views (e.g., a particular practice or law is unconstitutional, or a specific constitutional provision means X). Second, the public might hold a certain policy view or reach a certain moral judgment that might play a role in constitutional reasoning (e.g., nearly every state protects an individual's right to own a gun, or recent opinion polls show that a strong majority believes that discriminating against the LGBT community is wrong). Third, and finally, the public might recognize certain facts on the ground that might inform a constitutional issue (e.g., separate schools are inherently unequal, or corporate expenditures corrupt the political process).

These different modes of popular constitutional opinion may serve different interpretive purposes. Public opinion might supply an explicit constitutional judgment. This might include a direct gloss on the Constitution's text (e.g., whether a certain type of search or seizure is “unreasonable”), a direct conclusion about a practice's constitutionality (e.g., bans on assault weapons are unconstitutional), or a preference for a specific case's outcome (e.g., the baker should win in a case involving a same-sex couple requesting a wedding cake<sup>120</sup>). Alternatively, it might include a policy judgment (e.g., public support for bans on gender discrimination in employment) or public recognition of new facts on the ground (e.g., racial diversity is important to public education), either of which might be relevant to a shift in constitutional doctrine. Of course, some interpreters might determine that these final examples are too attenuated to justify a particular *constitutional* conclusion. But others may disagree and use them as an important source of popular constitutional authority.

For those interested in making popular constitutional argument work, a final—and powerful—objection arises. Can courts even do this? Of course, judges are not trained to discern public opinion. However, by limiting popular constitutional argument to instances of genuine consensus, even interpreters with limited training in analyzing public opinion might be able to recognize the American people's considered judgments.<sup>121</sup> Furthermore, even if

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120. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

121. Primus, *Public Consensus*, *supra* note 12, at 1222.



public opinion is arguably more remote from a judge's legal training than another approach, such as constitutional history, judges already *do* draw on indicators of public opinion to aid in their constitutional decisionmaking. In this Article, I seek to use these existing patterns of constitutional practice to build up a robust account of popular constitutional argument.

### *B. Popular Constitutionalism and Constitutional Theory*

Before turning to how popular constitutional argument has worked in practice, I will first situate it within contemporary debates in constitutional theory, including debates over judicial restraint, living constitutionalism, popular sovereignty, and originalism.

#### 1. Judicial Restraint: The Elected Branches Are *Not* “the People”

Popular constitutional argument is *not* a simple appeal to judicial restraint. Of course, one traditional argument is that the best way to realize popular constitutional views is to simply defer to the elected branches. This would give the American people, the political process, and elected officials the authority and responsibility to debate and settle constitutional issues.<sup>122</sup> It is no wonder that some popular constitutionalism scholarship defends judicial restraint as the primary means of addressing constitutional issues.<sup>123</sup>

By embracing judicial restraint, popular constitutionalists might unite with the work of early, influential constitutional theorists, including James Bradley Thayer and Felix Frankfurter.<sup>124</sup> However, there are limits to judicial restraint as a primary approach to popular constitutional argument. To understand these limits, we should first return to Thayer's canonical account and then consider the tradeoffs of embracing the elected branches as agents of popular constitutionalism.

In his classic article, Thayer looks to American constitutional history to understand the origins of judicial review and how it has

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122. See generally Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343 (2013) (discussing the implications of the link between judicial restraint and popular constitutionalism).

123. *Id.* at 347–50; see Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2151–52 (2014) (arguing popular constitutionalism is closely related to judicial restraint).

124. Snyder, *supra* note 123, at 2130, 2133 (discussing the work of James Bradley Thayer); Snyder, *supra* note 122, at 345 (discussing Justice Frankfurter's jurisprudence).

been applied in practice by American courts.<sup>125</sup> From his survey of early American history, Thayer derives a rule that advances a strong vision of judicial restraint.<sup>126</sup> For Thayer, a court cannot simply “disregard” an act “as a mere matter of course,—merely because it is concluded that upon a just and true construction the law is unconstitutional.”<sup>127</sup> Instead it can only invalidate it when the state legislature has “not merely made a mistake” but has “made a very clear one,—so clear that it is not open to rational question.”<sup>128</sup>

This rule is not a mere call for the courts to rubber-stamp legislative acts but instead turns on the respect that is owed the legislative branch, its constitutional role, and its professional judgment.<sup>129</sup> For Thayer, a court risks descending into “a pedantic and academic treatment of the texts,” while the ideal state legislator combines “a lawyer’s rigor with a statesman’s breadth of view.”<sup>130</sup> Thayer fears that judicial review might weaken this valuable perspective.

For Thayer, judicial review has “a tendency to drive out questions of justice and right” from legislatures and to fill legislators’ “mind[s] . . . with thoughts of mere legality, of what the [C]onstitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.”<sup>131</sup> (Later theorists—most notably, Mark Tushnet—take up this critique under the label of “judicial overhang.”)<sup>132</sup> Thayer’s solution is to redeem the legislators’ constitutional responsibility through a commitment to judicial restraint—one that leaves many constitutional decisions in the legislators’ (and the electorate’s) hands.<sup>133</sup>

For those concerned with the countermajoritarian difficulty, judicial restraint is a reasonable, if blunt, response. Thayer’s approach also limits the dangers of judicial adventurism. However, for the popular constitutional interpreter, it may also defer too much to the conclusions of the elected branches.

While judicial review may sometimes serve as a check on the elected branches, it may also be used as a tool to promote popular

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125. See Thayer, *supra* note 9, at 129 (discussing the inferential power of judicial review granted to judges by state constitutions prior to the enactment of the Federal Constitution).

126. *Id.* at 143–44.

127. *Id.* at 144.

128. *Id.*

129. *Id.* at 136.

130. *Id.* at 138.

131. *Id.* at 155–56.

132. TUSHNET, *supra* note 6, at 57–58.

133. Thayer, *supra* note 9, at 156.

sovereignty<sup>134</sup> by acting as a corrective for the various democratic deficiencies of the elected branches.<sup>135</sup>

Of course, one of the pervasive features of our constitutional system is its various veto points. To many—including the Framers—this is not a bug in our system but one of its most important features. Federalism divides power between the national government and the states. Separation of powers distributes power to three independent branches, each with distinct constituencies and terms of office. And the system of checks and balances provides each of these sources of political authority with the tools to check the other branches. However, these tools also restrict majoritarian political action.<sup>136</sup> Modern political trends and practices exacerbate some of these countermajoritarian tendencies.

Our parties are as polarized as ever. Congressional moderates are disappearing,<sup>137</sup> making compromise more difficult.<sup>138</sup> Well-established institutions like the congressional committee system and the Senate filibuster (and its increased use) provide further obstacles to majoritarian action.<sup>139</sup> And scholars lament other factors that may insulate incumbents and loosen our elected branches' representative ties to the American people, including partisan gerrymandering, closed primaries, high-dollar political contributions (and spending), and special-interest lobbying.<sup>140</sup>

Because of these countermajoritarian factors, the elected branches often struggle to pass legislation that matches the majoritarian preferences of the electorate.<sup>141</sup> At the same time, public opinion often outpaces legislation, and legislatures struggle to repeal old, unrepresentative laws.<sup>142</sup> As a result, old laws may survive for a range of reasons, including enduring support, a crowded legislative agenda, widespread indifference, or ongoing political paralysis.<sup>143</sup> More broadly, critics see a political system dominated by legislative

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134. 1 ACKERMAN, *supra* note 10, at 192, 289.

135. Hasen, *supra* note 24, at 992–93.

136. Lain, *supra* note 24, at 115–16.

137. *See* Hasen, *supra* note 24, at 992–93.

138. NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2d ed. 2016); Hasen, *supra* note 24, at 993.

139. Hasen, *supra* note 24, at 993, 1010; Lain, *supra* note 24, at 148.

140. *See* Chemerinsky, *supra* note 55, at 1015; Hasen, *supra* note 24, at 1009; Lain, *supra* note 24, at 115–16, 148–52. Scholars still debate the power of these forces, but they remain a concern of many.

141. Devins, *supra* note 40, at 1338; Lain, *supra* note 24, at 157.

142. Lain, *supra* note 18, at 403–04; *see* Lain, *supra* note 24, at 173 (“Legislation is not always the most reliable evidence of contemporary values. Sometimes it is not reliable at all.”).

143. *See* Lain, *supra* note 18, at 404.

gridlock and partisan pandering—with elected officials often catering to extremist base voters to avoid party primaries, *not* looking to promote the public good or the views of a majority of their constituents (or even their own best independent judgment on a given issue).<sup>144</sup>

With a system overrun by these problems, judicial review might offer a partial remedy. If political inaction merely reflects a divided public with no consensus on an issue, then this is not a problem for popular constitutionalism. There is simply no popular action for the elected branches to take. However, in other instances, popular constitutional argument provides a way of using judicial review to correct some of the deficiencies of the representative branches.

Recent scholarship suggests that unelected judges often do an effective job promoting majoritarian preferences through judicial review.<sup>145</sup> As Corinna Barrett Lain explains, “Supreme Court decision making is relatively fluid; the Court can change the status quo whenever a majority of the Justices decide to do so.”<sup>146</sup> This may lead the Supreme Court to strike down a law passed by a previous majority (as with the Defense of Marriage Act in *United States v. Windsor*)—one supported by a large enough number of elected officials to block legislative repeal, but also opposed by a majority of the American people.<sup>147</sup> It may also lead the Court to strike down outlier laws in the states.<sup>148</sup>

Even so, some influential popular constitutionalists—most prominently, Mark Tushnet—may still want to abolish judicial review and leave constitutional questions to the elected branches.<sup>149</sup> For these scholars, judicial review is simply not worth the trouble and it would be better to take the Constitution away from the courts. However, even important Supreme Court skeptics like Larry Kramer preserve a role for the courts within a system of popular constitutionalism. These scholars are less interested in checking the Court than in realizing the American people’s considered judgments. From this perspective, simple judicial restraint may not be enough.

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144. Lain, *supra* note 24, at 152.

145. *See, e.g.*, FRIEDMAN, *supra* note 16, at 14–15 (noting that Supreme Court decisions often converge with public opinion); Lain, *supra* note 24, at 117 (arguing that unelected, majoritarian courts may check the elected, nonmajoritarian branches through judicial review).

146. Lain, *supra* note 24, at 157.

147. *See* 570 U.S. 744 (2013).

148. *See* Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 247 (2008).

149. TUSHNET, *supra* note 6, at 154.

For these scholars, when the elected branches fail and a popular constitutional consensus exists, the Court may step in to enforce popular constitutional views—especially if the perceived deficiencies of the elected branches outweigh legitimate concerns about the judiciary’s competence in discerning public opinion. While this move may not completely resolve Thayer’s and Tushnet’s concerns about judicial overhang, judicial review remains one way of realizing the constitutional views of the American people.

## 2. Living Constitutionalism: Popular Constitutional Argument Is More than a Feeling

Living constitutionalism and popular constitutionalism bear a resemblance to one another across many dimensions. Both theories believe that constitutional doctrine should remain in line with contemporary values. Both may call on judges to play a role in translating these values into constitutional doctrine. And both approaches are undertheorized; indeed, critics attack them as vague and incoherent. At the same time, these two projects are distinct in important ways. To understand how and why, we must first construct a coherent account of living constitutionalism—a synthesis that is lacking in the existing literature.

Living constitutionalists are methodologically pluralist, often drawing on the full set of traditional constitutional arguments: text, history, structure, doctrine, prudence, and ethos.<sup>150</sup> When interpreting the Constitution, many living constitutionalists are also candid about drawing on their own sense of fairness and good social policy.<sup>151</sup> Finally, while methodologically eclectic, these theorists tend to share a common goal—to promote a vision of the Constitution that “keep[s] . . . in touch with contemporary values,”<sup>152</sup> “adapts to changing times,”<sup>153</sup> and “update[s] and [re]affirm[s]” the Constitution’s text in a normatively attractive way for each generation.<sup>154</sup>

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150. STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 143–51 (1996); William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358 (2007).

151. See Brennan, *supra* note 150, at 437 (acknowledging the “substantive value choices” made by the Founders and the need to for every generation to update them to fit new values); Leib, *supra* note 150, at 361 (arguing that living constitutionalists take into account “discussions of consequences” and “underlying principles of political morality” when interpreting the Constitution).

152. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545, 569 (2006).

153. JACK M. BALKIN, *LIVING ORIGINALISM* 277 (2011).

154. Leib, *supra* note 150, at 359.

For critics, living constitutionalism's methodological eclecticism fails to provide judges with concrete guidance on how to decide individual cases. Instead, living constitutionalist judges can simply read their own values into the Constitution.<sup>155</sup> This is a powerful critique—but its overall strength depends on the specifics of the interpreter's approach to living constitutionalism. The existing literature suggests two ways of “keeping” constitutional doctrine “in touch with contemporary values.” Both have roots in Justice Brennan's canonical defense of the theory.

The first approach is the most familiar one: living constitutionalism as independent judicial decisionmaking. Channeling Robert Jackson, Justice Brennan connects this approach with the traditional view that “the very purpose of our Constitution—and particularly of the Bill of Rights”—was “to declare certain values transcendent, beyond the reach of temporary political majorities.”<sup>156</sup> In other words, the independent judge should apply the Constitution's text in ways consistent with her own (elite) values—often to protect minorities from majoritarian abuses. In this account, her constitutional authority is tied to her duty as a judge, her professional training as a lawyer, and a vision of elite lawyers as defenders of our most cherished constitutional values.<sup>157</sup> These living constitutionalist interpretations will often contradict the constitutional views of the community. This approach is *not* consistent with popular constitutional argument.

Justice Brennan offers the powerful (and controversial) example of his conclusion that the death penalty is unconstitutional, an approach, he concedes, “to which a majority of my fellow Justices—not to mention, it would seem, a majority of my fellow countrymen—does not subscribe.”<sup>158</sup> Nevertheless, Justice Brennan embraces the role of judge as living constitutionalist prophet:

[W]hen a Justice perceives an interpretation of the text to have departed so far from its essential meaning, that Justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path. On this issue,

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155. See BALKIN, *supra* note 153, at 277–78; J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 11 (2012); William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 693 (1976). See also Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737, 1755 (2007) (arguing that living constitutionalists “sometimes use more abstract texts . . . as a springboard for elitist efforts to revolutionize American values”).

156. Brennan, *supra* note 150, at 436.

157. See WALDRON, *supra* note 87, at 244 (“Instead of empowering the people on the grounds that it is . . . their rights that are at stake, we might instead entrust final authority to a scholarly or judicial elite, on the ground that they are more likely to get the matter right.”).

158. Brennan, *supra* note 150, at 444.

the death penalty, I hope to embody a community, although perhaps [one that has] not yet arrived, striving for human dignity for all.<sup>159</sup>

Justice Brennan's approach is a familiar form of living constitutionalism and one with many supporters in the legal academy, political branches, and general public.

