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Popular Constitutionalism Inside the Courts: The Search for Popular Meaning

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While commentators celebrate (or lament) the rise of originalism on the Roberts Court, another theory may prove as important to the future of constitutional law: popular constitutionalism. In a range of recent cases, Justices from across the ideological spectrum have proven themselves open to using sources of popular authority to address important constitutional issues. This is especially true of the two Justices at the Roberts Court's ideological center: John Roberts and Brett Kavanaugh. Even so, the question remains how best to make popular constitutionalism work inside the courts. This question has vexed popular constitutionalists since the theory's inception. In my view, the answer lies in the search for (what I refer to as) the Constitution's popular meaning. *Put simply, popular meaning is a source of authority rooted in the constitutional status of the American people. While original meaning identifies the best reading of the Constitution's text at the time of its ratification, popular meaning draws on sources of authority outside of the courts to capture the constitutional views of the American people today. Popular meaning holds out the promise of addressing a range of longstanding theoretical challenges, including how to build a principled form of living constitutionalism and how*

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to make popular constitutionalism work inside the courts. It also offers a distinct lens through which to analyze ongoing debates on the Roberts Court over how best to weigh the authority of post-ratification history — whether framed as arguments from tradition, convention, historical practice, or constitutional liquidation.

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INTRODUCTION

Constitutional theory is often a battle between our nation's constitutional past and its constitutional future. However, theorists shouldn't ignore America's constitutional present — the voice of the American people today. I refer to this source of authority as the Constitution's *popular meaning*.

Those who look to the constitutional past prioritize arguments from constitutional text, history, structure, doctrine, and tradition. They

view constitutional law as a multigenerational project.[1] For this project to work, they argue that it's important for interpreters to preserve the achievements of past generations.[2] To realize this goal, theorists adopt a range of methodological approaches, including originalism,[3] traditionalism,[4] common law constitutionalism,[5] constitutional liquidation,[6] historical gloss,[7] constitutional fit,[8] and intergenerational synthesis.[9] While these theorists often disagree about both the details of interpretive method and the answers to specific questions, they all share one broad goal: placing constraints on the current generation in the service of America's constitutional past.

In contrast, those who look to the future draw on the value of constitutional prophecy.[10] These theorists see constitutional law as a story of change (and, hopefully, progress).[11] And they view the Constitution — with its broad text and redemptive principles — as a

[1] *See* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 962, 963 (1992); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 193 (1952).

[2] *See* Lee J. Strang, *The Clash of Rival and Incompatible Philosophical Traditions Within Constitutional Interpretation: Originalism Grounded in the Western Philosophical Tradition*, 28 HARV. J.L. & PUB. POL'Y 909, 972 (2005).

[3] *See* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998).

[4] *See generally* Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123 (2020) (identifying the use of tradition as a method of constitutional interpretation).

[5] *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 931 (1996) [hereinafter *Common Law Constitutional Interpretation*] (defining common law constitutional interpretation).

[6] *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (defining the concept of constitutional liquidation).

[7] *See generally* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017) (discussing justifications for judicial application of historical gloss).

[8] *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 159 (1985) [hereinafter A MATTER OF PRINCIPLE].

[9] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 59 (1991).

[10] *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 8, at 159.

[11] *See* LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 16 (2019).

powerful instrument for remaking our fallen world.[12] For these theorists, interpreters shouldn't be constrained by current public opinion or worry about the constitutional qualms of past generations.[13] Instead, they should privilege their own predictive judgments[14] and (in the words of Alexander Bickel) "place[] their own bet on the future."[15] In specific cases, these theorists look to update doctrine in ways that meet society's changing needs and address the challenges of tomorrow — even if their vision is in tension with the lessons of America's constitutional past and the views of the American people today.[16]

Both approaches bring with them certain virtues. However, they also suffer from familiar problems. In response to those who embrace the constitutional past, critics warn of the dangers of Founder worship, wooden formalism, and a resistance to change.[17] And for those who focus on the future, critics decry the threat of government by judiciary[18] — with an unelected (and unaccountable) legal elite allowing their own pragmatic judgments to override both the commands of the Constitution's text[19] and the wisdom of previous generations.[20]

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[12] *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 1-16, 174-252 (2011) [hereinafter CONSTITUTIONAL REDEMPTION].

[13] Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 358-59 (2007).

[14] *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 899 (2009) [hereinafter *The Modernizing Mission*].

[15] ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 99 (1970).

[16] *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 441 (1986).

[17] *See, e.g.*, BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 12, at 227 (criticizing certain originalists for treating key achievements like "equal rights for women" and "the right of blacks and whites to marry each other" as "pragmatic exceptions" inconsistent with the Constitution's original meaning); GARY J. JACOBSOHN, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT 38 (1977) (warning that "[t]he formalistic judge . . . arrives at a particular judgment through a mechanical process of deductive logic" divorced from practical reality).

[18] *See* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 9-17 (1977).

[19] *See* Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 360 (1988).

[20] *See* JACOBSOHN, *supra* note 17, at 79.

Missing in these debates is the voice of America's constitutional present — the American people today: not the Constitution's framers and ratifiers (the American people of the past), not the judges (the legal elite tasked with shaping the Constitution's meaning in concrete cases), not the elected officials (who are not the people, even though they "sometimes . . . fancy" themselves the people), but the American people themselves.[21] In a constitutional system rooted in popular sovereignty, this is a mistake.[22]

As keepers of America's constitutional memory, leading theorists are all too aware of both the Supreme Court's historical errors[23] and the role that those outside of the courts have played in promoting constitutional change.[24] Even so, those same theorists have spent far too little time developing the concrete indicators necessary to capture the American people's constitutional voice.[25] Living constitutionalists urge

[21] *See* THE FEDERALIST NO. 71 (Alexander Hamilton). *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988) (describing the role of popular sovereignty in English and American History); RICHARD TUCK, THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY (2015) (exploring the development of the concept of popular sovereignty through history).

[22] *See* U.S. CONST. pmbl.; *see, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 3-54 (2005) (describing popular sovereignty as the foundation of the U.S. Constitution); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 136 (1999) [hereinafter CONSTITUTIONAL INTERPRETATION] ("[N]o organ of the government is authorized to speak in the name of the people."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 530 (1969) (discussing the Federalists' — and especially James Wilson's — commitment to popular sovereignty); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044, 1049-50, 1054, 1056 (1988) [hereinafter *Philadelphia Revisited*] (using Founding era sources to advance an originalist argument that the American people may amend the Constitution outside of the formal requirements of Article V).

[23] *See generally* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (examining the features of Supreme Court cases deemed "anticanonical" — meaning classic examples of incorrectly decided cases).

[24] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[25] *See* Neal Devins, *The D'oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1340 (2007) (book review). Bruce Ackerman offers the most rigorous attempt in the literature. *See* 1 ACKERMAN, *supra* note 9, at 3-31. However, even Ackerman focuses on America's past — not the contours of current public opinion.

interpreters to craft constitutional doctrine in ways that evolve with American society.[26] Popular constitutionalists call on interpreters to yield to the American people's constitutional judgments.[27] Both sets of theorists express a clear sensibility. However, neither offers concrete advice for how best to identify when the American people have spoken.

In my view, the solution lies in the search for (what I refer to as) the Constitution's *popular meaning*. Put simply, popular meaning is a source of authority rooted in the constitutional status of the American people. While original meaning identifies the best reading of the Constitution's text at the time of its ratification, popular meaning draws on sources of authority outside of the courts to capture the constitutional views of the American people today.[28] To keep faith with the Constitution's popular meaning, interpreters must do more than appeal to the vague commands of "We the People." They must tend to the actual contours of popular constitutional opinion. To that end, interpreters might draw on a range of concrete indicators, including those associated with Congress, the President, state and local governments, the American people's actions and traditions, and the constitutional views of the American people themselves. When studying these sources of popular authority, the interpreter shouldn't ignore evidence from America's past. However, to be useful to the interpreter, this post-ratification evidence must tell her something meaningful about the views of the American people today.

In previous scholarship, I have responded to some of popular constitutionalism's most thoughtful (and forceful) critics.[29] These critics have long attacked popular constitutionalists for offering few

[26] For a helpful overview of living constitutionalism's central arguments, see Leib, *supra* note 13, at 353.

[27] *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005) (offering the canonical account of popular constitutionalism).

[28] For a concise look at the contours of the Constitution's original meaning, see McConnell, *supra* note 19.

[29] *See, e.g.*, Tom Donnelly, *Judicial Popular Constitutionalism*, 30 CONST. COMMENT. 541 (2015) (book review) (arguing that the American people are the ultimate drivers of constitutional change); Tom Donnelly, *Popular Constitutional Argument*, 73 VAND. L. REV. 73 (2020) (developing a framework for popular constitutional argument inside the courts).

clues for how their theory might work in practice.[30] In this Article, I build on my previous scholarship to introduce the concept of popular meaning and demonstrate how this source of authority might be useful to constitutional theory and Supreme Court practice. Beginning with constitutional theory, the concept of popular meaning responds to longstanding concerns that both living constitutionalists and popular constitutionalists have failed to offer interpreters the methodological tools necessary to make their theories work across a range of issues in a concrete, principled way.[31] By explaining how interpreters might capture the Constitution's popular meaning, I look to provide them with a concrete mechanism for translating the American people's considered judgments into constitutional doctrine.

At the same time, popular meaning also represents a source of constitutional authority that meets our constitutional moment. While many commentators celebrate (or lament) the rise of originalism on the Roberts Court, Justices from across the ideological spectrum have recently turned to sources of popular authority to address important constitutional issues, including the recognition and application of key constitutional rights.[32] This is especially true of the two Justices at the Roberts Court's ideological center: John Roberts and Brett Kavanaugh. Of course, few — if any — shifts in constitutional doctrine are possible without the support of at least one of these pivotal Justices. As a result, popular constitutionalism may prove as important to the future of constitutional law as its more famous methodological cousin, originalism.

Of course, this turn to popular meaning won't resolve every key difference between the Justices. Even so, the concept of popular meaning promises to provide both Justices and commentators alike a common vocabulary through which to debate the proper use of popular sources of authority inside the Roberts Court. Furthermore, for the Roberts Court's critics, popular meaning offers a powerful way of

[30] *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 constitutionalists have failed to identify how their theory might work inside the courts).

[31] *See* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1621 (2005) (book review).

[32] For a series of examples, see *infra* Part I.B.

critiquing the Court's countermajoritarian excesses — providing concrete criteria for determining whether the Court has ruled in ways contrary to the considered judgments of the American people.

In Part I, I introduce the concept of popular meaning, catalogue the concrete indicators of popular authority, and fill in the details of how popular constitutionalism might work inside the courts. In Part II, I explore how popular meaning might enrich debates over living constitutionalism. In Part III, I turn from constitutional theory to Supreme Court practice — addressing the Roberts Court's recent methodological battles in *New York State Rifle & Pistol Association v. Bruen*[33] and *Dobbs v. Jackson Women's Health Organization*.[34] In particular, I focus on how the concept of popular meaning might provide a useful framework for analyzing the proper role of post-ratification history in constitutional decision-making — whether framed as arguments from tradition,[35] convention,[36] historical practice,[37] or constitutional liquidation.[38] I conclude by suggesting an institutional reform that might help make popular constitutionalism work even better inside the courts: *the popular advisory opinion*.

I. POPULAR CONSTITUTIONALISM INSIDE THE COURTS: THE SEARCH FOR POPULAR MEANING

Over three decades ago, Bruce Ackerman laid down a challenge for constitutional theory. He called on scholars to develop ways of identifying when the American people have spoken.[39] In this Article, I respond to Ackerman's longstanding appeal.

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[33] 597 U.S. 1 (2022).

[34] 597 U.S. 215 (2022).

[35] *See generally* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653 (2020) (discussing traditionalism's foundations, justifications, and relationship with originalism).

[36] *See generally* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003) (discussing conventions of constitutional interpretation).

[37] *See generally* Bradley, *supra* note 7 (discussing how historical gloss should work inside the courts).

[38] *See generally* Baude, *supra* note 6 (defining the concept of constitutional liquidation).

[39] 1 ACKERMAN, *supra* note 9, at 17.

Through the years, scholars have identified a range of popular indicators that might inform constitutional decision-making inside the courts. However, no scholar has organized this material into a single source of constitutional authority — one that fits a range of constitutional theories and responds to important challenges on the Roberts Court today. I address this shortcoming with the concept of popular meaning.