The second approach—living constitutionalism as community values—looks to construe the Constitution's text in ways that are consistent with the evolving values that actually exist among the American people. This approach is meant to respond to the dead-hand problem.<sup>160</sup>

Returning to Justice Brennan, even he concedes that “[t]he Constitution cannot be for me simply a contemplative haven for private moral reflection.”<sup>161</sup> Instead, as a Justice, he must “speak” for his “community” and not for himself “alone.”<sup>162</sup> As a result, “[t]he act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought”—not the mere “personal moral predilections” of the interpreter.<sup>163</sup> This approach to living constitutionalism *is* consistent with popular constitutional argument—even if Justice Brennan himself does not offer any details for how a judge might go about discerning the “community's interpretation.” Sympathetic living constitutionalists might draw on popular constitutional argument to fill this interpretive gap.<sup>164</sup>

In the end, David Strauss offers today's most sophisticated account of living constitutionalism—one that incorporates both strands of the theory. Strauss's approach builds from constitutional practice and seeks to constrain judges through a form of common-law constitutional reasoning.<sup>165</sup>

For Strauss, the Constitution's text constrains at times, but constitutional practice is dominated by judges wrestling with

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159. *Id.*

160. *See, e.g.*, Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195, 195–98 (Jon Elster & Rune Slagstad eds., 1988) (introducing the “dead hand” problem).

161. Brennan, *supra* note 150, at 433.

162. *Id.* at 434.

163. *Id.* at 434–35.

164. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 307 (1980) (Powell, J., dissenting) (describing the Constitution as “a living Constitution” and arguing that a conviction under Texas's “three-strikes” law should have been thrown out based on his own sense of the community's judgment—namely, that “[t]he sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer”).

165. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) [hereinafter STRAUSS, LIVING CONSTITUTION]; Strauss, *supra* note 78; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) [hereinafter Strauss, *Irrelevance*].

doctrine.<sup>166</sup> While critics may charge that this leaves judges in an “anything goes” world and the law as “nothing more than a reflection of judges’ political views,” Strauss counters that judges are constrained by their own professional training and their own perceptions of their institutional role.<sup>167</sup> For Strauss, judges draw on traditional legal tools to make decisions in constitutional cases—tools like judicial precedent, legal craft, and sound judgment.<sup>168</sup> And while judges cannot help but be shaped by their society’s evolving values, judges need not simply yield to public opinion—especially when threats of majoritarian tyranny loom.<sup>169</sup>

Over time, judges must simply read cases, employ analogical reasoning, and develop constitutional doctrine in a case-by-case, common-law manner. At the same time, Strauss is candid that when traditional legal resources run out—or when a result is sufficiently out of step with one’s normative commitments—the judge will “often” base her ruling on “her views about which decision will be more fair or is more in keeping with good social policy.”<sup>170</sup> This approach is consistent with the common-law tradition, but inconsistent with popular constitutional argument.<sup>171</sup>

Even with Strauss’s nuanced account of living constitutionalism, familiar dangers remain. Strauss offers little concrete guidance to the judge in the individual case—other than an appeal to her own professional training, independent judgment, and sense of judicial humility. His theory is one of sensibility, not methodology. He also provides little specific guidance for when a judge may overturn precedent. Instead, those questions turn on some combination of judicial caution, professional norms, and moral judgments. Strauss’s defense may accurately describe constitutional practice, but popular constitutionalists may want additional guidance for judges.

In the end, popular constitutional argument offers the possibility of a principled, constrained form of living constitutionalism—one that limits judicial discretion by forcing judges to analyze concrete indicators of public opinion.<sup>172</sup> For the popular constitutional judge, it simply will not do to rely on generic appeals to

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166. Strauss, *supra* note 78, at 891.

167. *See id.* at 879, 927–28, 931–32.

168. *Id.* at 931.

169. *See id.* at 930–31.

170. STRAUSS, LIVING CONSTITUTION, *supra* note 165, at 38.

171. *See* Strauss, *supra* note 78, at 900.

172. *See* Grewal & Purdy, *supra* note 51, at 696–97.



the “evolving” constitutional views of the American people or on one’s own conclusions about sound policy or political morality.

When the American people have spoken, the popular constitutional judge must listen. Sometimes she might discover a popular constitutional consensus that reinforces her own conclusions—with popular constitutional argument countering charges of judicial adventurism and strengthening the judge’s claim to speak for the community. However, other times she might be compelled to follow the American people’s constitutional voice—even if she does not like what she hears. Either way, popular constitutional argument does not rely on a judge’s own independent judgment about policy or morality. However, it is up to popular constitutional theory to identify the methodological tools required to make popular constitutional argument work.

### 3. The Ackermanian Challenge: Taking Popular Sovereignty Originalism Seriously

Like the popular constitutionalist, Bruce Ackerman argues that the American people must play a key role in constitutional change. As a leading theorist of popular sovereignty, Ackerman provides extensive theoretical guidance to the popular constitutionalist seeking to identify when the American people have spoken on key constitutional issues. However, Ackerman’s approach is distinct in many ways. Most importantly, it limits popular sovereignty to certain important periods of higher lawmaking—leaving judges and lawyers to protect each revolutionary generation’s achievements and work out their meaning over time. The popular constitutionalist seeks to offer a more flexible approach—one that shares Ackerman’s central goal and borrows from many of his core insights but also allows interpreters to identify popular constitutional consensus outside of what Ackerman has famously labeled “constitutional moments.”

Ackerman’s theory offers a unique mix of constitutional dynamism and legal formalism.<sup>173</sup> Through a “reflective study of the past,” Ackerman looks to American constitutional history to identify patterns of legitimate constitutional lawmaking.<sup>174</sup> His goal is to build an account of how the Constitution changes outside of the context of Article V. Through this study of history, Ackerman seeks a formal rule

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173. See Ackerman, *supra* note 155, at 1754.

174. 1 ACKERMAN, *supra* note 10, at 17.

of recognition—one that allows him to distinguish between genuine acts of popular sovereignty and the mere acts of ordinary politics.<sup>175</sup>

As Ackerman teaches, the pathways of constitutional change are not identical. Different historical “cases”—e.g., the Founding, Reconstruction, the New Deal, and the Civil Rights Revolution—privilege different institutional arrangements, different agents of change, and different legal materials.<sup>176</sup> However, within these variations, Ackerman identifies certain key similarities—the key components of his “constitutional moments.”<sup>177</sup>

In each case, a new constitutional proposal must run a multiyear institutional gauntlet, characterized by national debates, high-profile political battles, important elections, and contentious Supreme Court fights.<sup>178</sup> Constitutional reformers must persuade an engaged public, win a series of institutional battles, attract support (or force acquiescence) from their political opponents, and convince the Supreme Court to translate their constitutional victories into durable constitutional doctrine.<sup>179</sup> This is how Ackerman identifies when the American people have spoken.<sup>180</sup> It is a powerful account, albeit one that has been attacked on multiple fronts.<sup>181</sup> Regardless, it remains a helpful model for popular constitutional argument: part guidebook, part cautionary tale.

While Ackerman has never provided a full account of how a committed Ackermanian might interpret the Constitution, he has provided glimpses in various works. In the remainder of this Section, I attempt to construct an approach to Ackermanian interpretation and then set it in dialogue with popular constitutional argument.

For Ackerman, the American people are the key agents of constitutional change, and judges are bound by the American people’s

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175. *Id.* at 59.

176. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 542 (2014); 1 ACKERMAN, *supra* note 10, at 58–80.

177. 1 ACKERMAN, *supra* note 10, at 58–80.

178. 3 ACKERMAN, *supra* note 176, at 43–47; 1 ACKERMAN, *supra* note 10, at 3–31; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 266–94 (1997).

179. 3 ACKERMAN, *supra* note 176, at 42.

180. *Id.* at 51.

181. *See, e.g.*, Grewal & Purdy, *supra* note 51, at 697–98 (complaining that Ackerman’s theory is too difficult to apply); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 *CONST. COMMENT.* 115 (1994) (arguing that Reconstruction’s collapse must be read as a “constitutional moment”); David A. Strauss, *The Neo-Hamiltonian Temptation*, 123 *YALE L.J.* 2676 (2014) (arguing that Ackerman’s account doesn’t match what the constitutional reformers thought they were doing at the time); *cf.* GERARD MAGLIOCCA, *ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES* (2007) (exploring the constitutional importance of the Jacksonian Age).

considered judgments during periods of higher lawmaking.<sup>182</sup> To decide a constitutional issue, the Ackermanian interpreter must draw on past patterns of higher lawmaking to identify *when* the American people have spoken.<sup>183</sup> This is the most fully developed part of Ackerman's theory. Interpreters must engage in the delicate task of distinguishing between acts of ordinary politics and acts of higher lawmaking—in other words, genuine acts of popular sovereignty.<sup>184</sup> In the former, elected officials are permitted to act within the boundaries set by the written Constitution and by the principles laid down during those rare moments when “We the People” have spoken.<sup>185</sup> In the latter, the American people can rewrite the constitutional rules—but only if constitutional reformers gain the “broad” and “sustained” support of the American people and traverse Ackerman's pathway of constitutional change.<sup>186</sup> In other words, the reform proposal must qualify as a bona fide “constitutional moment.” Importantly, for the interpreter, any principles endorsed during these constitutional moments have just as much *legal* force as an Article V amendment, shaping the outcome of new constitutional cases and entrenching these new principles against political reversals (absent another act of popular sovereignty that meets Ackerman's test).<sup>187</sup>

From there, the Ackermanian interpreter must look to synthesize the constitutional principles endorsed by the American people over time—incorporating new principles and refining (or, in some cases, discarding) old ones.<sup>188</sup> Ackerman offers few details about how this process of “intergenerational synthesis” might work,<sup>189</sup> but his account does capture a core aspect of American constitutional practice: the tendency to read new constitutional revolutions against the enduring commitments of our past and to try to “fit” any new principles into a “larger pattern of constitutional development.”<sup>190</sup>

As part of this process, judges both preserve and synthesize. They guard old principles from reversal by ordinary politicians and

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182. 1 ACKERMAN, *supra* note 10, at 139.

183. 3 ACKERMAN, *supra* note 176, at 337; 1 ACKERMAN, *supra* note 10, at 58–80, 266–94; 2 ACKERMAN, *supra* note 178, at 3–31.

184. 1 ACKERMAN, *supra* note 10, at 230–94.

185. *Id.* at 230–65.

186. 3 ACKERMAN, *supra* note 176, at 224; 1 ACKERMAN, *supra* note 10, at 266–94; 2 ACKERMAN, *supra* note 178, at 3–31.

187. 3 ACKERMAN, *supra* note 176, at 33, 225, 317.

188. *See* 3 ACKERMAN, *supra* note 176, at 336; 2 ACKERMAN, *supra* note 178, at 207–54 (analyzing the Reconstruction regime's principles against those established by the Founding generation).

189. 1 ACKERMAN, *supra* note 10, at 144.

190. 3 ACKERMAN, *supra* note 176, at 1, 336.

give new principles concrete legal content through the creation of durable constitutional doctrine.<sup>191</sup> This happens through a common law process, with judges facing “concrete cases” that force them “to confront and reconcile . . . the disparate historical achievements of the American people.”<sup>192</sup> Of course, there is no mechanical way to carry out this process. Instead, Ackerman leaves it to judges and lawyers—whether through professional legal judgment, statesmanship, or some combination thereof—to synthesize these principles one case at a time, applying the constitutional principles of the past to today’s constitutional controversies.

Unlike the popular constitutional interpreter, the Ackermanian judge is not tasked with seeking out contemporary public opinion for guidance. Current opinion is the product of normal politics, and the Ackermanian has no guarantee that it reflects the considered judgment of the American people—a judgment shaped by heightened engagement, broad debate, political contestation, and extended deliberation. Better to ignore contemporary public opinion and await the next constitutional moment (or lead it). Popular constitutional interpreters are more open to identifying popular consensus outside of Ackerman’s constitutional moments, recognizing the call of the American people on an ongoing basis.<sup>193</sup> This approach allows the popular constitutional interpreter to respond to one of the strongest objections to Ackerman’s theory—that it fails to offer a satisfying account of many key constitutional transformations that occur in between Ackerman’s constitutional moments.

Of course, popular constitutional argument is not without risk. Like Ackerman, popular constitutional theorists must design their own safeguards against constitutional false positives—instances when public opinion may reflect the half-baked views of an inattentive public or when elected officials may claim a false mandate for constitutional reform. In short, the popular constitutional interpreter increases the difficulty of identifying *when* the American people have spoken—a challenge that Ackerman addresses through his demanding rule of recognition.<sup>194</sup>

In the end, Ackerman already provides the interpreter with some theoretical guidance. So far, popular constitutionalists have failed to offer the same. In this Article, my goal is to fill this gap—both addressing Ackerman’s legitimate concerns about the dangers of false

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191. 1 ACKERMAN, *supra* note 10, at 139.

192. *Id.* at 160.

193. Strauss, *supra* note 78, at 905.

194. See 1 ACKERMAN, *supra* note 10, at 278–80; Grewal & Purdy, *supra* note 51, at 697–98.

positives and providing the interpreter with more flexible interpretive tools than Ackerman's multistage process—tools that allow the interpreter to identify periods of constitutional change outside of Ackerman's constitutional moments.

#### 4. Originalism: Is Popular Constitutional Argument a Rule of Constitutional Construction?

Originalists take a range of interpretive approaches, and many (if not most) originalists would reject popular constitutional argument outright.<sup>195</sup> However, one of originalism's key insights may help situate popular constitutional argument within the wider universe of constitutional theory.

Originalists are bound by the Constitution's original meaning.<sup>196</sup> As Keith Whittington explains, "At its most basic, originalism argues that the discoverable . . . meaning of the Constitution at the time of its . . . adoption should be regarded as authoritative for purposes of later constitutional interpretation."<sup>197</sup> To understand the interpreter's task, many originalists divide constitutional analysis into two separate phases: interpretation and construction.<sup>198</sup>

Interpretation uses traditional legal materials to determine the original meaning of the Constitution's text.<sup>199</sup> However, there are limits to what the interpreter can determine through "relatively technical and traditional instruments, such as text and structure, framers' intent, and precedent."<sup>200</sup> Once the interpreter reaches these limits, the task of construction remains. Construction "fills the inevitable gaps created by the vagueness" of the Constitution's text "when applied to particular circumstances."<sup>201</sup> As Whittington explains, "[A]dditional meaning . . . must be constructed from the political melding of the document with external interests and

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195. For an overview of the originalism literature, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); and Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013).

196. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990); Whittington, *supra* note 195, at 379.

197. Whittington, *supra* note 195, at 377.

198. See, e.g., BALKIN, *supra* note 153; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). Originalists also distinguish between "vagueness" and "ambiguity." Solum, *supra*, at 97–98.

199. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 100–01 (2004).

200. WHITTINGTON, *supra* note 198, at 1.

201. BARNETT, *supra* note 199, at 102.

principles,”<sup>202</sup> with “[c]onstructions perform[ing] important work by filling in gaps of constitutional meaning.”<sup>203</sup>

The Constitution’s text speaks clearly in some places—often with narrow, easy-to-apply rules.<sup>204</sup> For instance, a twenty-five-year-old cannot be president. However, the Constitution also includes broad language—principles like “equal protection,” “due process of law,” “privileges or immunities,” and “freedom of speech.”<sup>205</sup> Of course, these “abstract, general, and vague” pieces of constitutional text are precisely the provisions on which most of the Supreme Court’s high-profile cases turn.<sup>206</sup> When a term is irreducibly vague or ambiguous—in other words, when traditional legal materials fail to resolve a particular constitutional issue—interpretation ends and construction begins. The question remains: Which institution should we entrust with this task?

Some originalists argue that when interpretation ends, so too should the judicial task itself.<sup>207</sup> In short, judges should simply defer to the elected branches and allow them to engage in constitutional construction.<sup>208</sup> This is a reasonable conclusion—and one that is consistent with an account of judicial decisionmaking closely linked to a judge’s legal expertise. When traditional legal materials run out, there is simply nothing more for the judge to do. Construction becomes a political task for the elected branches. However, some originalists disagree, reserving an important role for judges in the task of constitutional construction.<sup>209</sup>

For these scholars, within the “construction zone,” judges might choose to apply a rule of constitutional construction that is guided by a particular normative principle—whether tied to the American constitutional tradition, a freestanding theory, or some combination of the two.<sup>210</sup> For instance, Randy Barnett argues that

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202. WHITTINGTON, *supra* note 198, at 1.

203. Whittington, *supra* note 195, at 403.

204. *See* BALKIN, *supra* note 153, at 6.

205. *See id.* (“The text of our Constitution contains different kinds of language. It contains determinate rules . . . . It contains standards . . . . And it contains principles.”).

206. *See* Solum, *supra* note 198, at 108.

207. WHITTINGTON, *supra* note 2, at 157.

208. Whittington, *supra* note 195, at 404; *see also* WHITTINGTON, *supra* note 2, at 158.

209. Whittington, *supra* note 195, at 401. Of course, originalists also disagree about how many issues interpretation resolves—and, conversely, about the size of the construction zone. *Id.* at 404. This question is beyond the scope of this Article. Instead, I focus on what the popular constitutional interpreter should do *inside* the construction zone—no matter its size. Even so, debates over the construction zone’s size remain important to popular constitutional theory. If the construction zone is large, popular constitutional argument may touch a great number of issues. If it is small, then it will not.

210. *See* Solum, *supra* note 198, at 108.

when interpretation runs out, judges should apply a “presumption of liberty.”<sup>211</sup> Following Barnett, popular constitutional argument might be understood as a rule of constitutional construction, applied by judges when the Constitution’s original meaning runs out.<sup>212</sup>

Like many originalists, popular constitutionalists fear judicial adventurism, seeking to root judges’ interpretations in concrete indicators—*not* personal normative preferences.<sup>213</sup> There is no reason why a popular constitutional interpreter could not combine a version of originalism with popular constitutional argument. For instance, when the Constitution’s original meaning is clear, the popular constitutional interpreter might apply it in much the same way as an originalist. However, when the traditional legal materials run out—when the Constitution’s text is vague or irreducibly ambiguous *and* the American people have reached a considered judgment on the issue—the popular constitutionalist might apply popular consensus as a default rule.<sup>214</sup>

But how might the interpreter actually go about that task? In other words, how might she identify when the American people have spoken? We turn to that important question in Part III.

### III. POPULAR CONSTITUTIONAL ARGUMENT IN CONSTITUTIONAL PRACTICE: THE FORMS OF POPULAR CONSTITUTIONAL ARGUMENT

To make popular constitutional argument work, scholars must provide interpreters with the methodological tools necessary to identify when the American people have reached a considered judgment about the Constitution’s meaning.

In this Part, I take up that task, exploring a variety of public opinion indicators available to interpreters. These indicators are the component pieces of popular constitutional argument. Sometimes one of these indicators will stand alone. More often, they will work together, allowing the interpreter to explore whether the American people have reached a popular consensus about a given constitutional issue. As with any other form of constitutional argument, popular constitutional argument is unlikely to settle our most vexing constitutional issues. However, it may be a useful tool to help us reach a satisfying conclusion in a given case.

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211. BARNETT, *supra* note 199, at 253–73.

212. Popular constitutional argument only conflicts directly with originalism if an interpreter argues that contemporary values should supersede the Constitution’s original meaning. But this result need not follow from popular constitutionalism’s core.

213. See WHITTINGTON, *supra* note 2, at 140.

214. See Solum, *supra* note 198, at 104–05; Whittington, *supra* note 195, at 404.

This catalogue is not intended to be exhaustive. Instead, I build on previous scholarship to create a typology of public opinion indicators—a typology that can be refined and supplemented in future work. My goal is to draw on constitutional practice and previous scholarship to bring coherence to popular constitutional analysis. Only then will we be in a better position to determine whether popular constitutional argument is a viable and attractive approach to constitutional interpretation. Admittedly, some modes of analysis are more common than others. However, interpreters can use *all* of these indicators to form powerful constitutional arguments rooted in popular consensus.

#### *A. State and Local Laws, Actions, and Activities*

The most familiar form of popular constitutional argument draws on state and local laws, actions, and activities.<sup>215</sup> This form of argument is already well established as a matter of constitutional practice, and scholars have already explored certain features of it in detail. Nevertheless, it is worth disaggregating its component parts to better understand its various forms. While many scholars have focused on state legislation counting as one source of popular constitutional authority, the interpreter might look to a variety of other indicators tied to states and localities, including state constitutions, state and local government amicus participation, patterns of law enforcement, ballot measures, and the everyday practices of the American people and their governments. I consider each of these indicators in turn.

*State Legislation.* The most familiar form of state and local constitutional argument is state legislation counting. In her pioneering scholarship, Corinna Barrett Lain has already shown the pervasiveness of this practice.<sup>216</sup> Her scholarship highlights that judges look to the state laws on the books to address not just familiar areas like the Eighth Amendment and substantive due process, but also a range of others, including procedural due process, equal protection, religious liberty, free speech, searches and seizures, and takings.<sup>217</sup>

State legislation counting touches on many of the interpretive areas in which popular constitutional argument is most useful. For

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215. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 97 (2012).

216. Lain, *supra* note 18.

217. *Id.* at 367–68, 371–405.



instance, Justices often use state legislation counts to strike down outdated laws or governmental practices. This is a familiar move, so a brief example should suffice. Consider the Court's long-standing approach to the Eighth Amendment. In this context, the Court looks to state legislation to help apply the Constitution's ban on "cruel and unusual punishment."<sup>218</sup> To that end, the Court often considers both the state laws on the books and any trends in legislative activity.<sup>219</sup> Lain's scholarship shows that the Justices apply similar reasoning in other constitutional contexts.<sup>220</sup>

At the same time, the Justices often use state legislation counts to *defend* the constitutionality of such laws and practices—drawing on the popular constitutional authority of state legislation to argue that a particular law or practice is consistent with a national consensus. On the Roberts Court, Justices from across the ideological spectrum have relied on this form of popular constitutional argument.

Consider Chief Justice Roberts and the campaign-finance context. Chief Justice Roberts turned to state legislation counting in *Williams-Yulee v. Florida Bar* when applying strict scrutiny to a Florida regulation preventing judicial candidates from personally soliciting campaign funds.<sup>221</sup> The Chief Justice looked to the rules in other states and concluded that "[l]ike Florida, most other States prohibit judicial candidates from soliciting campaign funds personally . . . [with] 30 of the 39 States that elect trial or appellate judges . . . adopt[ing] [similar] restrictions."<sup>222</sup> Chief Justice Roberts used these state judgments to reach an important conclusion about the relationship between direct judicial fundraising and perceptions of corruption: "Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors."<sup>223</sup> As a result, the Supreme Court concluded that the Florida regulation survived strict scrutiny—with the Florida rule "advanc[ing]

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218. U.S. CONST. amend. VIII; *see, e.g.*, *Hall v. Florida*, 572 U.S. 701, 714–19 (2014) (analyzing how states had adopted IQ cutoffs in death penalty cases when determining if Florida's strict cutoff was unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 307, 312–17 (2002) (determining if imposing the death penalty on a person with a severe mental disability was unconstitutional and considering state legislation).

219. Lain, *supra* note 18, at 373; *see, e.g.*, *Atkins*, 536 U.S. at 312 (using a state legislation count as part of a constitutional ruling striking down state laws imposing the death penalty on those with severe mental disabilities); *id.* at 322–24 (Rehnquist, C.J., dissenting) (expressing support for state legislation counting).

220. *See, e.g.*, Lain, *supra* note 18, at 367–68, 371–405.

221. 575 U.S. 433, 437–41, 445, 454 (2015).

222. *Id.* at 440.

223. *Id.* at 445.

the State's compelling interest in preserving public confidence in the integrity of the judiciary."<sup>224</sup>

Similar examples in the campaign-finance context abound—often in dissent. For instance, both conservative and progressive Justices have used similar arguments in the context of corporate campaign expenditures.<sup>225</sup> In *Citizens United v. FEC*, Justice Stevens drew on state legislation counts in his dissent, observing that “half the state legislatures . . . over many decades” have concluded that “their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds.”<sup>226</sup>

Similarly, nearly four decades earlier (and also in dissent), then-Justice Rehnquist turned to state legislation counts in *First National Bank of Boston v. Bellotti*. In *Bellotti*, Rehnquist drew, in part, on state legislative judgments about both the value and the constitutionality of restrictions on corporate campaign spending to support the constitutionality of a Massachusetts law regulating corporate political activity, observing that the “legislatures of 30 other States . . . have considered [this] matter, and have concluded that [such] restrictions . . . are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed over a period of many decades is entitled to considerable deference.”<sup>227</sup>

Returning to the Roberts Court and moving beyond campaign finance, Justice Alito has looked to state legislation in a variety of contexts. Consider his concurrence in *Riley v. California*.<sup>228</sup> There, the Court held that police officers must generally secure a warrant before searching digital information on a cell phone seized from an individual who has been arrested.<sup>229</sup> Justice Alito agreed with the Court's judgment, but he wrote separately to address a few points, one of which drew a connection between state legislation and how best to apply the Fourth Amendment in the digital age.<sup>230</sup>

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224. *Id.* at 444.

225. See *Randall v. Sorrell*, 548 U.S. 230, 284 (2006) (Souter, J., dissenting) (evaluating Vermont contribution limits, comparing those limits to those passed by other states, and arguing that Vermont's limits should be upheld because they were “not remarkable departures” from those of other states).

226. *Citizens United v. FEC*, 558 U.S. 310, 421 n.46 (2010) (Stevens, J., dissenting).

227. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 823 (1978) (Rehnquist, J., dissenting).

228. 573 U.S. 373, 404–08 (2014) (Alito, J., concurring in part and concurring in the judgment).

229. *Id.* at 403 (majority opinion).

230. *Id.* at 404–08 (Alito, J., concurring).

While Justice Alito saw no alternative to the majority's approach in *Riley*, he urged the Court to continue to look to the states for alternative rules. For Justice Alito, state legislation might serve as a useful source of information for judges—one rooted in the legislature's substantive expertise and its ties to the public's views. As he explained, "I would reconsider the question presented here if . . . state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables."<sup>231</sup> On this view, state legislation may help the Justices determine what sort of police behavior is "reasonable" in the context of the Fourth Amendment and how to strike the right balance between security and digital privacy.<sup>232</sup> Justice Alito has applied similar reasoning elsewhere, particularly in the First Amendment context (and often in dissent).<sup>233</sup>

The Justices also use state legislation to both identify unenumerated rights worthy of constitutional protection and incorporate Bill of Rights provisions against the states. Some scholars argue that the use of popular constitutional arguments in this context is consistent with the Constitution's text and history—most notably, under the Ninth Amendment (for unenumerated rights) and the Fourteenth Amendment (for unenumerated rights *and* incorporation).<sup>234</sup> The Supreme Court has followed suit.<sup>235</sup>

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231. *Id.* at 407–08.

232. Interestingly, Alito made a similar argument in *United States v. Jones*—another Fourth Amendment and technology case. See 565 U.S. 400, 429–30 (2012) (Alito, J., concurring in the judgment) ("A legislative body is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.")

233. See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 806 (2011) (Alito, J., concurring in the judgment) (warning the Court not to "hastily dismiss the judgment of legislators, who may be in a better position . . . to assess the implications of new technology"); *Snyder v. Phelps*, 562 U.S. 443, 463–75 (2011) (Alito, J., dissenting) (looking at the state tort law landscape and attacking the Court for rejecting a plaintiff's tort claim for emotional harms associated with an offensive protest at a military funeral); *United States v. Stevens*, 559 U.S. 460, 496 & n.6 (2010) (Alito, J., dissenting) (arguing that state legislation against animal cruelty reflected a "national consensus" and, in turn, this consensus provides "proof" that the "government interest" in regulating animal cruelty videos was "compelling").

These Alito opinions call to mind Chief Justice Rehnquist's use of state legislation counting to frame flag-burning as low value speech for purposes of First Amendment doctrine. See *Texas v. Johnson*, 491 U.S. 397, 435 (1989) (Rehnquist, C.J., dissenting) ("Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.")

234. See, e.g., Amar, *supra* note 52, at 1781–82 ("[I]n recognizing new rights, judges are not *amending* the [Constitution]. Rather, they are *applying* it, construing directives in the Ninth and Fourteenth Amendments that call for protection of fundamental but nonspecified rights.")

235. See *McDonald v. City of Chicago*, 561 U.S. 742, 777 (2010) (using a state legislation count to support the move to incorporate the Second Amendment against the states); Lawrence

In the end, state legislation remains a well established and powerful source for the popular constitutional interpreter. However, the Supreme Court looks to more than state legislation in this context.

*State Constitutions.* The popular constitutional interpreter may study the rights enshrined in state constitutions. Because these constitutions are easier to amend than the U.S. Constitution, they are often a better proxy for contemporary public opinion than their federal counterpart. Furthermore, many scholars have turned to the study of state constitutions in recent years.<sup>236</sup> The Supreme Court has similarly heeded this call.<sup>237</sup>

For instance, in her dissent in *Trinity Lutheran Church of Columbia v. Comer*, Justice Sotomayor argued that state funding for religious institutions was unconstitutional.<sup>238</sup> As part of her analysis, she turned to state constitutional provisions covering this issue. After explaining the long tradition of restricting funding for these institutions, Justice Sotomayor observed that thirty-nine states enshrined this tradition in their constitutions through provisions that, “as a general matter, date back to or before these States’ original Constitutions.”<sup>239</sup> For Justice Sotomayor, these provisions reflected “this Nation’s understanding of how best to foster religious liberty.”<sup>240</sup>

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v. Texas, 539 U.S. 558, 559 (2003) (looking to patterns in state legislation to show “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”); *Washington v. Glucksberg*, 521 U.S. 702, 710, 723 (1997) (observing that “almost every State” makes it “a crime to assist a suicide” and warning that recognizing a constitutional right to die would “strike down the considered policy choice of almost every State”).

236. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006) (analyzing state convention debates as a means of revising and rejecting governing principles as adopted in the federal convention of 1787); SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012) (examining the structures of the U.S. Constitution and the constitutions of the states and studying the connection between these documents and the growing political dissent in the country); EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (Ira Katznelson et al. eds., 2013) (arguing that state constitutions contain positive rights that are ignored by federal constitutional politics); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008) (providing an analysis of individual rights in state constitutions); Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012) (continuing the analysis of individual rights in state constitutions).

237. For instance, the Supreme Court looked to the gun rights enshrined in state constitutions when determining whether to incorporate the Second Amendment against the states. See *McDonald*, 561 U.S. at 769.

238. 137 S. Ct. 2012, 2027–41 (2017) (Sotomayor, J., dissenting).

239. *Id.* at 2037.

240. *Id.*

*State and Local Governments Inside the Courts.* The popular constitutional interpreter might also follow the Supreme Court in looking to state and local governmental participation in constitutional litigation.<sup>241</sup> For instance, in *McDonald v. City of Chicago*, the Supreme Court noted an amicus brief “submitted by 38 states” as part of its analysis of whether to incorporate the Second Amendment against the states.<sup>242</sup> Similarly, in *NFIB v. Sebelius*, the Supreme Court highlighted that “Florida and 12 other States” brought that constitutional challenge against the Affordable Care Act and “were subsequently joined by 13 [additional] States.”<sup>243</sup>

*Patterns of State and Local Law Enforcement.* The popular constitutional interpreter might look to patterns of state and local law enforcement. This form of analysis played a key role in the Supreme Court’s decision striking down Texas’s antisodomy law in *Lawrence v. Texas*.<sup>244</sup>

In his majority opinion, Justice Kennedy not only surveyed the state laws on the books, but he also looked to state and local enforcement of existing antisodomy laws. Justice Kennedy observed that these laws were rarely enforced by state and local law enforcement officials.<sup>245</sup> He explained, “Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private,” making it “difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults.”<sup>246</sup> In other words, Justice Kennedy enforced a form of constitutional desuetude.<sup>247</sup>

*State Ballot Measures.* Each of the indicators above draws on official government action—an indirect means of assessing popular constitutional views. State and local ballot measures offer a more direct means of assessing public opinion.

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241. See Blocher, *supra* note 30, at 111–14 (discussing the important but often overlooked role of state attorneys general in popular constitutionalism).

242. 561 U.S. at 789.

243. 567 U.S. 519, 540 (2012).

244. 539 U.S. 558, 569–70, 573 (2003).

245. *Id.*

246. *Id.* at 569–70.

247. *Cf.* *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting that “even among those States that regularly execute offenders . . . only five have executed offenders possessing a known IQ less than 70” in recent years and concluding that, given these enforcement patterns, the practice had “become truly unusual”).

While most ballot measures address specific questions of public policy, some states and localities *have* used advisory ballot measures to assess the public's views on constitutional issues—for instance, the constitutionality of corporate campaign spending after *Citizens United*.<sup>248</sup> However, even policy-focused ballot measures may prove useful in building popular constitutional arguments. And although not a prevalent source at the Supreme Court, some Justices have relied on state ballot measures as a gloss on whether a state law served a compelling enough interest to survive constitutional review.<sup>249</sup>

*The Everyday Practices of the American People and Their Governments*. Finally, the popular constitutional interpreter may look to the everyday practices of the American people and their state and local governments. This approach is consistent with Supreme Court practice. When analyzing a constitutional issue, the Justices sometimes look to how state and local governments operate, how the American people live their lives, or some combination of governmental and community practices.

In *Town of Greece v. Galloway*, the Supreme Court looked to the pervasiveness of state legislative prayer when determining the constitutionality of prayer at a town council meeting.<sup>250</sup> The Supreme Court upheld the practice, and, in his majority opinion, Justice Kennedy drew on state and local governmental practice to support his conclusion.<sup>251</sup>

As Justice Kennedy explained, the Establishment Clause “must be interpreted ‘by reference to historical practices and understandings.’”<sup>252</sup> The Court had already upheld state legislative prayer decades earlier in the context of state legislatures, relying, in part, on the fact that “the majority of the other States also had the

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248. Vikram David Amar, *Are “Advisory” Measures (Like Proposition 49) Permitted on the California Ballot?*, VERDICT (Aug. 29, 2014), <https://verdict.justia.com/2014/08/29/advisory-measures-like-proposition-49-permitted-california-ballot> [https://perma.cc/T5KT-R2XE] (describing advisory ballot measures assessing constitutional support for *Citizens United*).

249. *See, e.g.*, *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 761–72 (2011) (Kagan, J., dissenting) (drawing conclusions about the public’s views about money in politics and corruption from a state ballot measure); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 394 (2000) (“[A]lthough majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A [a campaign-finance measure] certainly attested to the perception relied upon here: ‘An overwhelming 74 percent of voters of Missouri determined that contribution limits are necessary to combat corruption and the perception thereof.’” (quoting *Carver v. Nixon*, 882 F. Supp. 901, 905 (S.D. Mo. 1995), *rev’d*, 72 F.3d 633 (8th Cir. 1995), *rev’d*, 528 U.S. 377 (2000))).

250. 572 U.S. 565, 574–81 (2014).

251. *See id.*

252. *Id.* at 576 (quoting *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989)).

same, consistent practice” for “more than a century.”<sup>253</sup> After turning to modern practice, Justice Kennedy observed that “dozens of state legislatures” continued to use legislative prayer and local governments often opened meetings with a prayer as well.<sup>254</sup> As a result, Justice Kennedy concluded, “[T]here can be no doubt that the practice . . . has become part of the fabric of our society.”<sup>255</sup>

The Justices have also sought to incorporate the American people’s everyday practices into constitutional doctrine.<sup>256</sup> For instance, the Supreme Court adapted First Amendment doctrine to the evolving role that film played in the lives of the American people.

In *Joseph Burstyn, Inc. v. Wilson*, the Supreme Court addressed the constitutionality of a New York law permitting the restriction of films on the grounds that they were “sacrilegious.”<sup>257</sup> The Court had previously upheld legislation creating an Ohio board of censors that screened films before they were shown in public.<sup>258</sup> In *Mutual Film Corp. v. Industrial Commission*, the Court relied, in part, on the role of film in early twentieth-century American society to uphold the Ohio board, explaining that “the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles.”<sup>259</sup> As a result, the Supreme Court concluded that films were “not to be regarded . . . as part of the press of the country, or as organs of public opinion”—that is, media protected by enduring free speech values.<sup>260</sup>

The Supreme Court decided *Mutual Film* before it incorporated the First Amendment against the states. In *Burstyn*, the Supreme Court addressed “whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of ‘speech’ or ‘the press.’”<sup>261</sup> To answer that question, the Court relied, in part, on film’s role within American culture—a role that had shifted considerably since *Mutual Film* was decided in 1915:

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253. *Id.*

254. *Id.* at 570.

255. *Id.* at 576.

256. See *Texas v. Johnson*, 491 U.S. 397, 438 (1989) (Rehnquist, C.J., dissenting) (reviewing the American flag’s role as “an important national asset” in everyday life).

257. 343 U.S. 495, 497 (1952); see also Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252–53 (1995) (describing the relationship between film’s role in American culture and its treatment in First Amendment doctrine).

258. *Mut. Film Corp. v. Indus. Comm’n*, 236 U.S. 230, 244–45 (1915) *overruled in part by Burstyn*, 343 U.S. 495.

259. *Id.* at 244.

260. *Id.*

261. *Burstyn*, 343 U.S. at 501.

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political [and] social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.<sup>262</sup>

Given film's important role in American society, the Court concluded "that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."<sup>263</sup>

Finally, the Supreme Court combined governmental and public practices to form a powerful popular constitutional argument in *Dickerson v. United States*.<sup>264</sup> There, the Court was asked to reconsider *Miranda* based on a law enacted by Congress two years after that landmark decision, which was designed to restore the pre-*Miranda* legal framework.<sup>265</sup> The majority opinion was authored by Chief Justice Rehnquist, who was a longtime critic of *Miranda*. In a powerful passage, he explored the relationship between precedent, governmental practice, and popular culture:

*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, we do not believe that this has happened to the *Miranda* decision. If anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.<sup>266</sup>

Rehnquist's reasoning in *Dickerson* remains one of the most powerful statements of popular constitutional argument in the *U.S. Reports*.

*Conclusion.* Of course, as sources for popular constitutional arguments, indicators covering state and local laws, actions, and activities have their limits. For instance, take the most prominent popular constitutional source in Supreme Court practice: state legislation. This indicator only imperfectly reflects popular constitutional views.<sup>267</sup> The same may be said of others connected with states and localities. Even so, state and local constitutional arguments—state legislation counts, state constitutions, state and local participation in litigation, law enforcement practices, ballot

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262. *Id.* (footnote omitted).

263. *Id.* at 502.

264. 530 U.S. 428 (2000).

265. *Id.*

266. *Id.* at 443–44 (citations omitted).

267. For a review of some of these representative deficiencies, see *supra* Section II.B.1.



measures, and the practices of the American people and their governments—may serve as key components of a broader popular constitutional argument.

### *B. The President*

The president has a powerful claim to constitutional authority.<sup>268</sup> Upon taking office, he must take an oath to “preserve, protect and defend” the U.S. Constitution, and he remains the one public official who is elected to represent the entire country.<sup>269</sup> It is little wonder that presidents play a key role in Larry Kramer’s pioneering popular constitutional narrative.<sup>270</sup>

To build a popular constitutional argument, the interpreter may draw on the president’s actions and activities.<sup>271</sup> To begin, she may analyze the president’s attempts to advance a constitutional vision through rhetoric on the campaign trail and while in office. For instance, she may look to previous presidential elections, studying the arguments made during the campaign and evaluating a president’s claim to a popular mandate for a specific constitutional vision following an election.<sup>272</sup> She may also look to presidential speeches once the president takes office, including key moments like inaugural addresses and State of the Union speeches.<sup>273</sup> While these types of arguments are not evident in Supreme Court practice, they remain available to the popular constitutional interpreter in future cases.

More concretely, the interpreter may examine the president’s official actions and those taken by executive agencies and officials.

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268. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 82 (2007) (explaining that, historically, presidents have “claimed the authority to set the nation on a new constitutional path, and in the process . . . rejected key aspects of the preexistent constitutional tradition”).

269. U.S. CONST. art. II, § 1.

270. Kramer, *supra* note 35, at 697–98.

271. See 3 ACKERMAN, *supra* note 176, at 69 (explaining that the public conversation between presidential candidates Lyndon B. Johnson and Barry Goldwater, which largely concerned racial issues and the New Deal, suggests a living Constitution informed by public mandates); WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 16 (2010) (“In America’s republic of statutes, republican deliberation over fundamental national commitment has migrated, relatively speaking, away from Constitutionalism and toward legislative and administrative constitutionalism.”); Purdy, *supra* note 30, at 1837–41 (arguing that, while other presidential actions inform some constitutional theories, presidential statements and general speech largely impacts American constitutionalism).

272. See 3 ACKERMAN, *supra* note 176, at 224 (“While the Court had been in the lead during the first decade after *Brown*, it [became] the president and Congress who were claiming a mandate from the people for a new commitment to the pursuit of racial justice.”).

273. See 3 *id.* at 7.

These are the ways in which the president may exercise his power to advance his constitutional vision while in office. The president may work with Congress to pass landmark legislation that may reshape core constitutional commitments, as with the Civil Rights Act of 1964.<sup>274</sup> He may veto legislation (and author veto messages), issue signing statements, and use executive orders to advance his vision.<sup>275</sup> And executive officials and administrative agencies may issue regulations to promote a president's constitutional vision.<sup>276</sup>

In addition, the president's lawyers may also make powerful constitutional arguments—both inside and outside the courts. For instance, the Office of Legal Counsel (“OLC”) regularly answers constitutional questions for the president, executive officials, and government agencies.<sup>277</sup> Although these OLC opinions vary in quality and persuasiveness, they are often as detailed and rigorous as judicial opinions, and the OLC's lawyers are often drawn from the nation's best law firms and law schools.<sup>278</sup>

More importantly, the Solicitor General advances the president's constitutional vision inside the courts.<sup>279</sup> The Solicitor General's office is highly respected within the judiciary and at the Supreme Court.<sup>280</sup> As a result, it often plays a key role in shaping the Court's docket at the certiorari stage by helping the Court identify meritorious petitions among the thousands that it receives each year.<sup>281</sup> And at the merits stage, the Solicitor General offers skilled

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274. See 3 *id.* at 95–104 (describing the integral role of President Lyndon B. Johnson's public statements and private acts in influencing Congress during deliberation over the Civil Rights Act of 1964).

275. Lain, *supra* note 30, at 1633.

276. See 3 ACKERMAN, *supra* note 176, at 171 (describing how the president can often ensure that his legislation will create effective change with “the real-world experience generated by the administrative process”); ESKRIDGE & FEREJOHN, *supra* note 271, at 10 (“The biggest change in the Constitutional structure has been the creation of the modern administrative state, through congressional delegations of *lawmaking* authority to independent agencies . . .”).

277. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 95–110 (2010).

278. *Id.* at 98–99.

279. See, e.g., Lain, *supra* note 30, at 1631–33 (explaining that the Supreme Court grants a large percentage of certiorari requests and rules in favor of the Solicitor General a majority of the time); Snyder, *supra* note 122, at 383, 416 (describing Justice Frankfurter's overtures to a former law clerk within the Solicitor General's office and probable deference to the Obama administration's refusal to defend the Defense of Marriage Act).

280. See H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 217 (1991) (“[W]hen the federal government seeks review, the chances of a case being taken are quite high.”).

281. See Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1116 (1988) (“Previous research indicates that cases are most likely to be selected for plenary review when . . . the solicitor general is the petitioner.”).

legal arguments that aid the Court in resolving difficult constitutional issues.<sup>282</sup> The Solicitor General's office derives its authority from its combined role as the voice of the executive branch in the courts and as an important repeat player at the Supreme Court. The Department of Justice and lawyers for various executive agencies serve a similar—if less influential—role for their specific substantive areas in the courts.