A. *Capturing the Voice of the American People — The Sources of Popular Authority: A Typology of Popular Indicators*

America's constitutional story is a story of ongoing debates over big constitutional issues: the powers of the government, the application of broad principles, the meaning of key rights, the list goes on.[40] These disagreements aren't a function of ignorance, bad faith, defective reasoning, or simple bias.[41] The Constitution's text doesn't settle many of our nation's most important constitutional issues.[42] Each interpretive methodology has its own flaws.[43] And many constitutional questions are difficult to answer — with strong arguments advanced by all sides.[44] For constitutional theorists, one of the central debates in the literature is over who should have the authority to resolve these disputes. Popular constitutionalists offer a distinct answer — one rooted in our nation's commitment to popular sovereignty: *the American people themselves*.[45]

By turning to the Constitution's popular meaning, theorists can begin to translate this broad principle into a specific methodology — crafting an interpretive approach that builds from a set of concrete indicators designed to capture the constitutional voice of the American people. However, this search for popular meaning might also prove useful to a range of other constitutional theories. In this Section, I survey the types

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[40] *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1368 (2006).

[41] *See* KRAMER, *supra* note 27, at 236.

[42] *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 126 (2018).

[43] *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 9-92 (1982) (introducing the conventional forms of constitutional argument).

[44] *See, e.g.*, Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 16-18 (1990) (examining the arguments in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

[45] *See* KRAMER, *supra* note 27, at 247-48.

of indicators that interpreters might use to analyze the Constitution's popular meaning. Drawn from work by a range of scholars and Supreme Court opinions authored by Justices from across the ideological spectrum, these indicators provide the interpreter with concrete guidance for determining whether a particular approach fits the considered judgments of the American people today.

1. Popular Indicator #1: Congress

When searching for the Constitution's popular meaning, an interpreter might begin by studying actions, activities, and practices associated with Congress. Possible indicators include constitutional principles enshrined in landmark statutes,[46] patterns of congressional lawmaking in constitutionally relevant areas,[47] evidence of longstanding congressional practice,[48] the constitutional contours of legislative debates surrounding key issues,[49] constitutional arguments offered by Members of Congress inside the courts,[50] and any claim to an electoral mandate for a particular congressional vision.[51]

[46] *See, e.g.*, 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 100 (2014) (discussing the constitutional dimensions of the Voting Rights Act); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2, 14, 30-34 (2003) (exploring Congress's role in defining constitutional meaning through its enforcement powers).

[47] *See*, *e.g.*, Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1658 (2020) (drawing on patterns of congressional lawmaking to conclude that members of Puerto Rico's Financial Oversight Board don't require Senate confirmation under the Appointments Clause).

[48] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 575-76 (2014) (drawing on Congress's longstanding practice of allowing sectarian prayers by its chaplains to reject a First Amendment challenge to a similar practice by a town council).

[49] *See*, *e.g.*, 3 ACKERMAN, *supra* note 46, at 150-51 (exploring speeches by congressional leaders and arguments advanced in committee reports during the battle over the Voting Rights Act).

[50] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 789 (2010) (highlighting an amicus brief filed on behalf of Members of Congress on the meaning of the Second Amendment).

[51] *See, e.g.*, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 160-207 (1998) (exploring the Republican Party's constitutional mandate following the election of 1866).

Importantly, the Supreme Court already draws on these types of arguments as a matter of constitutional practice. Sometimes the Supreme Court recognizes Congress's authority to shape key constitutional protections under its enforcement powers.[52] Other times the Justices defer to Congress's own constitutional conclusions as a separate branch of government.[53] This move is especially powerful in dissent — leveraging the countermajoritarian difficulty to criticize a majority opinion for striking down a congressional statute.[54] Finally, the Justices sometimes look not to a single landmark statute, but instead to larger patterns in congressional lawmaking.[55] In short, congressional constitutional arguments often play an important role at the Supreme Court and are a key indicator of popular constitutional opinion.

For instance, consider *Seila Law v. Consumer Financial Protection Bureau* ("CFBP").[56] During the Great Recession, Congress passed the Dodd-Frank Act, which established a new independent agency tasked

[52] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the constitutionality of the Voting Rights Act).

[53] *See, e.g.*, Spokeo, Inc. v. Robins, 578 U.S. 330, 340-42 (2016) (using Congress's definition of an intangible harm as expressed in the Fair Credit Reporting Act to apply in the "injury-in-fact" requirement of Article III standing); NLRB v. Noel Canning, 573 U.S. 513, 526-38 (2014) (drawing on congressional committee reports when interpreting the Recess Appointments Clause); 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).

[54] *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 593 (2013) (Ginsburg, J., dissenting) (describing the sustained, "bipartisan" support for the Voting Rights Act over time). This move is especially prevalent in the campaign finance context. *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 259 (2014) (Breyer, J., dissenting) (urging the Court to look to the "evidentiary record" to "determine whether or the extent to which we should 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 restrictions on corporate campaign spending to signify a "longstanding consensus" on the issue).

[55] *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397, 432-33 (1989) (Rehnquist, C.J., dissenting) (using a pattern of congressional lawmaking to establish a tradition of honoring and protecting the flag in our nation's law in support of the constitutionality of a Texas law banning flag burning); Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973) (using a pattern of congressional lawmaking to justify heightened scrutiny for laws that classify on the basis of sex).

[56] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

with protecting consumers from abuses in the financial industry: the CFPB.[57] Under this Act, Congress delegated the CFPB's broad authority to a single director insulated from presidential control.[58] In particular, the CFPB Director was to be nominated by the President, confirmed by the Senate for a five-year term, and removeable only for "inefficiency, neglect of duty, or malfeasance in office."[59] In *Seila Law*, the challengers argued that this removal scheme violated the Constitution's separation of powers.[60] In a five-to-four decision, the Supreme Court agreed — with the Justices dividing along ideological lines.[61] While the majority and the dissent diverged on their constitutional conclusions, they converged on their constitutional methodologies. In short, both the majority and the dissent turned to congressional constitutional arguments.

To that end, both sides scoured the *United States Code* for evidence of how Congress has shaped executive-branch agencies over time — comparing the challenged provision to congressional statutes on the books today and to other measures passed by Congress over time. For both the majority and the dissent, the primary goal was to survey the current statutory landscape and review the broader tradition of congressional lawmaking to determine whether the challenged law fit the Constitution's popular meaning or represented a novel exercise of congressional power.

In his majority opinion striking down the removal provision, Chief Justice Roberts concluded that the CFPB's structure was "almost wholly unprecedented."[62] While Roberts acknowledged longstanding caselaw upholding previous congressional efforts to insulate agencies and individual officials from presidential control, he refused to extend these previous rulings to uphold a powerful and "novel" one with "no foothold in history or tradition."[63] In contrast, Justice Kagan read much of the

[57] *Id.* at 2191.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 2192.

[61] *Id.*

[62] *Id.* at 2201.

[63] *Id.* at 2202. The Court made a similar move a decade earlier. *See generally* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (striking down the

same evidence and reached a different conclusion. In her view, the Supreme Court's previous rulings granted Congress considerable authority to limit the President's removal power,[64] and patterns of congressional lawmaking confirmed this understanding and "settled" the Constitution's meaning.[65]

For each Justice, the key methodological move was to situate the CFPB's structure within the context of congressional statutes on the books today and the broader constitutional tradition over time. While the Chief Justice looked to sever the link between preexisting removal schemes and the CFPB's structure — framing the new scheme as an unprecedented limit on the President's removal power[66] — Justice Kagan described the CFPB's structure as consistent with a longstanding tradition, one extending back to the First Congress and remaining alive in the *United States Code* today.[67]

2. Popular Indicator #2: The President

An interpreter might also turn to actions, activities, and practices associated with the President. Possible indicators include public speeches advancing a President's constitutional vision,[68] presidential attempts to enshrine key constitutional principles in landmark statutes,[69] patterns of presidential institutional practice,[70] unilateral presidential actions on constitutionally relevant issues,[71] constitutional

removal provision covering members of the Public Company Accounting Oversight Board).

[64] *See Seila Law LLC*, 140 S. Ct. at 2224 (Kagan, J., dissenting).

[65] *Id.* at 2225

[66] *Id.* at 2202 (majority opinion).

[67] *Id.* at 2224-25 (Kagan, J., dissenting).

[68] *See, e.g.*, Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1842-50 (2009) (discussing the constitutional significance of Inaugural Addresses).

[69] *See, e.g.*, 3 ACKERMAN, *supra* note 46, at 100 (treating Lyndon Johnson as a significant constitutional voice during the fight over the Voting Rights Act).

[70] *See, e.g.*, Trump v. Vance, 140 S. Ct. 2412, 2423 (2020) ("In the two centuries since the Burr trial, successive Presidents have accepted Marshall's ruling that the Chief Executive is subject to subpoena.").

[71] *See, e.g.*, Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1633 (2017) (discussing the constitutional value of presidential veto messages, signing statements, and executive orders).

arguments offered by the President's lawyers inside of the courts,[72] constitutional arguments advanced by executive-branch lawyers outside of the courts,[73] key executive-branch initiatives championed by the President,[74] and any evidence of an electoral mandate for a particular presidential vision.[75]

While many of these indicators have played little explicit role in Supreme Court decision-making over time,[76] the Roberts Court has increasingly relied on presidential constitutional arguments in recent years — part of the Court's broader turn towards the use of arguments rooted in the constitutional claims and historical practices of the elected branches.[77] For instance, in *United States v. Windsor*, Justice Kennedy referenced the Obama Administration's constitutional conclusions about the Defense of Marriage Act.[78] In *Trump v. Vance*, Chief Justice Roberts cited "two centuries" of presidential practice to support the conclusion that the President "is subject to subpoena."[79] And in *NLRB v. Noel Canning*, Justice Breyer drew on presidential practice and the

[72] *See, e.g.*, Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1115 (1988) (describing the role of the Solicitor General as the President's voice inside the courts).

[73] *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 95-110 (2010) (explaining the role of the Office of Legal Counsel as a key constitutional actor within the executive branch).

[74] *See, e.g.*, WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33-34 (2010) (highlighting the constitutional importance of various administrative regulations throughout American history).

[75] *See, e.g.*, 3 ACKERMAN, *supra* note 46, at 223 (exploring Franklin Roosevelt's constitutional mandate — after his landslide victory in 1936).

[76] Of course, scholars often argue that presidential constitutional arguments shape constitutional doctrine over time. *See, e.g.*, Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197, 198-200 (2013) (arguing that the Obama Administration's constitutional conclusions shaped future LGBTQ rights litigation).

[77] *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 3 (2020).

[78] United States v. Windsor, 570 U.S. 744, 754 (2013) ("The [Justice Department's] letter . . . reflected the Executive's own conclusion . . . that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.").

[79] Trump v. Vance, 140 S. Ct. 2412, 2423 (2020); *see also id.* at 2426-27 (drawing on an Office of Legal Counsel opinion for the President's view that "state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term").

executive branch's own constitutional interpretations over time when considering the meaning of the Recess Appointments Clause.[80] These examples provide models for future interpreters looking to give life to the President's constitutional conclusions.

Finally, the Roberts Court has also drawn on the executive branch's historical practices to analyze the scope of regulatory authority granted by Congress to executive-branch agencies in the context of the Court's newly minted "major questions doctrine."[81] While this doctrine specifically addresses issues of statutory interpretation, it also has important implications for key constitutional principles like the separation of powers. Under the major questions doctrine, the government must show a "clear" delegation of authority by Congress to an executive-branch agency whenever the "history and the breadth of the authority" asserted by the agency gives the Court "a reason to hesitate before concluding that Congress meant to confer such authority" on the relevant agency.[82]

In recent years, the Court has used this doctrine to limit the power of executive-branch agencies to issue ambitious regulations under broadly worded (often old) statutes in a variety of contexts,[83] including the Centers for Disease Control and Prevention's ("CDC") eviction moratorium,[84] Occupational Safety and Health Administration's ("OSHA") COVID vaccine-or-test requirement for large employers,[85] and the Environmental Protection Agency's ("EPA") Clean Power

[80] NLRB v. Noel Canning, 573 U.S. 513, 526-38 (2014) (drawing on Opinions of the Attorneys General and those of the Office of Legal Counsel when interpreting the Recess Appointments Clause).

[81] For a thoughtful overview of this doctrinal development, see Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

[82] West Virginia v. EPA, 597 U.S. 697, 721 (2022) (internal quotations omitted).

[83] *Id.* at 2609 (explaining that the major questions doctrine "address[es] a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted").