Presidential constitutional arguments are not prevalent in Supreme Court opinions. However, a recent Roberts Court decision, *NLRB v. Noel Canning*,<sup>283</sup> shows the power of this approach. There, Noel Canning—a Pepsi distributor—asked the U.S. Court of Appeals for the D.C. Circuit to set aside a National Labor Relations Board order, arguing that the Board lacked a quorum because three of the five Board members had been appointed in violation of the Recess Appointments Clause.<sup>284</sup> This was the first time the Supreme Court was ever called on to interpret that Clause.

As part of his majority opinion, Justice Breyer drew heavily on historical practice and the executive branch's conclusions about the scope of the Recess Appointments Clause. This included the presidents' consistent practice of issuing recess appointments during intrasession recesses and official opinions written by the presidents' legal advisors providing constitutional support for these decisions.<sup>285</sup> In the process, Justice Breyer cited written opinions by the Attorney General and the OLC, treating them much as he would Court precedent.

For instance, take Justice Breyer's analysis of the words "vacancies that may happen" in the Recess Appointments Clause. He concluded that this phrase encompassed both vacancies that had come into being during a congressional recess and those that arose prior to a recess.<sup>286</sup> To reach this conclusion, he relied on the constitutional judgments of presidents from the early republic through today—including Presidents John Adams, Thomas Jefferson, James Madison, and James Monroe.<sup>287</sup> He also drew on the opinions of various Attorneys General, including Edmund Randolph (arguing for a narrow reading), William Wirt (arguing for a broader reading), and "[n]early every subsequent Attorney General to consider the question

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282. See Lain, *supra* note 30, at 1631–32 (describing the Solicitor General's opinion as particularly influential).

283. 573 U.S. 513 (2014).

284. *Id.* at 520.

285. See *id.* at 549.

286. *Id.* at 539.

287. *Id.* at 543–49.

throughout the Nation’s history” (agreeing with Wirt in calling for a broader reading).<sup>288</sup>

In the process, Justice Breyer also turned to Opinions of the Attorney General and OLC opinions from 1832 through 2012.<sup>289</sup> Finally, he observed that “every President since James Buchanan has made recess appointments to pre-existing vacancies.”<sup>290</sup> Justice Breyer concluded, “Taken together, we think it is a fair inference that a large proportion of the recess appointments in the history of the Nation have filled pre-existing vacancies.”<sup>291</sup> The Supreme Court then construed the Clause to match this practice.

In the end, *Canning* was an unusual case. The Court was called on to interpret the Recess Appointments Clause for the first time—two hundred years after the ratification of the Constitution. Nevertheless, Justice Breyer’s opinion shows the promise and the power of taking the president’s practices and constitutional arguments seriously.

Interestingly, the Court also explicitly referenced a shift in the President’s constitutional positions and reasoning in *United States v. Windsor*.<sup>292</sup> There, the Obama Administration refused to defend the federal Defense of Marriage Act. In his majority opinion, Justice Kennedy explicitly referenced this shift in position and the Administration’s *constitutional* conclusions:

While [this case] was pending, the Attorney General . . . notified the Speaker of the House . . . that the Department of Justice would no longer defend the constitutionality of DOMA’s [section] 3. . . . [T]he Attorney General informed Congress that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.” . . . This case is unusual . . . because [this] letter was not preceded by an adverse judgment. *The letter instead reflected the Executive’s own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.*”<sup>293</sup>

Scholars often highlight the importance of this shift by President Obama and his lawyers in the constitutional battle over marriage equality.<sup>294</sup>

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288. *Id.* at 539–44.

289. *Id.* at 544.

290. *Id.* at 545.

291. *Id.* at 546.

292. 570 U.S. 744, 754.

293. *Id.* at 753–54 (emphasis added) (citations omitted).

294. See Eyer, *supra* note 30, at 201 (“[T]here is a strong case to be made that the Obama announcement helped to shape the ultimate outcomes (invalidation as unconstitutional) of the many DOMA challenges that were decided in its aftermath, both in the lower courts and in *Windsor* itself.”).

Of course, presidential constitutional arguments are not definitive. The president's actions and activities often say very little about the president's constitutional—as opposed to political—vision. Furthermore, even if the president's actions do advance a constitutional vision, that vision may reflect the views of a single political party, not a popular constitutional consensus. And finally, key executive branch lawyers may not fully represent the views of the president.<sup>295</sup> In the end, elected officials—whether the president, Congress, or state or local officials—are not the people.<sup>296</sup>

These caveats aside, popular constitutional interpreters might use presidential constitutional arguments in tandem with other indicators of public opinion to build powerful popular constitutional arguments.

### C. Congress

To build a popular constitutional argument, the interpreter may draw on Congress's actions and activities.<sup>297</sup> Possible congressional indicators include individual pieces of legislation, patterns of congressional policymaking, long-standing congressional practice, congressional amicus participation, and electoral mandates. I consider each, in turn.

*Congressional Legislation.* Beginning with congressional legislation, the popular constitutional interpreter may look to

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295. See Lain, *supra* note 30, at 1632 (“[T]he Solicitor General’s positions are not a perfect proxy for those of the executive branch. In theory, the Solicitor General represents the United States, not the President, and in practice the Solicitor General enjoys a substantial amount of independence in determining what positions to take.”).

296. See WHITTINGTON, *supra* note 2, at 131 (“[T]he government is only imperfectly representative of the people . . .”).

297. See 3 ACKERMAN, *supra* note 176, at 8–9 (“[C]ertain landmark statutes are indeed rooted in considered judgments of the people, and . . . it is these statutes, not formal amendments, that provided the primary vehicle for the legal expression of popular sovereignty in the twentieth century.”); ESKRIDGE & FEREJOHN, *supra* note 271, at 16 (arguing that because Constitutional amendments can prove “costly and hard to revoke . . . a more lengthy and polycentric statutory process has essentially superseded it”); Amar, *supra* note 52, at 1782; Lain, *supra* note 30, at 1634 (“Congress communicates its constitutional views by passing legislation that reflects a particular constitutional understanding . . . [C]ongressional legislation of this sort serves a legitimating function, validating contested constitutional understandings by transmitting them into the formal law.”); Post & Siegel, *Legislative Constitutionalism*, *supra* note 11, at 1985–86 (explaining that congressional action increasing civil rights protections “demonstrates the institutionally differentiated ways in which Congress and the Court engage in constitutional lawmaking”); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2–3 (2003) (arguing that congressional dialogue with the judiciary and exercise of its Section Five power suggest significant impact on constitutional culture).

landmark statutes and determine their relationship to the Constitution's text, history, and structure.<sup>298</sup> As part of this analysis, she may examine the legislative history underlying a specific law—particularly, speeches by congressional leaders and arguments advanced in committee reports.<sup>299</sup> She may also seek out larger patterns in congressional lawmaking.

Congressional legislation may take on popular constitutional importance in a variety of situations. First, congressional legislation may provide a source of popular constitutional authority in the context of Congress's enforcement powers under various amendments—most notably, the Reconstruction Amendments. While the Supreme Court has asserted its own independent authority to set the boundaries of Congress's power under these provisions,<sup>300</sup> the Court has long used congressional legislation to shape its own constitutional understanding in this context.<sup>301</sup> Some scholars offer a powerful defense of this relationship between the elected branches and constitutional doctrine.

For instance, Akhil Amar argues that robust congressional enforcement powers are consistent with the Reconstruction Amendments' text and history.<sup>302</sup> And Robert Post and Reva Siegel offer a powerful account of the relationship between Congress and the Supreme Court in this context. For instance, they argue that when Congress passes legislation under its Fourteenth Amendment enforcement power, Congress exercises its own constitutional “judgment[ ] about the [Constitution's] meaning” and, in the process, it “vindicate[s] public understandings about the nation's needs and obligations under the Fourteenth Amendment.”<sup>303</sup> For them, this

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298. See 3 ACKERMAN, *supra* note 176, at 199 (“Constitutional pragmatism was a key contribution of the landmark statutes of the Second Reconstruction . . .”); Post, *supra* note 41, at 40–41 (discussing President George W. Bush's description of the recently passed ADA legislation as an articulation of America's democratic principles and notion of equality); Post & Siegel, *supra* note 297, at 1–2, 14, 30–34 (discussing landmark statutes inspiring, and inspired by, landmark cases).

299. See 3 ACKERMAN, *supra* note 176, at 150–51.

300. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (explaining that the federal statute at issue, by controlling cases and controversies, is “beyond congressional authority” and that the “Court's precedent . . . must control”), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, 42 U.S.C. § 2000cc (2012), as recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

301. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (“The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects.”).

302. See Amar, *supra* note 52, at 1752.

303. Post & Siegel, *supra* note 297, at 2, 14.

process places Congress on “virtually equal” constitutional “footing with the Court.”<sup>304</sup>

The Justices sometimes draw on Congress’s interpretive authority under its enforcement powers to uphold landmark statutes. To justify deference, the Justices often appeal to high levels of congressional debate and deliberation, Congress’s constitutional role, and its democratic imprimatur. For instance, consider the Supreme Court’s approach in *South Carolina v. Katzenbach*.<sup>305</sup>

In *Katzenbach*, the Supreme Court considered a constitutional challenge to the Voting Rights Act of 1965 (“VRA”). In his majority opinion upholding the VRA, Chief Justice Warren offered a powerful defense of Congress’s constitutional conclusions, drawing on Congress’s enforcement power,<sup>306</sup> its meticulous study of voter discrimination, and its overwhelming (and bipartisan) support for the legislation. Chief Justice Warren highlighted the years of voter discrimination by the states, the “great care” that Congress used in studying the problem (including the extensiveness of the related hearings), the “voluminous legislative history,” and the “overwhelming” votes in favor of the legislation—a bipartisan coalition with the “firm intention to rid the country of racial discrimination in voting.”<sup>307</sup>

In the process, Chief Justice Warren discussed the length of the hearings in the House and Senate and the extent of debate on the floors of each House.<sup>308</sup> He cited to the legislative record, including House and Senate Committee Reports.<sup>309</sup> Tracking Congress’s constitutional judgment, the Supreme Court then upheld the VRA.<sup>310</sup> Interestingly, nearly a half-century later, Justice Ginsburg used similar arguments to defend the VRA in her *Shelby County v. Holder* dissent—drawing on congressional indicators to lay bare the countermajoritarian difficulty and attack the Court for subverting the

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304. Post, *supra* note 41, at 41.

305. 383 U.S. at 308–15 (discussing the extensive legislative history and rationale for the Voting Rights Act of 1965); *see also* *Katzenbach v. Morgan*, 384 U.S. 641, 654–56 (1966) (offering another powerful example of the Supreme Court reinforcing a robust congressional enforcement power); Post & Siegel, *supra* note 297, at 34–36 (examining the deference that the Court awarded to Congress and its interpretation of the Constitution in *Katzenbach v. Morgan*).

306. *Katzenbach*, 383 U.S. at 324, 326 (arguing that the Reconstruction Framers made Congress “chiefly responsible” for enforcing the Reconstruction Amendments).

307. *Id.* at 308–09, 315.

308. *Id.* at 308–09.

309. *Id.* at 309, 315.

310. *Id.* at 337.

constitutional views of the American people and their elected representatives.<sup>311</sup>

Second, the popular constitutional interpreter may look to larger patterns in congressional lawmaking to discern newly established constitutional principles.<sup>312</sup> In these cases, the Court uses congressional indicators to justify a new construction of constitutional text or a shift in constitutional doctrine. This move does not turn on simple deference to congressional legislation, as with *Katzenbach* and Ginsburg's *Shelby County* dissent, but instead uses congressional legislation to interpret the Constitution anew, whether through supporting a specific construction, recognizing a constitutionally relevant fact, or shifting constitutional doctrine.<sup>313</sup>

A Supreme Court plurality took up this approach in *Frontiero v. Richardson*.<sup>314</sup> There, a married female air force officer and her husband brought a challenge against the Secretary of Defense.<sup>315</sup> Federal law made it more difficult for female officers to receive spousal benefits than their male colleagues.<sup>316</sup> The challengers argued that the Court should recognize that “classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close . . . scrutiny.”<sup>317</sup> In his plurality opinion, Justice Brennan agreed—drawing, in part, on congressional legislation to support his argument that the Court should apply strict scrutiny to gender-based discrimination.<sup>318</sup>

By the time *Frontiero* reached the Court, Congress had already banned gender discrimination for nine years.<sup>319</sup> As part of his analysis, Justice Brennan studied the wave of legislation passed in the 1960s and 1970s attacking general discrimination, including the Equal Pay

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311. *Shelby Cty. v. Holder*, 570 U.S. 529, 559–564, 593 (2013) (Ginsburg, J., dissenting) (telling a powerful story of sustained, “bipartisan” support for the VRA—relying on the “overwhelming support” of Congress, Congress’s “conscientious[ ]” study of the problem, and the Act’s reauthorization across various Congresses and Presidents).

312. See 3 ACKERMAN, *supra* note 176, at 150–51 (discussing the turn away from a restrictive understanding of congressional constitutional power and toward a more inclusive interpretation, including expansion of the equal protection and commerce powers).

313. See, e.g., Post & Siegel, *Legislative Constitutionalism*, *supra* note 11, at 1950–51; Post & Siegel, *supra* note 297, at 32 (“The Court’s jurisprudence of sex discrimination illustrates how the Court’s constitutional interpretations can draw strength and legitimacy from a dialogic relationship to contemporary political culture.”).

314. 411 U.S. 677, 687–88 (1973); see also Post & Siegel, *Legislative Constitutionalism*, *supra* note 11, at 2003–04 (noting the role of congressional constitutionalism in *Frontiero*).

315. *Frontiero*, 411 U.S. at 677.

316. *Id.* at 679–80.

317. *Id.* at 682.

318. *Id.* at 688.

319. See Post & Siegel, *supra* note 297, at 32 & n.140.



Act of 1963, Title VII of the Civil Rights Act of 1964, and the Equal Rights Amendment.<sup>320</sup> Justice Brennan observed, “[O]ver the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications.”<sup>321</sup> Given this legislation, Brennan reasoned, “Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”<sup>322</sup>

Third, the popular constitutional interpreter may couple laws on the books with Congress’s expertise and constitutional judgments to justify judicial restraint in the face of a constitutional challenge.<sup>323</sup> While the *Frontiero* plurality used congressional indicators to heighten constitutional protections and attack a federal law, the Court might also draw on congressional indicators to defend a law.<sup>324</sup> At the Supreme Court, this is a popular move in the campaign-finance context.<sup>325</sup> And many of these types of congressional constitutional arguments parallel those that we witnessed in the context of arguments drawing on state legislation—again, often, but not always, in dissent.<sup>326</sup>

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320. *Frontiero*, 411 U.S. at 687.

321. *Id.*

322. *Id.* at 687–88. Chief Justice Rehnquist offered a similar analysis in *Texas v. Johnson*, using a pattern of congressional lawmaking to establish a long-standing tradition of honoring and protecting the flag in our nation’s law. 491 U.S. 397, 427–28 (1989) (Rehnquist, C.J., dissenting).

323. *But see* NFIB v. Sebelius, 567 U.S. 519, 555–56 (2012) (arguing that Congress’s failure to regulate “inactivity” in the past cautions against upholding the Patient Protection and Affordable Care Act’s individual mandate).

324. Occasionally, the Supreme Court also draws on congressional expertise as expressed in a single piece of legislation to construe a constitutional provision or apply well-established doctrine. *See, e.g.*, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (using Congress’s definition of an intangible harm to apply the “injury-in-fact” requirement of Article III standing).

325. *See* *McCutcheon v. FEC*, 572 U.S. 185, 259 (2014) (Breyer, J., dissenting) (urging the Court to look to the “evidentiary record” to “determine whether . . . [to] defer to Congress’ own judgments, particularly those reflecting a balance of the countervailing First Amendment interests” in the case); *Citizens United v. FEC*, 558 U.S. 310, 479 (2010) (Stevens, J., dissenting) (using congressional support for corporate campaign spending restrictions to establish a “longstanding consensus on the need to limit corporate campaign spending”); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 504 (2007) (Souter, J., dissenting) (observing “congressional recognition of the ensuing threat to democratic integrity as reflected in a century of legislation restricting the electoral leverage of concentrations of money in corporate and union treasuries”); *FEC v. Beaumont*, 539 U.S. 146, 152 (2003) (referencing “a century of congressional efforts to curb corporations’ potentially ‘deleterious influences on federal elections’”); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (calling for “considerable deference” to Congress in the area of campaign finance); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 822–23 (1978) (Rehnquist, J., dissenting) (citing long-standing congressional support for corporate campaign spending restrictions to justify upholding a Massachusetts law).

326. *See* *Riley v. California*, 573 U.S. 373, 407 (2014) (Alito, J., concurring in part and concurring in the judgment) (noting that he would “reconsider the question presented here

*Other Congressional Indicators.* Apart from legislation, the popular constitutional interpreter may look to a variety of other indicators, including congressional practice, Congress’s arguments inside the courts, and electoral mandates.

Beginning with congressional practice, the interpreter may examine a long-standing congressional tradition and explore its relationship to key constitutional questions. Much as in the state and local government context, the Supreme Court has used congressional practice in constitutional cases.<sup>327</sup> For instance, in *Galloway*, Justice Kennedy used the congressional practice of sectarian prayers to justify their use during town council meetings.<sup>328</sup>

The Court also provided a recent—and expansive—gloss on the importance of congressional practice in Justice Breyer’s majority opinion in *NLRB v. Noel Canning*. There, while exploring the meaning of the word “recess” in the Recess Appointments Clause, Breyer looked to congressional practice—in particular, he studied how the Senate responded to presidential recess appointments over time.<sup>329</sup> In the end, Justice Breyer used Senate practice to justify a broad reading of the word “recess”—one that permitted the president to make recess appointments in a variety of contexts.<sup>330</sup>

Second, the popular constitutional interpreter may analyze Congress’s actions inside the courts—namely, the constitutional arguments advanced by members of Congress in key litigation, including amicus briefs in important constitutional cases.<sup>331</sup> For instance, the Supreme Court drew attention to a congressional amicus brief in *McDonald v. City of Chicago*, with members of Congress arguing in favor of an individual-rights interpretation of the Second Amendment.<sup>332</sup>

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if . . . Congress” enacted related digital privacy legislation); *United States v. Alvarez*, 567 U.S. 709, 754 (2012) (Alito, J., dissenting) (“The Stolen Valor Act represents the judgment of the people’s elected representatives that false statements about military awards are very different from false statements about civilian awards.”); *United States v. Stevens*, 559 U.S. 460, 493 (2010) (Alito, J., dissenting) (“Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos.”).

327. *See, e.g., Johnson*, 491 U.S. at 426 (Rehnquist, J., dissenting) (noting the use of the flag in a position of honor in government buildings).

328. *See Town of Greece v. Galloway*, 572 U.S. 565, 579 (2014) (highlighting that Congress “continues to permit its . . . chaplains” to use sectarian prayers).

329. *NLRB v. Noel Canning*, 573 U.S. 513, 526–54 (2014) (analyzing the contours of Senate practice and constitutional debates, including congressional resolutions, existing laws, committee reports, amicus briefs submitted by leading Senators, and patterns of Senate acquiescence).

330. *Id.* at 513–14.

331. *See* Lain, *supra* note 30, at 1634.

332. 561 U.S. 742, 789 (2010).

Finally, the popular constitutional interpreter may look to how members of Congress—and their parties—seek to advance their constitutional visions through campaigns and speeches. For instance, she may examine a congressional party's claim to a popular mandate for its constitutional vision following a decisive electoral victory.<sup>333</sup> This type of argument is not evident in Supreme Court practice, but it remains a topic of debate in legal scholarship and a possible form of argument in future cases.

*Conclusion.* As with presidential constitutional arguments, those focused on Congress have their limits—especially when made in isolation. Congressional elections are often much less prominent than those for the presidency and rarely take on a constitutional dimension.<sup>334</sup> Congress itself is a multimember body—making it more difficult than in the case of the presidency to identify a unitary constitutional vision. Congressional leaders are often little known, and Members of Congress rarely build a public following outside of their own constituents. Finally, when Congress acts, it often acts in raw political terms, not constitutional ones.<sup>335</sup> And even then, its actions and inaction only imperfectly reflect the views of the American people.<sup>336</sup>

These limits aside, congressional constitutional arguments may still help an interpreter build a broader popular constitutional argument. This is especially true when the interpreter is able to find evidence that the president, the Senate, and the House are all working to advance a common constitutional vision.<sup>337</sup>

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333. Concededly, wave elections are rare—and wave elections *with a constitutional dimension* are even rarer. However, these elections sometimes *do* take on a constitutional dimension. See, e.g., 2 ACKERMAN, *supra* note 178, at 160–206 (exploring the Republican Party's mandate following its landslide victory in the election of 1866).

334. See Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 123 (2012) (“The People’s vote for or against an incumbent would not necessarily express popular approval or disapproval of the myriad constitutional judgments of legislators or presidents in a strongly popular constitutionalist regime.”).

335. See *id.*

336. See Devins, *supra* note 40, at 1338 (“The congruence between public policy and public opinion is roughly sixty percent.”); Werhan, *supra* note 334, at 123 (noting that “the People and their representatives are distinct”).

337. See 3 ACKERMAN, *supra* note 176, at 99–116, 149–51 (providing a powerful example of this sort of argument by rewriting *Heart of Atlanta Motel v. United States* and *Harper v. Virginia State Board of Elections*).

*D. Public Opinion Polls*

When building a popular constitutional argument, the interpreter may draw on data from public opinion polls. Though controversial within constitutional practice, polls offer the popular constitutional interpreter a quantitative means of assessing popular views—and, importantly, determining whether the American people may have reached something approaching a consensus on a given constitutional issue.

Recent polls may offer a snapshot of the American people's current constitutional views, and a series of polls over time might capture the contours of public opinion and any patterns of development. For instance, consistent results across several polls over many years may suggest stable constitutional views. Steady increases or decreases in support for a given position may suggest a consistent trend line. And sharp changes in support may suggest a rapidly shifting debate. Taken together, these data offer the interpreter another means of determining the depth and breadth of the American people's support for a given constitutional position.

Furthermore, by studying opinion polls, the interpreter might identify instances in which the American people and their elected officials are out of alignment. For instance, Congress may pass a law that lacks majority support. The American people may have turned against a law already on the books. Or the American people may support a particular action, but the elected branches may not act. Conversely, the interpreter might strengthen her own constitutional argument by showing that the American people and their elected officials have united behind her view.

While public opinion polls remain a controversial source of authority at the Supreme Court, the Justices sometimes rely on them as a component of their analysis in constitutional cases. The Supreme Court offered its most extensive treatment of public opinion polls in *Atkins v. Virginia*.<sup>338</sup> In his majority opinion, Justice Stevens offered a state legislation count and national polling data as evidence of a popular constitutional consensus against the execution of those with severe mental disabilities.<sup>339</sup> Citing a *New York Times* story and an amicus brief containing twenty state and national polls, Stevens concluded:

[P]olling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. Although these

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338. 536 U.S. 304 (2002).

339. *Id.* at 313–17.

factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.<sup>340</sup>

Nathaniel Persily and Kelli Lammie have also studied the well-established use of public opinion data in the context of challenges to campaign finance regulations.<sup>341</sup> In these cases, both sides often offer testimony from competing public opinion experts, with each side addressing the issue of whether there's a relationship between campaign finance and public perceptions of corruption—a key question under campaign-finance doctrine.<sup>342</sup> The Justices have sometimes drawn on these data in their opinions.<sup>343</sup>

While public opinion polls are useful, popular constitutional interpreters should approach them with the requisite level of humility and caution.<sup>344</sup> The interpreter should steer clear of reading too much into the result of any single poll on a given issue.<sup>345</sup> She should also be on guard for faulty polling methodology—for instance, misleading questions.<sup>346</sup> And even if the interpreter examines a range of trusted polls showing similar results, interpretive issues remain. Perhaps most importantly, the interpreter must ask whether the polling results represent the unreflective views of a sustained majority, or the American people's considered judgments.<sup>347</sup> To answer this key question, the interpreter must read public opinion data together with

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340. *Id.* at 316 n.21 (citations omitted).

341. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 120–24 (2004).

342. *Id.* at 128–29.

343. *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 461–62 (2015) (Ginsburg, J., concurring in part and concurring in the judgment) (using polling data to support her conclusion that states should have “leeway to ‘balance the constitutional interests in judicial integrity and free expression within the unique setting of an elected judiciary’” (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 821 (2002))).

344. *See* Lain, *supra* note 24, at 118 (“Public-opinion-poll data can be skewed, depending on how questions are asked. Institutional support can reflect elite, rather than popular, opinion.”).

345. *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 863 (2009) (“No one thinks that a court should strike down a law if, for example, more than 50 percent (or any other number) of those who responded to a public opinion poll disapproved of it.”).

346. *See* BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 6–7 (2004); Lain, *supra* note 24, at 118 (explaining that identifying the will of the majority can be difficult because of the risk that opinions may change “depending on how questions are asked”); Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 420 (2006). Chief Justice Rehnquist highlighted many of these issues in his rebuke of Justice Stevens’s use of public opinion data in *Atkins*. *See Atkins v. Virginia*, 536 U.S. 304, 322–28 (2002) (Rehnquist, C.J., dissenting); *see also id.* at 347 (Scalia, J., dissenting) (calling the majority’s use of polling data “[f]eeble”).

347. *See* Roesch, *supra* note 346, at 404.

other indicators of public opinion and place those views in the context of broader constitutional discourse.

Despite these risks, public opinion polls remain a valuable resource, and popular constitutional interpreters should not shy away from polling results that show sustained public support for a particular constitutional position over time.<sup>348</sup> Such findings, especially when coupled with evidence of public engagement and deliberation, may serve as a key component of a powerful popular constitutional argument.<sup>349</sup>

#### IV. CRAFTING POPULAR CONSTITUTIONAL ARGUMENTS

Taken together, these indicators of public opinion offer the popular constitutional interpreter a range of materials from which to build powerful popular constitutional arguments. No single indicator is a perfect reflection of public opinion. However, together, these indicators can help the interpreter determine whether the American people have reached a considered judgment about a given constitutional issue.

In this Part, I explore ways of crafting powerful popular constitutional arguments from these indicators. First, I consider various factors that might strengthen or weaken these arguments, including constitutional convergence, history, deliberation, and interbranch custom. And second, I offer a few thoughts on the relationship between popular constitutionalism and precedent.

##### *A. Ways of Strengthening Popular Constitutional Arguments*

When crafting a popular constitutional argument, the popular constitutional interpreter will often combine the various indicators of public opinion. However, she will also look to a variety of other factors that might strengthen (or weaken) her argument, including constitutional convergence, history, deliberation, and interbranch custom. I consider each in turn.

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348. See Primus, *Public Consensus*, *supra* note 12, at 1227 (“But the public opinion that can be an input in constitutional reasoning is stable public consensus, not shifting majority preference.”).

349. See Lain, *supra* note 24, at 122, 135 (using *Brown v. Board of Education* and *Roe v. Wade* as examples).

## 1. Constitutional Convergence

When crafting a popular constitutional argument, the interpreter might highlight any instances of constitutional convergence. To that end, she will study the various strands of public debate over a given constitutional issue and look for any evidence of cross-ideological overlap in the debate. Reva Siegel<sup>350</sup> and Bruce Ackerman<sup>351</sup> both explore this dynamic and its significance to constitutional development.

Social movements and political parties often mobilize around high-profile constitutional issues. These issues often divide the American people ideologically and politically, with mobilization on one side of the ideological spectrum leading to backlash and countermobilization on the other side.<sup>352</sup> As the debate unfolds, these divisions often deepen. However, scholars—most notably, Siegel—have also observed another dynamic often at work.

These patterns of mobilization and countermobilization often heighten the public's interest in the issue and spur broader debate and deliberation. Over time, the public debate often broadens from a small group of high-profile activists to the wider public. As the debate widens, each set of activists must address the other side's strongest arguments. In the process, each side may attempt to broaden its appeal, co-opting some of the most popular components of the other side's arguments.<sup>353</sup> As this process unfolds, the two sides may converge on a certain set of constitutional baselines—broad principles that unite both sides, even as opponents may still divide over specific applications.<sup>354</sup>

For the popular constitutional interpreter, this form of constitutional convergence may be strong evidence of popular consensus—a consensus that she may then seek to translate into constitutional doctrine. Examples might include constitutional convergence over gender equality in the 1970s and an individual-

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350. See Siegel, *Dead, supra* note 16, at 192 (“[T]his Comment shows how *Heller’s* originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism.”); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299 (2001) (“Both the ERA and the Nineteenth Amendment demonstrate how the text of the Constitution makes the terms of our constitutional tradition amenable to contestation by mobilized groups of citizens, acting inside and outside the formal procedures of the legal system.”).

351. *E.g.*, 3 ACKERMAN, *supra* note 176, at 6 (examining Southern reactions to the Civil Rights Movement).