[84] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (describing the CDC's "claim of expansive authority" under the relevant statute as "unprecedented").

[85] NFIB v. Dep't of Lab., 595 U.S. 109, 119 (2022) ("OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation of this kind . . . .").

Plan.[86] At the same time, the Court adopted a similar analysis when upholding the Department of Health and Human Services ("HHS") COVID vaccine mandate for health care workers — concluding that the new rule was consistent with "the longstanding practice" of the executive branch "in implementing the relevant statutory authorities."[87] In the end, the Court's rulings in these important cases have turned largely on whether the majority concludes that the new action fits the historical practices of the executive branch or whether it represents an "unprecedented" exercise of executive-branch power.

3. Popular Indicator #3: State and Local Governments

An interpreter might also turn to the laws, actions, and activities of state and local governments. Possible indicators include patterns of state and local lawmaking in constitutionally relevant areas,[88] constitutional arguments advanced by state and local governments inside the courts,[89] patterns of law enforcement at the state and local level,[90] and evidence of the everyday practices of state and local governments across the country.[91]

Of course, the Supreme Court already draws on this form of argument in a variety of contexts. For instance, consider the Court's pervasive use of state legislation counts.[92] The Justices draw on them to strike down

[86] *West Virginia*, 597 U.S. at 726-28 (describing the EPA's exercise of authority as "unprecedented" and contrary to the "consistent understanding" and "seemingly universal view" of the executive branch over time).

[87] *See* Biden v. Missouri, 595 U.S. 87, 94 (2022).

[88] *See*, *e.g.*, Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 370-85 (2009) [hereinafter *The Unexceptionalism of "Evolving Standards"*] (discussing the use of state legislation counts in death penalty cases).

[89] *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519 (2012) (highlighting the number of states bringing a constitutional challenge against the Affordable Care Act); Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2011) (exploring the role of state attorneys general in constitutional litigation).

[90] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 569 (2003) ("Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private.").

[91] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 587 (2014) (drawing on the longstanding use of legislative prayer by state and local governments as a defense against a First Amendment challenge to the practice).

[92] *See generally* Lain, *The Unexceptionalism of "Evolving Standards," supra* note 88.

laws[93] and to defend them.[94] They use them to identify unenumerated rights worthy of protection[95] and to incorporate Bill of Rights provisions against the states.[96] And they use them to highlight constitutional outliers worthy of constitutional checks.[97] In addition, the Justices draw on patterns of state and local legislation, actions, and practices to "liquidate" or "gloss" the Constitution's meaning through longstanding traditions.[98] And, more generally, they look to state legislation — and state legislative expertise — to help construct doctrine that is faithful to the Constitution's text, history, and purpose.[99] In the end, this type

[93] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 312 (2002) (describing state legislation as "the clearest and most reliable objective evidence of contemporary values").

[94] *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433, 445 (2015) (upholding state limits on fundraising activities by judicial candidates, in part, because "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"); First Nat'l Bank v. Bellotti, 435 U.S. 765, 822-23 (1978) (Rehnquist, J., dissenting) (voting to uphold restrictions on corporate campaign spending based, in part, on the fact that "legislatures of 30 other States . . . have considered the matter, and have concluded that [such] restrictions . . . are both politically desirable and constitutionally permissible").

[95] *See*, *e.g.*, *Lawrence*, 539 U.S. at 570-73 (looking to patterns in state legislation — both the laws on the books and trends 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"). The Court also uses state legislation counts to reject efforts to recognize new fundamental rights. *See* 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").

[96] *See*, *e.g.*, McDonald v. City of Chicago, 561 U.S. 742 (2010) (drawing on a state legislation count to incorporate the Second Amendment against the states).

[97] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 79 (2022) (Kavanaugh, J., concurring) (attacking New York's "may-issue" permitting regime for concealed firearms as a constitutional "outlier").

[98] *See, e.g.*, Chiafalo v. Washington, 591 U.S. 578, 592-93 (2020) (drawing on historical practice in the states to "liquidate" the role of the states as part of the Electoral College system).

[99] *See, e.g.*, Carpenter v. United States, 585 U.S. 296, 398-404 (2018) (Gorsuch, J., dissenting) (outlining a "positivist" approach to the Fourth Amendment — using state laws to shape the contours of Fourth Amendment protections); Riley v. California, 573 U.S. 373, 407-08 (2014) (Alito, J., concurring) ("I would reconsider the question [of whether police officers must get a warrant before searching the cell phone of an arrestee] if . . . state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable

of argument represents a powerful source of popular authority — one that already plays an important role at the Supreme Court.

For instance, take *Roman Catholic Diocese of Brooklyn v. Cuomo*.[100] There, the Supreme Court used patterns of state policymaking to apply the First Amendment's protection against religious discrimination.[101] In *Cuomo*, worshippers brought a First Amendment free exercise challenge against an executive order issued by Governor Andrew Cuomo that limited attendance at religious services during the COVID-19 pandemic.[102] To resolve this case, the Court drew on patterns of state policymaking to apply its traditional test for religious discrimination claims — using the existing legal landscape to help determine whether the Governor's order was narrowly tailored to serve a compelling government interest.[103] In particular, the Court looked to state policies on the books and asked whether Cuomo's order tracked the approaches of other states or represented a highly restrictive outlier.[104] In the end, the Court sided with the challengers and blocked the Governor's order — concluding that the order was "much more severe than the restrictions . . . impos[ed] . . . by most other states" and "far more restrictive than any COVID-related regulations that ha[d] previously come before the Court."[105]

For another recent example, consider the Court's use of state and local governmental practices to analyze a First Amendment retaliation claim in *Houston Community College System v. Wilson*.[106] There, the board of trustees of a community college censured one of its own members,

distinctions."); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821 (2016) (offering a detailed account of how interpreters might use positive law to shape the application of the Fourth Amendment to new cases).

[100] Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U.S. 14 (2020) (per curiam).

[101] *See id.*

[102] *See id.* at 15-16.

[103] *See generally* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (applying strict scrutiny to a local ordinance that gave rise to a religious discrimination claim by a religious minority).

[104] *See Cuomo*, 592 U.S. at 16-19.

[105] *Id.* at 18; *id.* at 28 (Kavanaugh, J., concurring).

[106] 595 U.S. 468 (2022).

David Wilson.[107] Prior to his censure, Wilson had taken a variety of aggressive actions against his fellow board members — suing them for alleged misconduct, paying for robocalls attacking them, and even hiring a private investigator to tail one of them.[108] In response, the board issued a formal censure against Wilson.[109] Wilson then sued the board, arguing that this censure resolution violated the First Amendment.[110]

In a unanimous opinion written by Justice Gorsuch, the Supreme Court disagreed. As part of his analysis, Gorsuch drew on the practices of state and local governments to "liquidate" the First Amendment's meaning.[111] To that end, Gorsuch reviewed evidence about state and local censure practices across American history, beginning with the colonial period and extending up through the twenty-first century. Drawing on this evidence, Gorsuch concluded that Wilson's retaliation claim was inconsistent with the longstanding practices of America's state and local governments. As Gorsuch explained, "[E]lected bodies in this country have long exercised the power to censure their members."[112] Furthermore, Gorsuch leveraged current patterns by state and local governments, observing that these bodies continue to issue censure resolutions today. As Gorsuch noted, "[T]he model manual of the National Conference of State Legislatures" still "contemplates" censure resolutions,[113] and, "in August 2020 alone," the "elected bodies in this country issued no fewer than 20 censures."[114] In the end, Gorsuch found no "evidence" that any generation of Americans "thought" that a censure resolution violated an elected representative's free speech rights.[115] In Gorsuch's view, such a retaliation claim was unprecedented.

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[107] *Id.* at 471.

[108] *Id.* at 471-72.

[109] *Id.* at 472.

[110] *Id.* at 472-73.

[111] *Id.* at 474 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 450 (Gaillard Hunt ed., 1908)).

[112] *Id.* at 475.

[113] *Id.* at 476.

[114] *Id.*

[115] *Id.* at 477.

4. Popular Indicator #4: The American People's Actions and Traditions

Turning away from sources of authority derived from the constitutional status of the elected branches, an interpreter might also draw on popular indicators associated with the actions and traditions of the American people themselves. Possible indicators include the content of state constitutions,[116] the results of state and local ballot measures,[117] the composition of amicus briefs filed in specific cases,[118] and evidence of how the American people live their lives on a day-to-day basis.[119] Akhil Amar argues that these types of indicators help the interpreter capture (what he describes as) the "Constitution as Lived."[120]

Importantly, the Justices already draw on these types of arguments in a range of contexts. They use them to help decide whether to incorporate Bill of Rights provisions,[121] recognize unenumerated

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[116] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 769 (2010) (looking to gun rights enshrined in state constitutions when determining whether to incorporate the Second Amendment). This follows from a rich scholarly literature on the importance of state constitutions. For an overview of this literature, see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1-6 (2020), and EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 1-17 (2013).

[117] *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 758-61 (2011) (Kagan, J., dissenting) (drawing conclusions about the public's views on money-in-politics from the results of state ballot measures).

[118] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 330-31 (2003) (using amicus briefs filed by the business community and the military to justify its conclusion that diversity remained a compelling interest in the context of affirmative action).

[119] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 426 (1989) (Rehnquist, C.J., dissenting) (reviewing the American flag's role as "an important national [symbol]" in everyday life — including "at the graves of loved ones" — as part of a constitutional argument in favor of upholding laws banning flag burning).

[120] Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1744 (2011) [hereinafter *America's Lived Constitution*].

[121] *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (drawing on a current count of state constitutions, in part, to incorporate the Eighth Amendment's Excessive Fines Clause against the states — observing that "all 50 States" now "have a constitutional provision prohibiting the imposition of excessive fines").

rights,[122] uphold (or strike down) a range of laws,[123] apply existing doctrinal approaches to new contexts,[124] and overrule (or stand by) longstanding precedent.[125] Together, these indicators ensure that constitutional doctrine remains in conversation with the views, actions, and practices of the American people themselves.

Of course, sometimes the Justices analyze concrete indicators tied to forms of official political action. For instance, consider the Roberts Court's use of state constitution counts in *Timbs v. Indiana*.[126] There, a unanimous Court incorporated the Eighth Amendment's ban on excessive fines against state abuses.[127] Justice Ginsburg wrote the majority opinion for the Court — joined by every Justice except for Clarence Thomas. As part of her analysis, Ginsburg studied the Constitution's original meaning — drawing on key historical evidence from the Founding and Reconstruction.[128] However, she also turned to state constitutions as a means of capturing the constitutional views of the American people — drawing on state constitution counts from the

[122] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 221 (2022) (refusing to recognize a constitutional right to an abortion, in part, because "[n]o state constitutional provision . . . recognized such a right").

[123] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 487-89 (2017) (Sotomayor, J., dissenting) (defending the constitutionality of a state funding law based, in part, on a state constitutional analysis — noting that thirty-nine states banned funding for religious schools in their constitutions and concluding that these provisions reflected the "Nation's understanding of how best to foster religious liberty"); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 394-95 (2000) (drawing on the results of a state ballot measure to support the constitutionality of a campaign finance law).

[124] *See, e.g.*, Carpenter v. United States, 585 U.S. 296, 311-15 (2018) (refusing to extend the Fourth Amendment's third-party doctrine to GPS location data based, in part, on a recognition that GPS location data provide the government "near perfect surveillance" of a suspect and "cell phones and the services they provide are 'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society").

[125] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443-44 (2000) (upholding the *Miranda* rule because of its entrenchment in American society).

[126] 139 S. Ct. 682 (2019).

[127] *Id.* at 687.

[128] *Id.* at 688-89.

Founding, Reconstruction, and today to assess the contours of public support for bans on excessive fines across American history.[129]

At the Founding, eight states — representing seventy percent of the U.S. population — enshrined a ban on excessive fines in their constitutions.[130] By the ratification of the Fourteenth Amendment in 1868, this consensus had grown to thirty-five of thirty-seven states — "accounting for over 90% of the U.S. population."[131] Finally, Justice Ginsburg turned to the contents of state constitutions today, observing that "all 50 States" now "have a constitutional provision prohibiting the imposition of excessive fines."[132] By turning to evidence from state constitutions across time, Ginsburg was able to draw a powerful link between the Constitution's original meaning and its popular meaning.

While this first set of indicators requires the Justices to weigh official political actions and engage in a concrete form of state-counting, another approach calls on the Justices to shape doctrine in ways that respond to evidence of how the American people have lived their lives. Perhaps this move is best understood as a search for *popular facts* that might inform the development of constitutional doctrine. Broadly speaking, interpreters might use this form of popular constitutional analysis to guide them in a variety of contexts, including how to apply existing doctrine to new technologies, whether to extend existing rights protections to new contexts and new groups, and whether to recognize a particular government interest as compelling. While the Justices often use analogical reasoning and pragmatic judgments to make these sorts of doctrinal choices, they sometimes draw on the Constitution's popular meaning as well.

In an early (and striking) example from the 1950s, the Supreme Court relied on evidence of the "Constitution as Lived" to reshape First Amendment doctrine in ways that matched the evolving role that film has played in the lives of everyday Americans. In *Joseph Burstyn, Inc. v. Wilson*, the Supreme Court confronted a New York law permitting state

[129] *Id.*

[130] *Id.* at 688.

[131] *Id.*

[132] *Id.* at 689.

censorship of "sacrilegious" films.[133] Decades earlier, in *Mutual Film Corp. v. Industrial Commission of Ohio*, the Court had already upheld an Ohio law that created a state board of censors — one tasked with screening (and, at times, blocking) films before they were exhibited in public.[134] There, the Court drew, in part, on a certain account of film's role in American society — reasoning that "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles."[135] As a result, the Justices concluded that film was a low-value medium — one "not to be regarded . . . as part of the press of the country, or as [an] organ[] of public opinion."[136] Because film played only a superficial role in the lives of ordinary Americans, the Court concluded that it was unworthy of robust free speech and free press protections. However, as film's role in American society evolved, so too did the Court's approach to laws regulating its content.

The Supreme Court decided *Mutual Film* in 1915 — a decade before it incorporated the First Amendment's free speech and free press protections against state abuses in *Gitlow*.[137] When the Court returned to the issue of film censorship in *Burstyn*, it confronted a new question shaped by the incorporation revolution: "whether motion pictures" were "within the ambit" of free speech and free press protections guaranteed by the First and Fourteenth Amendments.[138] This forced the Court to reassess its earlier conclusions about the film industry. For the *Burstyn* Court, film's role in 1950s American society bore little resemblance to the one that shaped the Court's earlier decision in *Mutual Film*, a decision issued when American cinema was still in its infancy:

> It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public

[133] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497 (1952). For a thoughtful analysis of *Burstyn*, see Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252-53 (1995).

[134] Mut. Film Corp. v. Indus. Comm'n, 236 U.S. 230, 244-45 (1915).

[135] *Id.* at 244.

[136] *Id.*

[137] *See generally* Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the First Amendment's protection of free speech and a free press against the states).

[138] *Burstyn*, 343 U.S. at 501.

> 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.[139]

Because film had come to play such an important role in the lives of ordinary Americans, 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."[140]

In recent years, the Court has adopted a similar approach in the context of the Fourth Amendment and digital privacy. In particular, the Roberts Court has allowed one key feature of the modern-day world — the pervasiveness of smartphone use — to shape the development of Fourth Amendment doctrine.[141] For a recent example of this line of digital privacy cases, consider *Riley v. California*.[142] There, a police officer conducted a warrantless search of an arrestee.[143] After discovering the arrestee's cell phone in his pocket, the police officer opened it up and searched its contents.[144] The arrestee argued that this warrantless search violated the Fourth Amendment.[145]

Technically speaking, the case turned on the Court's application of a well-established Fourth Amendment rule: the warrant exception for a search incident to a lawful arrest.[146] In a unanimous opinion — authored by Chief Justice Roberts — the Supreme Court agreed with the challenger and refused to extend this preexisting exception to a new

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[139] *Id.*

[140] *Id.* at 501-02.

[141] This approach is evident in the Court's Fourth Amendment jurisprudence as early as the landmark case of *Katz v. United States*, 389 U.S. 347 (1967). There, the Court applied the Fourth Amendment's protections to an incident involving government eavesdropping in a public telephone booth, in part, because the Court recognized "the vital role that the public telephone has come to play in private communication." *Id.* at 352.

[142] 573 U.S. 373 (2014).

[143] *Id.* at 378-79.

[144] *Id.* at 379.

[145] *Id.*

[146] *Id.* at 382.

context. To reach this conclusion, the Chief Justice relied heavily on evidence of how the American people live their lives.[147] Roberts focused especially on the role that cell phones play in the lives of everyday Americans.[148]

To determine whether to grant an exception to the Fourth Amendment's warrant requirement, the Court typically applies a balancing test — weighing the privacy interests of the individual against the degree to which the search is needed to promote a legitimate government interest.[149] The Court established the warrant exception at issue in *Riley* decades before smartphones became a "pervasive" part of everyday life.[150] As Chief Justice Roberts explained, back then, "people did not typically carry a cache of sensitive personal information with them as they went about their day."[151] Today, most people do.[152] For Roberts, this lived reality has important implications for the Fourth Amendment and its protection of digital privacy.

As Roberts observed, recent data suggests that "more than 90% of American[s] . . . own a cell phone," with the vast majority of them carrying smartphones with "a digital record of nearly every aspect of their lives" as they go about their days.[153] As a result, the warrantless search of a smartphone after an arrest "bears little resemblance" to the searches allowed in previous cases — conveying "far more" about a person "than previously possible."[154] In Roberts's view, the Court must shape Fourth Amendment doctrine in ways that account for this difference and address the new threats that smartphones pose to the privacy interests of everyday Americans. Responding to these concerns, the *Riley* Court concluded that police officers should be required to

[147] *Id.* at 385.

[148] *Id.*

[149] *Id.* at 385.

[150] *Id.*

[151] *Id.* at 395.

[152] *Id.* ("According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower.").

[153] *Id.*

[154] *Id.* at 386, 394-95.

secure a warrant before searching the contents of an arrestee's cell phone.[155]

Finally, the Court has also looked to the "Constitution as Lived" to determine whether to overrule (or stand by) existing precedent. For instance, consider *Dickerson v. United States*.[156] There, the challengers asked the Court to reconsider *Miranda v. Arizona*[157] — based, in part, on a statute passed shortly after the original decision that sought to reestablish the pre-*Miranda* legal framework.[158] In *Dickerson*, the Supreme Court rejected this constitutional challenge in a majority opinion authored by Chief Justice Rehnquist, a longtime critic of *Miranda*.[159] In a key passage, Rehnquist explored the relationship between longstanding precedent, governmental practice, and constitutional 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.[160]

Rehnquist's passage in *Dickerson* remains one of the most powerful examples of popular constitutional reasoning in the *United States Reports* — with the Chief Justice using evidence of the "Constitution as Lived" to reaffirm a well-established (if, in his view, legally problematic) precedent.

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[155] *Id.* at 403.

[156] Dickerson v. United States, 530 U.S. 428 (2000).

[157] 384 U.S. 436 (1966).

[158] *Dickerson*, 530 U.S. at 432.

[159] *Id.* at 431-32.

[160] *Id.* at 443-44 (citations and internal quotations omitted).

5. Popular Indicator #5: The Constitutional Views of the American People Themselves

Finally, an interpreter might draw on the results of public opinion polls to capture the constitutional views of the American people themselves. Of course, this is a controversial move as a matter of constitutional practice. Even so, Justices *do* occasionally turn to polling results when analyzing constitutional issues.[161]

Public opinion polls provide each interpreter with a concrete method for measuring popular constitutional opinion.[162] When analyzing a constitutional issue, an interpreter may use polls to assess both the depth and the breadth of the public's support. Recent polls provide information on current views, while tracking polls can assess any patterns in public opinion over time. If a certain constitutional view is broadly popular and stable, then the polling results might suggest a durable consensus. If support is steadily increasing (or decreasing), then the polling results might offer clues about any trends. And if support is erratic — with major swings up and down — then the polling results may suggest an unsettled (or unformed) debate.

Finally, by analyzing public opinion data, the interpreter might also identify areas in which elected officials (and the laws on the books) are out of step with the views of the American people. Sometimes Congress passes unpopular laws.[163] Other times the American people may express support for new laws, but the elected branches may oppose them.[164] And

[161] *See, e.g.*, Williams-Yulee v. Fla. Bar, 575 U.S. 433, 461 (2015) (Ginsburg, J., concurring in part and concurring in the judgment) (using polling data to support campaign finance regulations covering judicial elections); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) ("[P]olling data shows a widespread consensus among Americans . . . that executing the mentally [disabled] is wrong."); *see also* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 120 (2004) (studying the widespread use of public opinion data in the context of challenges to campaign finance regulations).

[162] For a comprehensive study of contemporary public opinion and its impact on the Supreme Court, see PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan, eds., 2008).

[163] Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 157 (2012) [hereinafter *Upside-Down Judicial Review*].

[164] Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989, 995-97 (2013).

still other times outdated laws may remain on the books — whether due to inattention, inertia, or entrenched interests.[165] In the end, public opinion polling remains a concrete — if controversial — method for capturing the American people's constitutional views and assessing whether our nation's laws are consistent with the contours of popular constitutional opinion.

B. Ways to Strengthen (or Weaken) the Popular Signal

In addition to these *five* sets of indicators, an interpreter might also consider a variety of other factors that might strengthen (or weaken) the popular signal. First, an interpreter might draw on *post-ratification history* to assess the strength of a given popular constitutional consensus — whether through historical narratives, tracking polls, or trends in legislation on the books.[166] Generally speaking, the popular constitutionalist begins by studying what we can know today and then works backwards to incorporate relevant post-ratification history. While some areas of consensus may have formed recently, others might have a longer historical pedigree. Post-ratification history allows the interpreter to add this time element to her analysis — providing her with a better understanding of the longevity (or novelty) of a given constitutional judgment. Importantly, the Justices often draw on this mix of public opinion and post-ratification history as a matter of constitutional practice.[167]

Second, an interpreter might also seek to determine whether a constitutional issue has been the topic of ongoing *deliberation* among the American people and their political leaders. To that end, she might look

[165] Lain, *The Unexceptionalism of "Evolving Standards*," *supra* note 88, at 399, 403.

[166] For a thoughtful account of the varieties of historical argument in constitutional theory and practice, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641-42 (2013).

[167] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535-36 (2022) (overruling *Lemon v. Kurtzman* and explaining that the Court should turn to evidence of "historical practices and understandings" when deciding Establishment Clause cases); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (embracing a "modest approach" to Establishment Clause cases and "look[ing] to history" — especially patterns of historical practice — "for guidance"); Citizens United v. FEC, 558 U.S. 310, 479 (2010) (Stevens, J., dissenting) (arguing that the history of corporate campaign spending bans represents "the common sense of the American people").

to the contours of public discourse over a given issue. If the American people have debated it over time, then the interpreter might trust that their views represent a certain level of reflection. At the same time, if the public has mostly ignored an issue, then the interpreter may fear that any popular indicators might represent unreflective snapshots rather than well-considered judgments. Whenever relevant, the interpreter might also study the quality of the legislative process that produced a given law.[168] Importantly, the Justices often turn to deliberation to either strengthen their own arguments[169] or to expose their opponents' positions as elitist attempts to second-guess high-quality deliberations in Congress[170] and shut down constitutional debates throughout the nation.[171]

Third, an interpreter might also analyze the contours of the public debate over a constitutional issue and assess whether the opposing sides have reached any points of *constitutional convergence* — in other words, points on which the two sides have settled on certain constitutional understandings, even as they disagree on a range of other issues.[172] Importantly, the Justices often draw on explicit evidence of constitutional convergence in their opinions. Sometimes they note

[168] South Carolina v. Katzenbach, 383 U.S. 301, 308-09, 315, 324, 326 (1966) (celebrating the legislative process that gave rise to the Voting Rights Act, including the "great care" that Congress took in studying the problem, the extensiveness of the congressional hearings, and the "voluminous legislative history").

[169] *See, e.g.*, 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 [disabled] criminal [for over a decade]. The consensus reflected in those deliberations informs our answer to the question presented by this case.").

[170] *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 564 (2013) (Ginsburg, J., dissenting) (emphasizing Congress's "conscientious[]" study of the problem of voter discrimination when reauthorizing the Voting Rights Act).

[171] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (explaining that state laws rejecting a right to die had been "reexamined and, generally, reaffirmed" in "recent years" following extensive debates in the states).