352. Siegel, *De Facto, supra* note 16, at 1362–63.

353. See *id.* at 1330–31.

354. See Siegel, *Dead, supra* note 16, at 193–94 (noting the pattern of “mobilization, countermobilization, coalition, and compromise”).

rights reading of the Second Amendment in the 2000s.<sup>355</sup> In each instance, the Supreme Court translated constitutional convergence into official constitutional doctrine.<sup>356</sup>

The popular constitutional interpreter may also look for other patterns in public discourse (and opinion). For example, following a period of extensive public debate, ideological divisions might dissolve, as key actors defect from one side of the debate to another. For the popular constitutional interpreter, this may signal that an ideological consensus on one side of the debate is breaking down, perhaps signaling a broader shift in the American people's views. The Supreme Court recognized this dynamic in *Lawrence v. Texas*.<sup>357</sup> As part of its analysis, the Court used "substantial and continuing" attacks on *Bowers v. Hardwick* by key conservative voices like Charles Fried and Richard Posner to signal a growing cross-ideological consensus condemning the criminalization of same-sex sodomy.<sup>358</sup>

Even more powerfully, one political party may completely abandon a constitutional debate. For a period of time, a key constitutional issue—for instance, national regulation of the economy—may divide the two parties. The parties may run on competing constitutional visions over the course of a series of elections. They may carry out public debates on the campaign trail, in newspapers, and on the radio. And they might fight a series of battles at the Supreme Court. However, after a series of defeats—both legal and political—one side (or, at least, many of its mainstream leaders) may simply surrender, either by co-opting the popular views of its opponents or by simply abandoning that line of argument. A few die-hard traditionalists may stand pat, keeping the old constitutional faith alive. However, a critical mass will have given up the fight, thus signaling the end of *constitutional* debate over a given issue or principle by the major parties. This form of acquiescence and consolidation plays a key role in Bruce Ackerman's theory of

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355. See Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1414 (2009) ("In my recent Comment on the decision, I read *Heller* as enforcing understandings forged in popular constitutionalism."); Siegel, *supra* note 350, at 308–13 ("[W]e might view mobilization of women for constitutional change as the source of the new understanding that informed judicial interpretation of the Constitution in the 1970s.").

356. See Siegel, *De Facto*, *supra* note 16, at 1331, 1406 (recognizing that, in the case of the ERA, the debate over whether legislation was necessary to protect women's rights provided the Court with apparent public agreement that women possessed rights under the Equal Protection Clause); Siegel, *supra* note 355, at 1414 n.65 (reviewing scholarly works that suggested "*Heller* would have been impossible" without the "chang[e] [in] Americans' minds about the meaning of the Second Amendment" resulting from the work of organizations initiating debates on the topic).

357. 539 U.S. 558 (2003).

358. *Id.* at 576.



constitutional change—for instance, when the Republican Party eventually accepted the New Deal.<sup>359</sup>

While constitutional convergence may play an implicit role in many shifts in constitutional doctrine, we also see explicit evidence of constitutional convergence in the Supreme Court's opinions. For instance, consider *McDonnell v. United States*, a recent case addressing allegations of corruption against the former Governor of Virginia and the scope of a federal anticorruption statute.<sup>360</sup>

Chief Justice Roberts wrote the majority opinion for a unanimous Court.<sup>361</sup> As part of his analysis of the statute, he relied on constitutional convergence in two instances. First, Roberts quoted a bipartisan amicus brief filed by former White House counsel who served both parties: “White House counsel who worked in every administration from that of President Reagan to President Obama warn that the Government’s ‘breathtaking expansion of public-corruption law would likely chill federal officials’ interactions with the people they serve and thus damage their ability effectively to perform their duties.’”<sup>362</sup> Second, he cited bipartisan briefs from state attorneys general offering additional support, explicitly highlighting the party breakdown for each brief: “Six former Virginia attorneys general—four Democrats and two Republicans—also filed an *amicus* brief in this Court echoing those concerns, as did 77 former state attorneys general from States other than Virginia—41 Democrats, 35 Republicans, and 1 independent.”<sup>363</sup> A unanimous Supreme Court ultimately followed the advice offered in these bipartisan briefs and read the statute narrowly.

The Court also turns to constitutional convergence when analyzing congressional action. For some Justices, bipartisan support increases the legitimacy of a given statute and strengthens its claim to speak for an underlying popular constitutional consensus. For instance, Chief Justice Warren used constitutional convergence as part of his argument in *Katzenbach*, stressing the “overwhelming,” bipartisan votes in favor of the Voting Rights Act.<sup>364</sup> Justice Ginsburg made similar arguments in her *Shelby County* dissent.<sup>365</sup>

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359. 2 ACKERMAN, *supra* note 178, at 255–311.

360. 136 S. Ct. 2355, 2357–58 (2016).

361. *Id.* at 2360.

362. *Id.* at 2372.

363. *Id.*

364. *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09, 315 (1966).

365. *Shelby Cty. v. Holder*, 570 U.S. 529, 593 (2013) (Ginsburg, J., dissenting) (emphasizing the “bipartisan” support for the Voting Rights Act’s reauthorization in 2006 and quoting the Republican House Judiciary Committee Chair, James Sensenbrenner, as a key supporter).

Finally, we also see constitutional convergence frequently in legal practice before the Supreme Court. With the rise of Supreme Court amicus briefs,<sup>366</sup> litigants look for ways to stand out from the avalanche of other filings. In our polarized age, one of the best ways to signal the legitimacy of one's constitutional position is through filing a "strange bedfellows" brief—one that brings together groups, scholars, government officials, or elected officials from across the ideological spectrum. We saw an example of the power of this move in Chief Justice Roberts's opinion in *McDonnell*. There are many examples of these filings in a range of other areas in recent years, including marriage equality<sup>367</sup> and the Affordable Care Act.<sup>368</sup>

In the end, by studying constitutional convergence and divergence—evidence of social movement activity, political mobilization, and wider public debate—the popular constitutional interpreter can gain a better understanding of the depth and breadth of support for a given constitutional judgment. By examining these dynamics, the interpreter can either strengthen or weaken her popular constitutional argument.

## 2. History

The interpreter may draw on history to strengthen her popular constitutional argument—whether through historical narrative, polling patterns, or trends in state legislation on the books. By turning to history, the interpreter might establish the durability of a given popular constitutional consensus. While some areas of consensus may have formed recently (e.g., support for LGBT rights), others might have a longer historical pedigree (e.g., support for regulating corporate campaign spending). Historical argument allows the popular constitutional interpreter to add this time element to her argument.

The Justices often turn to this combination of popular opinion and history. For instance, Justice Stevens drew on history to build a powerful popular constitutional argument in his *Citizens United*

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366. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744 (2000) ("In recent years, one or more amicus briefs have been filed in 85% of the Court's argued cases.").

367. See Sheryl Gay Stolberg, *Republicans Sign Brief in Support of Gay Marriage*, N.Y. TIMES (Feb. 25, 2013), <https://www.nytimes.com/2013/02/26/us/politics/prominent-republicans-sign-brief-in-support-of-gay-marriage.html> [<https://perma.cc/V4Q2-BZDY>] (using briefs signed by Republicans in *Obergefell* to describe a growing bipartisan consensus around marriage equality).

368. See Jonathan H. Adler & Abbe R. Gluck, *What the Lawless Obamacare Ruling Means*, N.Y. TIMES (Dec. 15, 2018), <https://www.nytimes.com/2018/12/15/opinion/obamacare-ruling-unconstitutional-affordable-care-act.html> [<https://perma.cc/YZX2-4DBX>] (describing a brief signed by scholars from across the ideological spectrum opposing a recent ruling attacking the Patient Protection and Affordable Care Act).

dissent. There, Stevens argued that the Court should uphold federal restrictions on corporate campaign spending.<sup>369</sup> To support this conclusion, he highlighted support for such regulations in Congress and in “half the state legislatures . . . over many decades”—combining congressional action, state legislation counting, and history.<sup>370</sup> Stevens also ended his dissent with a powerful popular constitutional narrative, again drawing on history:

At bottom, the Court’s opinion is . . . a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.<sup>371</sup>

Stevens used public opinion and history to reinforce the set of traditional constitutional arguments made throughout the rest of his dissent.<sup>372</sup>

In the end, by turning to history, the popular constitutional interpreter can gain a better understanding of the durability (or novelty) of a given constitutional judgment. Depending on the findings, this move may either strengthen or weaken the interpreter’s popular constitutional argument.

### 3. Deliberation

Constitutional scholars have long argued that the Framers—and James Madison, in particular—designed our constitutional system to promote deliberative democracy.<sup>373</sup> For constitutional scholars, these deliberative values often tie back to Madison’s vision for our constitutional system—with the public and its leaders debating the most important issues facing the nation, public opinion reflecting reason (not passion or partisan interest), and these refined views, in turn, shaping policy.<sup>374</sup> This strand of constitutional thought is

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369. *Citizens United v. FEC*, 558 U.S. 310, 393–480 (2010) (Stevens, J., concurring in part and dissenting in part).

370. *Id.* at 421 n.46.

371. *Id.* at 479.

372. Chief Justice Rehnquist made a similar move in *Texas v. Johnson*. 491 U.S. 397, 426–27 (1989) (Rehnquist, C.J., dissenting) (using the historic symbolism of the American flag to support his argument that prohibiting the public burning of the flag does not violate the First Amendment).

373. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 19–20 (1993) (“[T]he American Constitution was designed to create a deliberative democracy.”).

374. See, e.g., Colleen A. Sheehan, *The Politics of Public Opinion: James Madison’s “Notes on Government,”* 49 WM. & MARY Q. 609, 625 (1992) (arguing that Madison envisioned a constitutional system guided by public opinion, but not simply immediate opinion or the

important to popular constitutionalism and is reflected in Larry Kramer's influential account.<sup>375</sup>

For popular constitutional argument, interpreters may study the public debate surrounding an issue to determine whether it has been a topic of ongoing debate and deliberation among the American people and their political leaders—or not. On the one hand, if the American people have engaged the issue over time, then the interpreter can be more confident that the public's views reflect some level of thought and debate. This analysis might support popular constitutional action if this deliberation has led to a consensus, or inaction if the public remains divided and debate persists. On the other hand, if the public has *not* debated the issue over time, then there is the danger that any public opinion indicators are merely an unreflective (or unrepresentative) snapshot of the public's view.

The Justices often use deliberation to either strengthen their own affirmative popular constitutional argument or expose their opponents' position as an elitist attempt to shut down debate and impose the views of unelected judges on the American people.<sup>376</sup> For instance, in *Washington v. Glucksberg*, Chief Justice Rehnquist looked to debates in state legislatures to reject a constitutional right to die. He stressed the deliberative process in the states, explaining that state laws touching on a right to die had been "reexamined and, generally, reaffirmed" in "recent years."<sup>377</sup> He also noted that the states were still "engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues."<sup>378</sup> Chief Justice Rehnquist feared that a Supreme Court ruling in favor of a

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preferences of a "factious majority"); Colleen A. Sheehan, *Public Opinion and the Formation of Civic Character in Madison's Republican Theory*, 67 REV. POL. 37, 45 (2005) (describing how the Framers' complex system would open up space for a public debate guided by political leaders). Madison explains this view well in *The Federalist*. See, e.g., THE FEDERALIST NO. 10 (James Madison) (explaining that the American constitutional system would "refine and enlarge the public's views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the interest of their country").

375. Kramer, *supra* note 35, at 748.

376. See, e.g., *Shelby Cty. v. Holder*, 570 U.S. 529, 564–65 (2013) (Ginsburg, J., dissenting) (emphasizing Congress's "conscientious[ ]" study of the problem of voter discrimination); *Atkins v. Virginia*, 536 U.S. 304, 307 (2002) ("[T]he American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case."); *South Carolina v. Katzenbach*, 383 U.S. 301, 308–09, 315 (1966) (highlighting the extensiveness of the hearings and the "voluminous legislative history" underlying the VRA).

377. *Washington v. Glucksberg*, 521 U.S. 702, 716 (1997).

378. *Id.* at 719.

constitutional right to die would short-circuit this deliberative process and “strike down the *considered* policy choice of almost every state.”<sup>379</sup>

In the end, by turning to deliberation, the popular constitutional interpreter can gain a better understanding of the amount of public debate underlying popular views on a given constitutional issue. Depending on the findings, this turn to deliberation may either strengthen or weaken the interpreter’s popular constitutional claim.

#### 4. Interbranch Custom

The popular constitutional interpreter may look to interbranch custom to strengthen her popular constitutional argument. Interbranch custom refers to instances in which the president and Congress have settled on a practice that gives life to a particular constitutional provision. These patterns of action by the elected branches have proven especially useful in the separation of powers context—an area in which the Supreme Court has often been reluctant to adjudicate disputes between two coequal branches of government. By turning to interbranch custom, the popular constitutional interpreter might draw authority from the democratic legitimacy of the people’s elected representatives and their constitutional authority as officials who have taken an oath to support the Constitution.<sup>380</sup>

This approach has a strong historical pedigree—both in constitutional theory and in Supreme Court practice. For instance, in the early twentieth century, Karl Llewellyn valued governmental practice over the Constitution’s text, arguing that “*it is only the practice which can legitimize the words as being still part of our going Constitution.*”<sup>381</sup> Turning to Supreme Court decisionmaking, Llewellyn added, “*Established* executive, administrative or legislative practice the Court merely accepts.”<sup>382</sup>

In *Canning*, Justice Breyer offers the most thorough defense—and the most extensive example—of the Supreme Court’s use of interbranch custom in recent years. As he explains, “[W]e interpret the Constitution in light of its text, purposes, and ‘our whole experience’ as a Nation. And we look to the actual practice of Government to inform our interpretation.”<sup>383</sup>

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379. *Id.* at 723 (emphasis added).

380. See U.S. CONST. art. VI.

381. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 12 (1934).

382. *Id.* at 31.

383. *NLRB v. Noel Canning*, 573 U.S. 513, 557 (2014) (citation omitted).

Justice Breyer links this method back to two of the most important constitutional figures in the early republic—James Madison and John Marshall. Beginning with Madison, Justice Breyer draws on Madison’s reflections on how interpreters might use governmental practice to settle the Constitution’s meaning over time:

As James Madison wrote, it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding [the] terms & phrases necessarily used in [the] charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.”<sup>384</sup>

Madison’s vision is central to Justice Breyer’s approach to interbranch custom in *Canning*.

Justice Breyer also turns to Chief Justice Marshall and a canonical case, *McCulloch v. Maryland*, for constitutional authority. Consistent with Madison’s insight, Marshall called on judges to rely on governmental practice to help settle constitutional disputes:

[A] doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice.<sup>385</sup>

In *Canning*, Justice Breyer instructs interpreters to first analyze the Constitution’s text. If the text is dispositive, then that is the end of the inquiry. However, if the text is susceptible to multiple readings, then the interpreter might refer to interbranch custom to help settle the constitutional dispute. After analyzing the Constitution’s text, Justice Breyer concludes that the Recess Appointments Clause is ambiguous and then uses interbranch custom to help determine its meaning and scope.<sup>386</sup> We reviewed parts of Justice Breyer’s analysis in Section III.B—an analysis that draws on presidential practice, Senate acquiescence, and legal arguments (and actions) by both branches.