[172] *See, e.g.*, Reva B. Siegel, *The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1331, 1406 (2006) (discussing constitutional convergence on certain aspects of gender equality during the debates over the Equal Rights Amendment).

broad bipartisan support for a key piece of congressional legislation.[173] Other times they highlight cross-ideological consensus for a given constitutional position — whether expressed in academic scholarship, legal briefs, or public debates.[174] Finally, lawyers often leverage the persuasive power of these patterns in Supreme Court practice (most notably, through filing briefs that bring together voices from across the ideological spectrum).[175]

Fourth, an interpreter might also look for evidence of any existing *interbranch custom* — in other words, instances in which the President and Congress have settled on a practice that relies on a particular account of the constitutional powers granted to each branch of government.[176] With the Supreme Court often reluctant to settle disputes between Congress and the President, the Justices often draw on these patterns of action by the elected branches to address vexing separation-of-powers issues.[177] By turning to interbranch custom, the

[173] *Shelby County*, 570 U.S. at 559-64, 593 (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); *Katzenbach*, 383 U.S. at 308-09, 315 (using the "overwhelming" votes in favor of the Voting Rights Act of 1965 to reinforce the Act's constitutionality).

[174] *See, e.g.*, McDonnell v. United States, 579 U.S. 550, 575 (2016) (drawing on a brief by a bipartisan group of White House counsel arguing for a narrow reading of an anti-corruption statute because of its risk of chilling speech within government); Lawrence v. Texas, 539 U.S. 558, 560, 576, 588-89 (2003) (using "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); 2 ACKERMAN, *supra* note 51, at 6 (discussing the Republican Party's eventual acceptance of certain components of the New Deal).

[175] *See, e.g.*, 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/VL8H-E5CN] (using briefs signed by Republicans in *Obergefell* to describe a growing bipartisan consensus around marriage equality).

[176] *See* Curtis A. Bradley & Trevor M. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 413-15 (2012).

[177] *See, e.g.*, Trump v. Mazars USA, LLP, 591 U.S. 848, 858-60 (2020) (drawing on the history of interbranch conflict and negotiations — beginning with "George Washington and the early Congress" — to build new constitutional doctrine to guide future disputes between the President and Congress over congressional subpoenas); NLRB v. Noel

Court often looks to leverage the democratic legitimacy of the elected branches and the constitutional authority of elected officials who have taken oaths to support the Constitution.[178]

Fifth, interpreters might look to "impeach" the *pedigree of certain pieces of popular evidence*.[179] Charles Barzun has already developed this idea in the context of judicial precedent.[180] There, he argues that the interpreter might turn away from an existing line of cases based on "historical evidence indicating that the precedent was decided on the basis of improper motivations or as the result of political pressure[.]"[181] Interpreters might apply a similar approach to popular sources of authority. For instance, when studying the Constitution's popular meaning, the interpreter might impeach — in other words, devalue or reject — popular evidence drawn from laws, actions, or practices established at a time when key groups were excluded from political participation or based on improper motives that conflict with core constitutional principles.[182] Similarly, in the interests of rule of law values, she may ignore a newly formed judgment that was reached quickly in response to a controversial event.[183] Finally, there may be certain provisions that she excludes from popular constitutional

Canning, 573 U.S. 513, 557 (2014) ("[W]e look to the actual practice of Government to inform our interpretation.").

[178] *See* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 301-02 (2016).

[179] *Cf.* Charles L. Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1631 (2013) ("[T]he effort to historicize or impeach a past decision is a legitimate and potentially useful means of evaluating a decision's authority as a matter of precedent.").

[180] *See id.* at 1625.

[181] *Id.* at 1626.

[182] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 372-73 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (arguing that the Fourteenth Amendment's ratifiers were "not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation"); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1202 (2023) (attacking the legitimacy of earlier bans on abortion — arguing that earlier generations "employed the criminal law as an instrument of social control, to change public beliefs about abortion").

[183] *See* Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 15 (2007) [hereinafter *Double-Consciousness*] (describing how judges may disregard certain legal rules when their strict application would lead to results that would have public backlash).

analysis altogether — for instance, minority-protective provisions like the First Amendment and the Equal Protection Clause.[184]

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Taken together, the *five* indicators of popular authority provide an interpreter with concrete ways of analyzing the Constitution's popular meaning and capturing the American people's constitutional voice. Furthermore, the interpreter can use factors like post-ratification history, deliberation, constitutional convergence, interbranch custom, and the pedigree of certain pieces of popular evidence to either strengthen or weaken the popular signal. Of course, no single indicator is perfect, and different interpreters might weigh them differently. Nevertheless, when various indicators all point in the same direction, they might offer the interpreter concrete (if imperfect) guidance for identifying a consensus that represents the considered judgment of the American people.

C. Two Objections and a Popular Constitutionalist Response: The Invisible Hand of Public Opinion, Thayerian Judicial Restraint, and the Functions of Popular Meaning Inside the Courts

Of course, even sympathetic theorists may still question whether popular constitutionalism requires a methodological turn. This critique comes in two varieties.

One set of scholars urges interpreters to leave popular constitutionalism to the invisible hand of public opinion.[185] This critique turns on a certain story about American political institutions — celebrating the connection between elections, the Supreme Court

[184] Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1243 (2010); 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, 239 (2007).

[185] *See* JACK M. BALKIN, LIVING ORIGINALISM 23 (2011) [hereinafter LIVING ORIGINALISM] (avoiding the temptation to offer "detailed normative advice" to judges "about how to decide particular cases").

nomination process, and constitutional law.[186] From this point of view, the constitutional system itself maintains a link between the Constitution's meaning and the public's views through some combination of elections, judicial retirements, public discourse, and court-curbing threats.[187] Sometimes this popular constitutional machine is fueled by new Supreme Court appointments.[188] Other times it shifts gears as the views of the Justices evolve with American society.[189] Either way, these scholars offer a vision of a popular constitutional machine that will go of itself.[190] No need for the interpreter to develop a finely tuned interpretive method for translating the Constitution's popular meaning into constitutional doctrine.[191]

However, this popular constitutional machine often breaks down. Supreme Court nominations maintain only an imperfect link between public opinion and constitutional law — whether because of irregular retirements, imperfect presidential predictions, or a shifting Supreme Court agenda.[192] The elected branches rarely have the political will (or

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[186] *See, e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46-78 (2001) (discussing how judicial nominations maintain a link between public opinion and constitutional law).

[187] *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051 (2001); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957); Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 127, 130 (2007); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 37 (1993); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986); Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005).

[188] *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 87 (2007) [hereinafter POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY].

[189] *See* 3 ACKERMAN, *supra* note 46, at 131-32.

[190] *See* Friedman, *supra* note 184, at 1243.

[191] *See* BALKIN, LIVING ORIGINALISM, *supra* note 185, at 328 ("Judges do not have to do anything special or out of the ordinary to participate in the processes of living constitutionalism.").

[192] *See* WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 188, at 87.

power) to follow through on their court-curbing threats.[193] Sitting Justices often resist the pull of public opinion — whether due to Article III's institutional safeguards,[194] the stubbornness of elite opinion,[195] or both. And even when the views of the Justices shift, they often follow the opinions of legal elites, not the American people.[196] In the end, while the mechanics of the constitutional system *do* maintain some connection between constitutional law and popular meaning, the invisible hand of public opinion isn't enough. Popular meaning can help bridge the gap between constitutional doctrine and popular meaning that's left by these imperfections in the popular constitutional machine.

At the same time, other scholars argue that the best way to redeem the promise of popular self-governance is for judges to commit themselves to a strong form of judicial restraint.[197] This vision has appealed to a range of theorists and practitioners across the generations — perhaps, most notably, to James Bradley Thayer, Oliver Wendell Holmes, and Felix Frankfurter.[198] And it finds strong expression in the work of modern-day critics of judicial review like Mark Tushnet and Jeremy Waldron.[199] Of course, Thayer offered the canonical account of judicial restraint, urging courts to only invalidate a law when the legislature has "not merely made a mistake," but has "made a very clear

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[193] *See* Tom S. Clark, *The Separation of Power, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971, 973 (2009).

[194] *See* U.S. CONST. art. III.

[195] *See* Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 264 (2015); *cf.* Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, *in* IDEOLOGY AND DISCONTENT (David Apter ed., 1964) (offering the classic account in the political science literature on the stability of elite opinion).

[196] *See* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515-16 (2010).

[197] *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 131 (1893).

[198] *See* Baker v. Carr, 369 U.S. 186, 267-70 (1962) (Frankfurter, J., dissenting); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); Thayer, *supra* note 197, at 131.

[199] *See generally* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (calling for an end to judicial review); Waldron, *supra* note 40, at 1348 (offering an extended critique of judicial review and defense of legislative constitutionalism).

one — so clear that it is not open to rational question."[200] However, the popular constitutionalist need not revert to Thayerian judicial restraint.

The elected branches themselves are imperfect, and their representative deficiencies are well known. Our system's numerous veto points — federalism, bicameralism, the separation of powers, checks and balances, and the filibuster — block popular action.[201] The elected branches struggle to both pass new laws and repeal outmoded ones.[202] While the Madisonian system was designed to slow down the political process and promote deliberation, it often simply grinds to a halt — resulting in political pandering, gridlock, and a mix of public anger, aversive polarization, and a widespread feeling of hopelessness.[203] Our polarized age magnifies these problems.[204]

These pathologies often widen the gap between the elected branches' actions and the American people's preferences. Importantly, the Supreme Court — by exercising judicial review — can help to close it. The Justices often use judicial review not to block popular action, but to promote it.[205] When the elected branches fail to act and a popular constitutional consensus exists, the Court may step in to enforce the American people's views. Sometimes this leads the Court to strike down state laws that run afoul of a national consensus.[206] Other times, it leads the Court to attack an unpopular congressional statute passed by a previous majority.[207] Either way, the popular constitutionalist may turn to popular meaning to help enforce the considered judgments of the American people. This may serve a variety of functions inside the courts — many of them already highlighted in Parts I.B and I.C.

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[200] Thayer, *supra* note 197, at 144.

[201] *See* Hasen, *supra* note 164, at 993, 1010.

[202] *See* Lain, *The Unexceptionalism of "Evolving Standards*," *supra* note 88, at 404.

[203] *See* Lain, *Upside-Down Judicial Review*, *supra* note 163, at 152.

[204] *See* NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 57 (2006).

[205] *See* 1 ACKERMAN, *supra* note 9, at 6; Lain, *Upside-Down Judicial Review*, *supra* note 163, at 115.

[206] *See* Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246 (2008); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1-5 (1996).

[207] *See, e.g.*, United States v. Windsor, 570 U.S. 744 (2013) (striking down the Defense of Marriage Act).

First, popular meaning might inform an interpreter's best reading of certain broadly worded parts of the Constitution's text. When applying these key provisions, the Justices often rely on a mix of traditional legal materials (text, history, structure, and doctrine) and pragmatic judgments. However, the interpreter might also use the contours of popular constitutional opinion to shape the meaning and application of these broadly worded provisions. For example, she might rely on popular meaning to help determine whether a law is "necessary and proper" (Article I, Section 8), a "search or seizure" is "unreasonable" (Fourth Amendment), government compensation is "just" (Fifth Amendment), a trial is "speedy" (Sixth Amendment), a bail amount or government fine is "excessive" (Eighth Amendment), a punishment is "cruel and unusual" (Eighth Amendment), or a certain right is fundamental (Ninth Amendment or Fourteenth Amendment).

Second, popular meaning might help an interpreter determine how best to apply certain doctrinal tests. When applying these tests in specific cases, the Justices often rely on traditional common-law decision-making — a familiar blend of analogical reasoning, pragmatic considerations, and moral judgments.[208] However, many doctrinal tests are worded in ways that might welcome input from popular constitutional opinion. For instance, the interpreter might draw on popular meaning to help decide whether a law or governmental action serves a sufficiently "compelling interest" to survive strict scrutiny,[209] whether a speech-act qualifies as a form of "low-value" speech,[210] whether a campaign finance law "protect[s] against . . . the appearance of corruption,"[211] whether a longstanding tradition is worthy of constitutional respect,[212] whether a particular weapon is in "common use,"[213] whether a defendant has a "reasonable expectation of privacy,"[214]

[208] For the classic account of common-law constitutionalism, see Strauss, *Common Law Constitutional Interpretation*, *supra* note 5.

[209] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

[210] *See* Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 791-92 (2011).

[211] *See* McCutcheon v. FEC, 572 U.S. 185, 191 (2014).

[212] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022); Town of Greece v. Galloway, 572 U.S. 565, 575-76 (2014).

[213] *See* District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

[214] *See* Katz v. United States, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring).

whether a punishment is consistent with America's "evolving standards of decency,"[215] whether a right is "fundamental to our scheme of ordered liberty,"[216] and whether discrimination against a particular group merits heightened scrutiny.[217] Of course, this list merely scratches the surface of the various contexts in which interpreters might use popular meaning to shape the application of well-established tests.

Third, an interpreter might use popular meaning to evaluate the ongoing use existing doctrine — whether to reinforce a longstanding line of precedent, strengthen the argument for overturning an old case, or craft a new doctrinal test for a specific constitutional issue. When analyzing a given approach, the Justices already weigh a variety of factors, including concerns about workability, reliance interests, effects on other areas of the law, and the quality of the legal reasoning underlying the existing doctrinal framework.[218] The interpreter might also turn to the Constitution's popular meaning to identify popular approaches worthy of serious precedential weight — even if the Court's initial ruling conflicted with a provision's original meaning, arguments from tradition, longstanding precedent, pragmatic concerns, or the Constitution's popular meaning at the time of the Court's initial decision. In short, evidence of a popular constitutional consensus might be especially helpful in convincing an interpreter to remain faithful to an existing doctrinal approach with considerable popular support — one that might be difficult to justify as an initial matter but has long since emerged as settled (and accepted) law by the American people.[219] On this view, even if a decision like *Miranda* was legally problematic when

[215] *See* Atkins v. Virginia, 536 U.S. 304, 311-312 (2002).

[216] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[217] *See* United States v. Virginia, 518 U.S. 515, 532 (1996).

[218] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 262-89 (2022).

[219] For thoughtful reflections on the value of popular precedent, see BALKIN, LIVING ORIGINALISM, *supra* note 185, at 55 ("The authority of constitutional constructions . . . comes from their direct or long-run responsiveness to popular will as expressed through the processes of democratic politics.") and Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1442-43 (2007) ("Although constituting only a diluted expression of the people's will, over time majoritarian acceptance of originally erroneous judicial precedents can grant those precedents a degree of legitimacy they would not otherwise have.").

it was first decided in 1966, it might become a well-settled *popular precedent* decades later.[220]

Fourth, an interpreter might turn to popular meaning to address the threat of localist (or even regional) tyranny.[221] To that end, the Constitution's popular meaning might provide the interpreter with concrete tools for identifying a constitutional view embraced by most Americans at the national level that targets discriminatory laws, actions, and traditions at the state and local level. In such contexts, popular meaning isn't an agent of intolerance or majoritarian tyranny, but instead a protector of minority rights — attacking constitutional outliers and shielding vulnerable minorities from local (or regional) majorities.[222] On this view, the Constitution's popular meaning may represent a one-way ratchet that may expand — but not constrict — the Fourteenth Amendment's promise of equality.[223] In short, when an interpreter embraces popular meaning at the national level, she is often able to protect political minorities at the state and local level.

Finally, the interpreter might use evidence of a popular constitutional consensus in a variety of other contexts. She might use it to correct for flaws in the representative branches — when our system's many veto points leave the laws on the books out of step with the American people's considered judgments. She might use it to uphold a new congressional statute with a strong popular pedigree even if it pushes the limits of constitutional orthodoxy.[224] She might use it to assess the popular constitutional strength of her own conclusions — whether to bolster her own independent judgments or counteract some of her constitutional (and normative) failings. And she might use it to

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[220] *See* Dickerson v. United States, 530 U.S. 428, 443-44 (2000).

[221] *See* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 64-66 (2011) (describing the Jim Crow system as an example of a regional tyranny requiring strong constitutional medicine).

[222] *See* Klarman, *supra* note 206, at 1-3.

[223] *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) ("We emphasize that Congress' power under § 5 [of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.")

[224] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 29-31 (1962) (discussing the "legitimation function" of judicial review).

challenge the conclusions of her constitutional opponents — leveraging the countermajoritarian difficulty to argue that her opponents are out of touch with the American people.

D. How to Use Popular Meaning: A Primer

In its simplest form, popular meaning is a source of authority rooted in the constitutional status of the American people — one distinct from traditional sources based on the Constitution's text, history, structure, and doctrine. While original meaning identifies the best reading of the Constitution's text at the time of its ratification, popular meaning draws on sources of authority outside of the courts to capture the constitutional views of the American people today. While critics have long attacked popular constitutionalists for offering few clues for how their theory might work in practice, popular constitutionalism inside the courts is best understood as a search for the Constitution's popular meaning.

When analyzing this source of authority, the popular constitutionalist relies on more than the results of the most recent opinion poll, historical evidence of an old tradition, or vague gestures to the evolving views of the American people. Instead, she studies a range of popular sources, including concrete indicators associated with Congress, the President, state and local governments, the American people's actions and traditions, and the constitutional views of the American people themselves. From there, she also considers a variety of additional factors that either strengthen or weaken the popular signal, including post-ratification history, levels of deliberation, patterns of constitutional convergence, signs of interbranch custom, and the pedigree of certain pieces of popular evidence. Together, these materials help the interpreter capture the contours of popular constitutional opinion — its ebbs and flows, its areas of consensus and conflict, its clear commands, and its imprecise signals.

When studying a specific constitutional issue, the popular constitutionalist's goal is to determine whether the American people have reached a consensus on how to address it. Contrary to the caricatures of its critics, popular constitutionalism doesn't call for brute

majoritarianism.[225] The popular constitutionalist takes seriously the Madisonian challenge of separating the American people's fleeting preferences from their deeply held views.[226] To satisfy the popular constitutionalist, a given view must draw broad support from the American people. It must arise out of extensive deliberation and debate. In short, it must reflect the American people's considered judgments — not their unreflective whims.[227] However, when a popular view satisfies these demanding requirements, the popular constitutionalist grants it considerable interpretive weight. Consistent with Larry Kramer's original vision, popular constitutionalism is best understood as a theory of deliberative democracy.[228]

As part of this analysis, the popular constitutionalist doesn't ignore popular evidence from America's past. However, to be useful to the popular constitutionalist, this post-ratification evidence must tell her something meaningful about the constitutional views of the American people today. For instance, a current view's depth, breadth, longevity, or deliberativeness.

To be clear, the public often will not have views — to say nothing of *considered* views — on many constitutional questions.[229] And even when

[225] For an illustrative example of this attack, see Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675-77 (warning that popular constitutionalism gives rise to the threat of majoritarian tyranny).

[226] *See* THE FEDERALIST NO. 10 (James Madison) (crafting a form of representative government would "refine and enlarge the public views"); Colleen A. Sheehan, *The Politics of Public Opinion: James Madison's "Notes on Government,"* 49 WM. & MARY Q. 609, 619-25 (1992) (explaining that Madison sought a constitutional system that didn't simply reflect immediate preferences of a "factious majority," but instead one that "refine[d] and "elevate[d]" the public's views).

[227] 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 sometimes oversimplify constitutional debates and overstate the level of constitutional consensus. *See* Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 758 (2011).

[228] *See* Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 748 (2006).

[229] Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1209 (2010).

most Americans *can* express a view on a given issue, the American people may not have reached a consensus on how to approach it.[230] This is especially true in our polarized age.[231] In such circumstances, popular meaning may not provide interpreters with a decisive answer to a specific constitutional question. However, this situation simply places popular meaning on the same footing as other sources of constitutional authority and popular constitutionalism itself on equal footing with other leading constitutional theories.[232] No single source of authority — and no single theory — can resolve all constitutional disputes.

Of course, even if interpreters agree on the importance of popular meaning, they may disagree about how best to integrate this source of authority into their broader methodological approaches.[233] For clarity's sake, we might chart interpreters on a popular constitutional spectrum based on how much weight they grant to popular meaning within their chosen methodologies. At one end of the spectrum, some interpreters might dismiss the legitimacy of the Constitution's popular meaning outright.[234] At the other end of the spectrum, opposing interpreters might argue that the Constitution's popular meaning should trump all other sources of constitutional authority.[235] However, this is far from the only way for interpreters to use popular meaning to settle a given issue.

The Constitution's popular meaning need not serve as a constitutional trump. Instead, interpreters may choose from a range of intermediate options. A constitutional pluralist might use the Constitution's popular meaning as one source of authority among

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[230] Primus, *Double-Consciousness*, *supra* note 183, at 12.

[231] *See* MCCARTY ET AL., *supra* note 204, at 3.

[232] For instance, even leading originalists acknowledge that the Constitution's original meaning doesn't resolve all constitutional issues. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95-96 (2010).

[233] For a thoughtful overview of similar debates over the use of the Constitution's original meaning, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1087-89 (1989), and Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 394-404 (2013).

[234] *See* RONALD DWORKIN, LAW'S EMPIRE 21 (1986) [hereinafter LAW'S EMPIRE].

[235] *See* RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 1-6 (1994).

many.[236] A living constitutionalist might use it to help shape constitutional doctrine in ways that match changes in American society.[237] And an originalist might use it in a range of ways, whether to confirm her best reading of the Constitution's original meaning,[238] discover new "privileges or immunities" of national citizenship,[239] or craft a rule of construction when the Constitution's original meaning runs out.[240]

In the end, popular meaning remains useful to a range of theorists — not just to the committed popular constitutionalist. In Part II, I explore how it may help address longstanding theoretical challenges for the theory of living constitutionalism both inside the Roberts Court and in the legal academy.

II. THE USE OF POPULAR MEANING IN CONSTITUTIONAL THEORY: CAPTURING LIVING CONSTITUTIONALISM'S POPULAR VOICE

Critics have long attacked the theory of living constitutionalism as either vague (at best)[241] or dangerous (at worst).[242] For these critics, living constitutionalists have failed to provide judges with concrete guidance for deciding individual cases — leaving sympathetic jurists free to simply read their own personal values into the Constitution.[243]

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[236] *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 7, 143-52 (1996).

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

[238] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 20-22 (2022).

[239] *See* Amar, *America's Lived Constitution*, *supra* note 120, at 1752.

[240] *See* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 22, at 1.

[241] *See, e.g.*, Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 166 (2012) (stating that "living constitutionalism lacks sufficient theoretical shape to provide criteria for inclusion and exclusion").

[242] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38-39 (1997) (criticizing living constitutionalism as an elitist theory that allows unelected judges to "determine" society's "needs" and "find" the law that meets them — based on each judge's own normative preferences).

[243] *But see* J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 12-13 (2012).

Popular meaning offers a response to these powerful objections — providing scholars with a new vocabulary for distinguishing between different forms of living constitutionalism and a new framework for bringing greater coherence to the theory as a whole. Furthermore, by offering a source of constitutional authority that enables America's living constitution to speak in a popular voice, popular meaning provides new resources for enriching some of living constitutionalism's leading accounts. It might also strengthen the interpretive approach outlined by the dissenters in *Dobbs v. Jackson Women's Health Organization*.[244] In the end, popular meaning offers a response to the longstanding theoretical challenge of building a principled form of living constitutionalism — one that is consistent with the theory's broader goals, but with a concrete methodology that constrains judges.

A. Popular Meaning's Theoretical Value: Distinguishing Between America's Living Constitution(s) — Elite and Popular

As early as 1908, Woodrow Wilson described the Constitution as a "living" document — calling on interpreters to adapt its meaning to "the thought and habit of the nation, its conscious expectations and preferences."[245] In the ensuing decades, a range of influential judges, scholars, and commentators adopted this powerful constitutional metaphor. Key voices included Benjamin Cardozo, Karl Llewellyn, Howard Lee McBain, Roscoe Pound, and R.G. Tugwell.[246] By 1963, the

[244] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 359-417 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

[245] *See* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 22 (1908).

[246] *See, e.g.*, JACOBSOHN, *supra* note 17, at 82-87 (offering examples of this constitutional metaphor in the work of Benjamin Cardozo); HOWARD LEE MCBAIN, THE LIVING CONSTITUTION 33 (1927) (describing the Constitution's "living skin" as "elastic, expansile, and . . . constantly being renewed); Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 31 (1936) (explaining that "[s]ince most of the words and phrases dealing with the powers and the limits of government are vague and must in practice be interpreted by human beings, it follows that the Constitution as practice[d] is a living thing"); K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3-6 (1934) (applying this vision to a range of issues during the New Deal era); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 615 (1908) (characterizing Chief Justice Marshall's "work" as "giving us a living constitution by

metaphor itself was so pervasive that Arthur Selwyn Miller both acknowledged its popularity and complained about "a poverty of theory" to "explain and justify [it]."[247] Similar criticisms persist to this day.

Living constitutionalism's critics have a point. Varieties of living constitutionalism abound. The theory's competing accounts include Dworkinian moralists, common law constitutionalists, Ackermanian popular sovereignty theorists, living originalists, popular constitutionalists, and constitutional pluralists.[248] It's little wonder that no single scholar has managed to provide a satisfying account of the broader theory that integrates its various strands into a single coherent whole.