In the end, Justice Breyer reads the use of the word “recess” broadly, permitting recess appointments during intrasession recesses and for vacancies that arise while the Congress is still in session.<sup>387</sup> However, he also concedes that he may have reached a different conclusion if he had ignored interbranch custom and relied on the

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384. *Id.* at 525 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)); see also William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

385. *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

386. *Canning*, 573 U.S. at 527–28.

387. *Id.* at 538.

Constitution's text alone.<sup>388</sup> For Justice Breyer, interbranch custom has real interpretive bite.

In the end, by considering interbranch custom, the popular constitutional interpreter can focus on instances in which the elected branches have reached a constitutional settlement on the application of the Constitution's text. Of course, interbranch custom has its limitations. Custom may reflect genuine agreement between the branches. However, congressional acquiescence does not always mean that a congressional majority supports a presidential practice. Even when a position has majority support, Congress often has difficulty acting—whether because of a crowded agenda, the institution's veto gates, or a mere preference for constitutional shirking.<sup>389</sup>

Nevertheless, when the interpreter identifies evidence that the elected branches have reached a constitutional settlement, she might draw on this settlement to strengthen her popular constitutional argument. And conversely, interbranch conflict might undermine any claims of a popular constitutional consensus.

### *B. Precedent and Popular Constitutionalism*

Finally, a quick word on precedent. A new popular constitutional consensus may push courts down a new doctrinal path—breathing new life into an old constitutional provision, identifying a new fundamental right, or closing off a line of precedent. However, the popular mandate giving life to this new construction is but the beginning of an unfolding legal process, as courts attempt to translate that popular constitutional understanding into doctrine. In this sense, popular constitutional consensus may set a new agenda—an individual-rights reading of the Second Amendment, for instance—but then it is up to the courts to construct a doctrine to implement that new value in the courts.

Popular constitutional judges looking to start down a new doctrinal path should be conscious of their place in the constitutional life cycle. When beginning to shift constitutional doctrine in a new direction, such a judge should issue minimalist decisions tightly linked to the facts of a given case and the specifics of the constitutional consensus that has crystallized around it.<sup>390</sup> Such

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388. *Id.* at 527.

389. Even Justice Breyer conceded as much. *Id.* at 532.

390. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 61–72 (1999) (explaining that this practice allows continued public debate on the broader topic); Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1982–83 (2006)

rulings should clearly leave open the possibility of future doctrinal developments and ongoing democratic deliberation.<sup>391</sup>

This kind of approach would allow for easy midcourse corrections in the face of public backlash<sup>392</sup> and, therefore, guard against moving too far, too fast based on a single reading of public consensus on a given issue.<sup>393</sup> This would also permit additional debate among legal elites, judges, elected officials, and the American people, as new cases in the lower courts and additional social mobilization further focus the public's attention, heighten public engagement, and clarify any practical implications of the new construction.<sup>394</sup>

In the end, the popular constitutional judge should approach shifts in constitutional doctrine with caution.<sup>395</sup> She should pause before recognizing a new constitutional consensus about a given issue, limit the early wave of cases to their specific facts and to paradigmatic applications of the new construction, and leave doctrinal room for backtracking in the face of public outrage.

#### V. POPULAR CONSTITUTIONAL ARGUMENT—A CASE STUDY: *OBERGEFELL V. HODGES* AND MARRIAGE EQUALITY

To see how popular constitutional argument might work in a recent case, I end by contrasting the reasoning in the Supreme Court's decision in *Obergefell v. Hodges*<sup>396</sup> with how a popular constitutional interpreter might have addressed marriage equality. Scholars are no doubt right that public opinion writ large influenced the Justices on

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(describing the different ways that a constitutional provision may apply to a set of facts depending on the analysis used by the Court).

391. See SUNSTEIN, *supra* note 390, at 24–45, 61–72 (outlining the connection between minimalism and democracy); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 14, 99 (1996) (“Minimalist judges try to keep their judgments as narrow and as incompletely theorized as possible.”).

392. See Amar, *supra* note 52, at 1782 (“If judges may properly strike down highly unusual state (or even federal) laws . . . will government innovation and experimentation be unduly stifled . . . ? Not if the judges proceed with caution and humility . . .”).

393. See Coan, *supra* note 12, at 238 (asserting that judges should practice “judicial restraint” when deciding cases based on public outrage); Strauss, *supra* note 345, at 868–69 (explaining how *Furman*'s decision that the death penalty was unconstitutional as applied may have been attributed to diminishing public support for capital punishment, which was later revitalized as states enacted new death penalty statutes).

394. See Lain, *supra* note 24, at 183 (asserting that, even if the Court reaches the wrong decision in a case, this may “forc[e] public debate over contested constitutional questions”); Sunstein, *supra* note 391, at 99 (stating that minimalism helps to “maximize the space for democratic deliberation about basic political and moral issues”).

395. See Amar, *supra* note 52, at 1782.

396. 135 S. Ct. 2584 (2015).



this issue,<sup>397</sup> but the opinion itself—its reasoning and its craft—can also be analyzed from a popular constitutional perspective, especially when placed in dialogue with Chief Justice Roberts’s dissent.

In *Obergefell*, the Supreme Court issued a 5-4 decision striking down state same-sex marriage bans.<sup>398</sup> Justice Kennedy wrote the majority opinion in the case, and it combines traditional legal analysis with Justice Kennedy’s usual commitment to “dignity” and “liberty.”<sup>399</sup> However, he does strike some popular constitutional notes as part of his analysis, drawing on traditional forms of popular constitutional argument.

For instance, he relies on indicators of state lawmaking and practice. Beginning with state legislation, Justice Kennedy collects “State Legislation . . . Legalizing Same-Sex Marriage” in an Appendix to his *Obergefell* opinion.<sup>400</sup> However, the Appendix lists only twelve laws, which suggests the *weakness* of his state constitutional argument.<sup>401</sup>

Justice Kennedy also uses examples of state lawmaking and practice to reinforce his own constitutional conclusions—in many cases, using state actions to establish constitutionally relevant facts. For instance, Justice Kennedy uses state adoption laws as “powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.”<sup>402</sup> He similarly argues that state laws providing benefits to married couples “have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.”<sup>403</sup> Given this treatment of marriage by the states, when states exclude same-sex couples from the institution, they “impose stigma and injury of the kind prohibited by our basic charter.”<sup>404</sup>

Justice Kennedy also draws on historical narrative to place the debate over marriage equality in context. In the process, he offers an account of the LGBT rights movement that builds on that social movement’s history and highlights the extent to which the issue of marriage equality has been the topic of public debate for years—a fusion of history and deliberation that strengthens the popular

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397. See DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 17–93 (2016) (describing the history of the fight for legality of same-sex marriage in the United States).

398. *Obergefell*, 135 S. Ct. 2584.

399. *Id.* at 2585.

400. *Id.* at 2611 app. B.

401. *Id.*

402. *Id.* at 2600.

403. *Id.* at 2601.

404. *Id.* at 2602.

constitutional dimensions of his opinion.<sup>405</sup> The main thrust of Justice Kennedy's narrative is clear: there has been an undeniable trend in favor of LGBT rights (and marriage equality) over time. And some of his most powerful passages use deliberative argument—passages that show that key changes in society, politics, and law reflected a national debate over LGBT rights and marriage equality. In the process, Justice Kennedy explicitly ties arguments made at the Supreme Court to the insights gleaned from these debates.<sup>406</sup>

Justice Kennedy links the legitimacy of constitutional change (and the recognition of new rights) to changes in society-wide public opinion—a classic popular constitutional move. He observes: “[R]ights come not from ancient sources alone. They arise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.”<sup>407</sup> Justice Kennedy adds, “[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”<sup>408</sup> It is the Court's duty to “[r]espond to” this “new awareness.”<sup>409</sup>

Despite these strong gestures towards popular constitutional argument, Justice Kennedy is ultimately fuzzy on how the Court should go about recognizing “new insights and societal understandings.”<sup>410</sup> In the end, he returns to judicial authority and argues that the Court must ultimately exercise its own independent judgment—shaped by “new insights” gleaned by the current generation, but ultimately settled by the independent legal reasoning of judges “in the formal discourse of the law.”<sup>411</sup> For instance, stressing the Court's countermajoritarian mission, Justice Kennedy explains, “It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the *legal* question whether the Constitution protects the right of same-sex couples to marry.”<sup>412</sup> In the end, Justice Kennedy's vision risks leaving judges—not the American people—in the drivers' seat.

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405. *Id.* at 2595–97.

406. *Id.* at 2605 (using powerful language to highlight the extent of the debate over marriage equality).

407. *Id.* at 2602.

408. *Id.* at 2603.

409. *See id.* at 2604.

410. *Id.* at 2603.

411. *Id.* at 2588.

412. *Id.* at 2606 (emphasis added).

This countermajoritarian turn leaves Justice Kennedy vulnerable to attack on multiple fronts, including key *popular constitutional* fronts, even as Justice Kennedy could easily lay claim to enforcing a newly emerging popular constitutional consensus. Chief Justice Roberts exploits this opening, in a dissent that ties a call for judicial restraint to many strands of popular constitutional argument.<sup>413</sup>

For instance, Chief Justice Roberts strikes many popular constitutional chords in the following passage—one of his most powerful—combining deliberative argument, state legislation counting, history, and the dangers of judicial supremacy:

Supporters of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. . . . [T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia . . . . Just who do we think we are?<sup>414</sup>

Throughout his dissent, the Chief Justice also references public opinion,<sup>415</sup> acknowledges ongoing public debate,<sup>416</sup> draws on state legislation counting,<sup>417</sup> and places these state legislation counts in the context of a broader history of limiting marriage to a man and a woman throughout American history.<sup>418</sup>

While the Chief Justice's dissent ultimately turns on other factors—namely, his conclusion that the Constitution does not speak to marriage equality—it often reads like a constitutional law lesson for lawyers, law students, and ordinary citizens, linking *Obergefell* to previous instances of judicial overreach like *Lochner*.<sup>419</sup> Justice Kennedy's emphasis on countermajoritarian reasoning and independent legal judgment play into the Chief Justice's hands—strengthening this attack.

To be clear, the Chief Justice's popular constitutional arguments are, themselves, open to popular constitutional *counterarguments*. While Justice Kennedy makes an easy target for a

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413. *Id.* at 2611–26 (Roberts, C.J., dissenting).

414. *Id.* at 2611–12.

415. *Id.* at 2615 (“Over the last few years, public opinion on marriage has shifted rapidly.”).

416. *Id.* at 2624–25 (praising the debate over marriage equality).

417. *Id.* at 2614, 2615, 2626.

418. *Id.* at 2614 (“There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way.”).

419. *Id.* at 2615–16 (“In reality . . . the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner* . . .”); see *Lochner v. New York*, 198 U.S. 45 (1905).

*Lochnerizing* assault, popular constitutional argument offers a principled response to the Chief Justice—one tied to concrete indicators of public opinion, *not* a judge’s own independent moral judgments.

For instance, the Chief Justice’s dissent leaves the impression that the Supreme Court was imposing an unpopular opinion on the American people—and Justice Kennedy left himself susceptible to that argument by stressing his use of independent legal reasoning. However, even if Chief Justice Roberts is right that the Constitution does not speak on the issue,<sup>420</sup> and that, therefore, there is no judicial role here except for deference—it is simply *not* true that the Court was imposing an unpopular decision on the American people. Public opinion evidence demonstrated majority support for marriage equality and tracking polls suggested a strengthening trend in that direction.<sup>421</sup>

Or, take the issue of unenumerated rights. Chief Justice Roberts is right that there is “no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution.”<sup>422</sup> He is also right to warn about the dangers of unconstrained judicial policymaking—that “[a]llowing unelected judges to select which unenumerated rights rank as ‘fundamental’ . . . raises obvious concerns about the judicial role.”<sup>423</sup> However, popular constitutional argument provides concrete indicators for discerning public opinion. Furthermore, the Constitution’s text—namely, the Ninth Amendment and the Fourteenth Amendment—may provide a warrant for protecting rights actually deemed fundamental by the American people even if they are not explicitly mentioned in the Constitution. Finally, while Roberts suggests that *Glucksberg* and its focus on history and tradition is the best approach to unenumerated rights,<sup>424</sup> popular constitutional argument offers an alternative—one that provides the Justices with a means of tying the recognition of a new right to the commands of the American people.

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420. And he’s not.

421. See *Gay and Lesbian Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Dec. 23, 2019) [<https://perma.cc/XS52-WCGR>] (showing majority support (sixty-one percent) for marriage equality in 2016—rising to sixty-seven percent by 2018).

422. *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

423. See also *id.* (“[A] Justice’s commission does not confer any specific moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of ‘due process.’”).

424. *Id.* at 2622–23 (“The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs . . .”).

Of course, different popular constitutional interpreters might have reached different conclusions in *Obergefell*. For those interpreters joining Justice Kennedy in striking down same-sex marriage bans, they might emphasize public opinion data showing majority support for marriage equality, trends in public opinion reinforcing that result (with support continuing to grow), and evidence of a crumbling consensus *against* marriage equality, with marriage equality becoming orthodoxy on the political left and increasing support for marriage equality even among some establishment figures on the political right.

Some popular constitutional interpreters may have been open to upholding same-sex marriage bans when they clearly divided the public and there was strong (and unified) support for these bans on the right. However, with this support weakening and a bipartisan consensus in opposition emerging, they might have become more open to striking these bans down—perhaps combining some of the tools of popular constitutional argument with other constitutional modalities to reach that conclusion.<sup>425</sup> Still others might have excluded cases involving alleged discrimination against minorities from popular constitutional analysis altogether and instead might have looked to other constitutional arguments to resolve this case.

Finally, for those interpreters joining the dissenters in upholding the same-sex marriage bans, they might have looked at many of the same indicators of public opinion highlighted by Chief Justice Roberts and concluded that the debate is still ongoing. From this perspective, neither side has secured a sustained, cross-ideological consensus. Therefore, these interpreters might have simply deferred to the elected branches, allowed a diversity of approaches at the state level, and permitted the debate to go on.

As with any constitutional methodology, popular constitutional argument does not dictate any particular outcome in a given case. Nevertheless, the indicators of public opinion may provide a framework for assessing whether popular constitutional argument has any force.

## CONCLUSION

Popular constitutionalism—as a matter of both theory and practice—remains a work in progress. In this Article, I have sought to

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425. See Primus, *Public Consensus*, *supra* note 12, at 1228 (suggesting that “the content of equal protection shifted as public opinion moved away from a once-solid consensus dismissing the possibility of same-sex marriage”).

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provide a framework for understanding the role that popular constitutional consensus might play inside the courts. In the process, I have explored the relationship between popular constitutional argument, the existing popular constitutionalism literature, and long-standing debates in constitutional theory. And I have sought to offer the interpreter a concrete framework for crafting popular constitutional arguments—cataloguing various indicators of public opinion and offering examples of how to use popular constitutional analysis to address today’s constitutional questions.

While this Article makes a start, much work remains.