On the one hand, living constitutionalists *do* share a common goal — promoting a vision of the Constitution that "keep[s] . . . in touch with contemporary values,"[249] "adapt[s] . . . to changing times,"[250] and "update[s] and affirm[s]" the Constitution's text in a normatively attractive way for each generation.[251] On the other hand, living constitutionalists remain a methodologically eclectic bunch, often mixing and matching a range of constitutional arguments — namely, those based in text, history, structure, and doctrine — to resolve specific constitutional issues.[252] In addition, many living constitutionalists are candid about drawing on their own sense of fairness and good social policy when these traditional legal materials run out.[253]

To living constitutionalism's critics, this methodological eclecticism is a failure of both theory and practice — providing scholars and judges alike with little concrete guidance when analyzing a given constitutional

judicial interpretation"); R.G. Tugwell, *That Living Constitution*, 55 NEW REPUBLIC 120, 121 (1928) (calling on the Supreme Court to embrace "the spirit" of the Constitution).

[247] Arthur Selwyn Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881, 912 (1963).

[248] For a thoughtful overview of the various theories of living constitutionalism, see Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1262-71 (2019).

[249] Post & Siegel, *supra* note 237, at 569.

[250] BALKIN, LIVING ORIGINALISM, *supra* note 185, at 277.

[251] Leib, *supra* note 13, at 359.

[252] *See* GRIFFIN, *supra* note 236, at 143-151.

[253] *See* Brennan, Jr., *supra* note 16, at 437-39.

issue.[254] As a result, critics have long attacked living constitutionalism as more of a loose metaphor than a coherent theory, licensing interpreters to read their own policy preferences into the Constitution with few (if any) methodological constraints.[255] Over time, living constitutionalists have struggled to respond to this powerful critique. However, its overall strength turns on the details of a given interpreter's approach to living constitutionalism.

The existing literature suggests two ways of "keeping" constitutional doctrine "in touch with contemporary values" — one elite and the other popular. Both approaches have roots in Justice Brennan's famous defense of living constitutionalism.[256] Popular meaning provides us with a vocabulary for distinguishing between them.

B. A Living Constitutionalism for Legal Elites

The first version of living constitutionalism is the most familiar one: a living constitutionalism for legal elites. Within the theoretical literature, this version is most often associated with Ronald Dworkin and his famous image of Hercules — "a lawyer of superhuman skill, learning, patience and acumen."[257] When interpreting the Constitution, the Dworkinian judge must advance the best account of political

[254] While there's some truth to this criticism, it may be overstated. For instance, scholars offer a similar set of critiques as to originalism. For thoughtful accounts of the divisions within originalism, see generally Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013) (explaining the differences between old originalism and new originalism), Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) (describing the tradeoffs for originalists when they embrace "new originalism"), Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009) (exploring the development of different strands of originalism); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185 (highlighting the various divisions within originalist theory), and Peter J. Smith, *How Different Are Originalism and Non-Originalism*, 62 HASTINGS L.J. 707 (2011) (comparing and contrasting originalism and non-originalism).

[255] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976). Even sympathetic theorists like Jack Balkin admit that living constitutionalism itself remains "more of a slogan than a theory" — conceding that it is "undertheorized" as a concrete methodology. BALKIN, LIVING ORIGINALISM, *supra* note 185, at 277-78.

[256] *See* Brennan, Jr., *supra* note 16, at 433-35.

[257] Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975).

morality that still "fits" the American constitutional tradition.[258] While Dworkin's fit requirement could be used to constrain judges, critics have long argued that Dworkin's approach prioritizes political morality over legal fit.[259] As a result, Dworkin's approach might be framed as a living constitutionalism for legal elites.

In his classic defense of living constitutionalism, Justice Brennan connected this Dworkinian vision to the traditional argument that the "purpose of our Constitution" is "to declare certain values transcendent, beyond the reach of temporary political majorities."[260] On this view, the judge should rely on her own independent judgment when interpreting the Constitution — often drawing on her own (elite) values to protect minority rights from majoritarian tyranny. In Brennan's account, the judge's constitutional authority is connected to her professional training as a lawyer, her role as a judge in our constitutional system, and her status as a member of a community of legal elites committed to protecting the rights enshrined in the Constitution. These elite interpretations will often conflict with the contours of popular constitutional opinion.

Sometimes the elite interpreter draws on her own moral conclusions about the best outcome in a given case.[261] Sometimes she relies on her own professional judgment about how best to adapt existing doctrine (and its underlying principles) to a new situation.[262] And sometimes she factors in her own pragmatic calculations about the practical

[258] *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 8, at 159.

[259] *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1270 (1997); Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197, 199-200 (2000).

[260] Brennan, Jr., *supra* note 16, at 436.

[261] *See, e.g.*, DWORKIN, A MATTER OF PRINCIPLE, *supra* note 8, at 159 (offering an approach to constitutional interpretation that relies, in part, on moral reasoning).

[262] *See, e.g.*, Strauss, *Common Law Constitutional Interpretation*, *supra* note 5, at 880-84 (describing constitutional interpretation as a form of constitutional common law, with judges mostly wrestling with doctrine — not constitutional text or history — over time).

consequences of a given ruling.[263] Popular meaning plays no role in this form of analysis.

To make this approach more concrete, Justice Brennan offers the example of his own controversial approach to the death penalty. While Brennan himself concludes that this practice is unconstitutional, he concedes that his position is one "to which a majority of my fellow Justices — not to mention, it would seem, a majority of my fellow countrymen — do[] not subscribe."[264] Nevertheless, Brennan embraces the living constitutionalist's role as constitutional 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, the death penalty, I hope to embody a community, although perhaps not yet arrived, striving for human dignity for all.[265]

This living constitutionalism for legal elites is probably the most familiar version of the theory. Over time, it has attracted many supporters in the legal academy, the elected branches, and the wider public.[266] At the same time, it remains susceptible to some of the strongest critiques of living constitutionalism as a whole — with Justice Brennan and his compatriots valuing the elite opinions of judges and scholars over other key sources of authority like the Constitution's original meaning and its popular meaning.

C. A Popular Approach to Living Constitutionalism

In contrast, the second version of living constitutionalism turns away from the independent judgment of legal elites. Instead, it looks to read

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[263] *See, e.g.*, Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 249 (2002) ("[T]he real-world consequences of a particular interpretive decision . . . play an important role in constitutional decisionmaking.").

[264] Brennan, Jr., *supra* note 16, at 444.

[265] *Id.*

[266] *See generally* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997) (providing a history of the rise of the concept of a living constitution).

the Constitution's text in ways that evolve with the American people's actual views. This approach is meant to respond to both the dead hand problem[267] and the risk of government by judiciary.[268] Drawing on the Constitution's popular meaning, this version of the theory envisions a popular approach to living constitutionalism.

In fact, even Justice Brennan admitted that "[t]he Constitution cannot be for [him] simply a contemplative haven for private moral reflection."[269] Far from relying exclusively on his own independent judgment, Brennan concedes that, as a Justice, he must also "speak" for his "community."[270] On this view, "[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.[271] While Brennan doesn't offer any details for how a judge might go about discovering the "community's interpretation," this approach to living constitutionalism is consistent with certain forms of popular constitutional analysis. Sympathetic living constitutionalists might draw on the Constitution's popular meaning to make this version of the theory work.

Guided by this powerful source of constitutional authority, those committed to this version of living constitutionalism might craft a rigorous approach to popular constitutional analysis — one that provides interpreters with a concrete method for identifying the American people's constitutional views and enforcing their constitutional commands. For this set of living constitutionalists, the interpreter must do more than rely on vague gestures to the "evolving" views of the American people or appeal to her own independent judgment about the best policy or set of moral commitments. Instead, she must turn to the Constitution's popular meaning — studying the concrete indicators of public opinion, analyzing the contours of the public's constitutional views, and, whenever relevant, translating the American people's considered judgments into constitutional doctrine.

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[267] *See* Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195, 195-98 (Jon Elster & Rune Slagstad eds., 1988).

[268] *See* BERGER, *supra* note 18, at 372.

[269] Brennan, Jr., *supra* note 16, at 433.

[270] *Id.* at 434.

[271] *Id.* at 434-35.

This form of popular constitutional analysis provides the living constitutionalist with a rigorous way of ensuring that constitutional doctrine tracks contemporary values over time. In short, popular meaning holds out the promise of constructing a principled, constrained form of living constitutionalism — one that listens to the constitutional voice of the American people.

For instance, consider how popular meaning might strengthen the approach of the dissenting Justices in *Dobbs v. Jackson Women's Health Organization*. There, Justices Breyer, Kagan, and Sotomayor advanced an ambitious account of progressive constitutionalism — one that drew on a mix of constitutional principle, judicial precedent, and popular sources of authority. In the *Dobbs* dissenters' view, interpreters should not "define rights by reference to the specific practices existing at the time" a provision was added to the Constitution.[272] Instead, they should "apply[]" the Framers' principles "in new ways, responsive to new societal understandings and conditions."[273] For the dissenters, "the constitutional 'tradition' . . . is not captured whole at a single moment."[274] Instead, interpreters must analyze "content from the long sweep of our history and from successive judicial precedents — each looking to the last and each seeking to apply the Constitution's most fundamental commitments to new conditions."[275]

Even as the *Dobbs* dissenters offer the broad outlines of a powerful interpretive approach, they leave out many of the details about how such an approach might work in future cases. It's no wonder that Justice Alito attacks them for offering a "vague" methodology that "imposes no clear restraints on . . . the exercise of raw judicial power."[276] Popular meaning suggests one possible reply to Justice Alito's critique. In future cases, the progressive Justices might turn to the Constitution's popular meaning as a source of interpretive constraint — drawing on popular sources of authority to identify "new societal understandings," map "the whole course of the Nation's history and traditions," and shape

[272] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 374 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

[273] *Id.*

[274] *Id.* at 376.

[275] *Id.*

[276] *Id.* at 261 (majority opinion).

constitutional doctrine in ways separate from their own normative preferences.[277]

Turning away from Supreme Court practice, a popular approach to living constitutionalism might also enrich some of living constitutionalism's leading theories.

D. Popular Meaning and Its Uses: Ensuring That Living Constitutionalism Speaks in a Popular Voice

In this Section, I explore how popular meaning might enrich some of the leading theories of living constitutionalism, including those offered by Bruce Ackerman, Philip Bobbitt, Richard Fallon, Lawrence Lessig, and David Strauss. In each instance, I explore how popular meaning might fit within the internal logic of the theory — using the concept of popular meaning to strengthen each approach in a way that's faithful to each theorist's original vision. By turning to the Constitution's popular meaning, these theorists might ensure that America's living constitution speaks in a popular — rather than elitist — voice.

1. Popular Sovereignty Theory: Hearing the Voice of "We the People" in Between Ackerman's "Constitutional Moments"

For Bruce Ackerman, a principled form of living constitutionalism begins *not* with vague gestures to American society's "evolving views," but with a genuine commitment to following the American people's constitutional commands.[278] Ackerman's goal is to set down a clear rule for determining when the American people have spoken — a means of separating higher lawmaking from the ordinary actions of America's elected officials.[279] Within Ackerman's theory, when the American people speak, they can transform the Constitution's meaning, even if they act outside of the Article V amendment process.[280] (These are Ackerman's famous "constitutional moments."[281]) However, outside of

[277] *Id.* at 374, 387 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[278] 3 ACKERMAN, *supra* note 46, at 6.

[279] *Id.* at 17.

[280] 1 ACKERMAN, *supra* note 9, at 266-67 (summarizing the higher lawmaking process that the American people may follow to transform constitutional law).

[281] *Id.* at 58-80.

these periods of higher lawmaking, Ackerman leaves it to judges and lawyers to synthesize the American people's past constitutional achievements and protect them from ongoing threats by ordinary politicians (and their supporters).[282] Ackerman describes this interpretive process as "intergenerational synthesis."[283] By turning to the Constitution's popular meaning, Ackerman might also capture the American people's constitutional voice in between key constitutional moments.

To begin, the Ackermanian interpreter must draw on past patterns of higher lawmaking to identify when the American people have spoken.[284] To that end, interpreters must engage in the delicate task of distinguishing between acts of ordinary politics and genuine acts of popular sovereignty.[285] To make this interpretive process work, the Ackermanian interpreter must engage in a "reflective study of the past" — analyzing the various pathways of higher lawmaking within the American constitutional tradition.[286] While the American people have sometimes amended their Constitution through Article V, they have also pushed for big constitutional changes outside of the formal amendment process — whether by defying the Articles of Confederation at the Founding, stretching Article V to its breaking point during Reconstruction, transforming the scope of national power during the New Deal, or shedding the doctrinal fetters of Jim Crow during the Civil Rights Revolution.[287]

By studying these key periods in constitutional history, the Ackermanian interpreter looks to derive America's rule of recognition — one that establishes a method for identifying genuine acts of popular sovereignty and excluding reformers who falsely claim to speak for the American people.[288] This is no simple task. Even restricting ourselves to Ackerman's four recognized constitutional moments — the Founding,

[282] *Id.* at 139.

[283] *Id.* at 97.

[284] 2 ACKERMAN, *supra* note 51, at 3-31.

[285] 1 ACKERMAN, *supra* note 9, at 230-65.

[286] *Id.* at 17. For a close look at this process, see generally Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984).

[287] 3 ACKERMAN, *supra* note 46, at 5-19; ACKERMAN, *supra* note 9, at 58-80.

[288] 1 ACKERMAN, *supra* note 9, at 59.

Reconstruction, the New Deal, and the Civil Rights Revolution — each moment offers its own distinct set of revolutionary actors, institutional configurations, sequences of action, and canonical legal materials.[289] Despite these differences, Ackerman still identifies a core that unites each of these key periods.

For Ackerman, it's the very process of constitutional contestation itself — no matter the precise actors, sequence, or institutional forum.[290] No matter the specifics, a new constitutional movement must *earn* the right to speak for the American people — surviving a multi-year series of debates, elections, legislative battles, and Supreme Court cases.[291] Over time, reformers must secure the broad, durable, and genuine support of the American people — persuading an engaged public, winning a series of institutional fights (at the ballot box, in Congress, and in the courts), attracting support (or forcing acquiescence) from their political opponents, and convincing the Supreme Court to translate their constitutional victories into durable constitutional doctrine.[292] This is how Ackerman identifies when the American people have spoken.[293] This is what it means for reformers to create a constitutional moment.[294]

Turning to concrete cases, the Ackermanian interpreter must then look to *synthesize* the constitutional principles endorsed by the American people during these periods of higher lawmaking — incorporating new principles and refining (or, in some cases, discarding) old ones.[295] As constitutional doctrine develops, it often moves from particularistic decisions closely tethered to the original expected applications of the first generation of revolutionaries to comprehensive forms of synthesis that apply old principles to new (analogous)

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[289] 3 ACKERMAN, *supra* note 46, at 1-5.

[290] 1 ACKERMAN, *supra* note 9, at 139.

[291] 2 ACKERMAN, *supra* note 51, at 266-94.

[292] 3 ACKERMAN, *supra* note 46, at 42.

[293] *Id.* at 51.

[294] *Id.* at 3.

[295] *Id.* at 336; 2 ACKERMAN, *supra* note 51, at 207-54 (analyzing the Reconstruction regime's principles against those established by the Founding generation); *Id.* at 255-78 (synthesizing the principles endorsed by the New Deal with those endorsed by previous generations); 1 ACKERMAN, *supra* note 9, at 131-64 (introducing how intergenerational synthesis might work).

contexts.[296] For Ackerman, there is no mechanical way for interpreters to carry out this process of intergenerational synthesis. Instead, he leaves it to judges and lawyers — through some combination of historical study, professional legal reasoning, and acts of statesmanship — to synthesize these underlying principles one case at a time, applying the constitutional principles of the past to the constitutional controversies of today.[297] This process turns *not* on the Ackermanian interpreter's search for the Constitution's popular meaning, but instead on (what Ackerman describes) as a judge's "situation sense" — her own independent judgment about the best way to read the American constitutional tradition.[298]

From a popular constitutional perspective, Ackerman's approach is susceptible to *two* main critiques. First, Ackerman limits his theory to a few pivotal moments in constitutional history — the Founding, Reconstruction, the New Deal, and the Civil Rights Revolution.[299] All other periods — no matter how politically significant — are the mere acts of ordinary politicians, with no genuine constitutional importance. While this approach limits the dangers of false positives, it also risks ignoring areas of genuine popular constitutional consensus when they exist in between Ackerman's constitutional moments.[300]

Second, Ackerman's theory reserves for the Justices a massive role in preserving our constitutional tradition in times of ordinary politics.[301] For Ackerman, constitutional doctrine often develops against the

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[296] 1 ACKERMAN, *supra* note 9, at 97-98.

[297] *Id.* at 94-98.

[298] 3 ACKERMAN, *supra* note 46, at 308.

[299] Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115 (1994) (criticizing Ackerman for offering too restrictive a rule of recognition and arguing that Reconstruction's collapse qualifies as a "constitutional moment" under Ackerman's theory).

[300] *See, e.g.*, David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 690, 697-98 (2018) (observing that popular constitutional conversation (and consensus) is a pervasive feature of the American constitutional tradition — not something reserved for a small number of constitutional moments); Strauss, *Common Law Constitutional Interpretation*, *supra* note 5, at 905 (describing various transformations of constitutional doctrine that fall outside of Ackerman's account, including the expansion of free speech rights and the growth of presidential power).

[301] 1 ACKERMAN, *supra* note 9, at 230.

background of popular silence, with the Justices following a common law process — deciding "concrete cases" that force them "to confront and reconcile . . . the disparate historical achievements of the American people."[302] Despite its emphasis on popular sovereignty, Ackerman's theory leaves many constitutional changes to judicial discretion.[303] As a result, when engaging in intergenerational synthesis, the Ackermanian interpreter risks speaking in an elitist — rather than a popular — voice.[304]

To respond to both sets of critics, Ackerman might incorporate popular constitutional analysis into his approach to intergenerational synthesis. Consider a concrete example: How might an Ackermanian judge apply this new framework to a constitutional challenge to the use of affirmative action at public universities? Even within this new framework, the Ackermanian judge would still apply her own independent judgment — her own situation sense — to determine for herself whether a university's affirmative action program violates the constitutional principles endorsed by previous generations.[305] However, to guard against the dangers of elite bias, the Ackermanian judge would then turn to the Constitution's popular meaning — using the tools of popular constitutional analysis to assess the contours of the American people's current constitutional views before reaching a specific conclusion. To that end, she would study the concrete indicators of public opinion and determine whether the American people have reached any relevant areas of popular constitutional consensus. Consistent with Ackerman's broader theory, the Ackermanian judge would use this interpretive approach to distinguish between the American people's considered judgments and their unreflective whims — those popular views worthy of judicial notice and those that might be safely ignored.[306]

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[302] *Id.* at 160.

[303] *See* Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2648 (2014).

[304] *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 45 (2019).

[305] 3 ACKERMAN, *supra* note 46, at 131-32.

[306] 1 ACKERMAN, *supra* note 9, at 17.

In the end, this turn to the Constitution's popular meaning addresses both the danger of false positives and the threat of elitist decision-making. Over time, it might promote a tighter link between the process of intergenerational synthesis and the American people's ongoing commands. Furthermore, it might provide the Ackermanian judge with more flexible interpretive tools than Ackerman's own demanding rule of recognition — tools that might allow her to identify genuine exercises of popular sovereignty outside of Ackerman's constitutional moments and incorporate those insights into her acts of intergenerational synthesis.

2. Constitutional Ethos: Rooting Bobbitt's Ethical Argument in the Constitution's Popular Meaning

For Philip Bobbitt, America's living constitution is an evolving tradition of constitutional conversation. In his classic book — *Constitutional Fate* — Bobbitt draws on the "legal grammar" that all lawyers "share" to derive a set of legitimate arguments from constitutional theory and practice.[307] For Bobbitt, these forms of constitutional argument include arguments from text, history, structure, doctrine, and prudence.[308] As Bobbitt explains, "the Court hears arguments, reads arguments, and ultimately must write arguments, all within certain conventions."[309] However, these conventions are far from settled.[310] New constitutional arguments emerge, and others recede.[311] Some become more powerful, and others become less persuasive. Consistent with this evolving tradition, Bobbitt argues that lawyers should recognize a new form of constitutional argument: *ethical argument*.[312]

With this form of argument, the interpreter draws on "the character, or *ethos*, of the American polity" — *not* her own independent moral

[307] BOBBITT, *supra* note 43, at 6.

[308] *Id.* at 7.

[309] *Id.* at 6-7.

[310] *Id.* at 8.

[311] *Id.* at 175.

[312] *Id.* at 94.

judgment.[313] When addressing a specific constitutional issue, she doesn't ask whether "a particular solution is right or wrong," but instead whether "the solution comports with the sort of people we are" as Americans.[314] When Bobbitt originally published his book three decades ago, he conceded that many lawyers might treat this form of argument as "disreputable" or "controversial."[315] Today, leading scholars recognize *both* its legitimacy *and* its power.[316] Even so, Bobbitt's account of ethical argument remains methodologically thin. Moving forward, interpreters might use popular meaning to root America's constitutional ethos in the specific contours of popular constitutional opinion.

Bobbitt's own approach to ethical argument blends legal craft, constitutional creativity, and independent judgment. In Bobbitt's view, the interpreter might build her ethical arguments from a variety of constitutional sources. She might turn to the Constitution's text — using analogical reasoning to move from enumerated rights to broad ethical principles.[317] She might study the Constitution's history, structure, and doctrine for evidence of broader patterns pointing to deep ethical commitments.[318] Or she might read the Constitution holistically and settle for broad "inference[s]" based on core principles — like the Constitution's commitment to limited government.[319] However, apart from these broad brushstrokes, Bobbitt provides little concrete advice on how best to approach a given constitutional issue — leaving it up to each interpreter to develop her own criteria for *both* deriving new ethical principles *and* determining whether those principles fit our nation's constitutional ethos.[320] Moving forward, interpreters might turn to the Constitution's popular meaning to ensure

[313] *Id.*

[314] *Id.* at 94-95.

[315] *Id.* at 93, 125, 168.

[316] For examples of scholars drawing on ethical argument in their scholarship, see Balkin, *supra* note 166; Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978 (2012); Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. 79 (2010).

[317] BOBBITT, *supra* note 43, at 142.

[318] *Id.* at 118.

[319] *Id.* at 150.

[320] *See id.* at 128.

a connection between new ethical arguments and the constitutional views of the American people.

Of course, popular meaning is a natural fit for Bobbitt's interpretive approach. For Bobbitt, ethical arguments derive their constitutional authority from the ethos of the American people. While Bobbitt leaves the specific contours of any new ethical arguments to each interpreter's own individual discretion, those same interpreters might use popular constitutional analysis to determine which key principles *both* run throughout American history *and* remain alive today.

Practically speaking, the ethical interpreter might focus on the actions of national, state, and local governments over time: materials like the laws on the books, regulations advanced by the executive branch, arguments made by government lawyers in court, and governmental practices on the ground.[321] In addition, she might study concrete indicators associated with the American people themselves — whether enshrined in state constitutions, expressed in state and local ballot measures, or reflected in how Americans have lived their lives over time.[322] Either way, interpreters might use popular constitutional analysis to build ethical arguments that are *both* faithful to America's constitutional ethos *and* responsive to today's constitutional challenges.

Of course, interpreters need not abandon Bobbitt's existing methodological advice. They might still construct new ethical arguments from other sources of authority like inferences from the Constitution's text, history, structure, doctrine, and principles.[323] Even so, popular constitutional analysis might provide those same interpreters with a concrete way of comparing any new ethical arguments to the contours of popular constitutional opinion — ensuring that those new arguments remain in conversation with the constitutional views of the American people.

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[321] *See supra* Part I.A.

[322] *See supra* Part I.A.

[323] BOBBITT, *supra* note 43, at 119, 142, 150.

3. Fallon's Pluralism: Finding a Reflective Equilibrium Between Normative Preferences, Constitutional Methodology, and the Constitution's Popular Meaning

For Richard Fallon, America's living constitution represents a reflective equilibrium between constitutional methodology and normative preferences.[324] Fallon roots this vision in constitutional theory's tradition of pluralism.[325] While most constitutional theorists defend a single authoritative approach to constitutional interpretation, the constitutional pluralist adopts a form of methodological eclecticism — drawing on a range of competing theories and clashing methodologies to determine the best response to a given constitutional issue.[326] Fallon is no exception.

Fallon's core concern is with the Supreme Court's legitimacy.[327] For Fallon, the Court's institutional reputation turns on its ability to balance between *three* types of legitimacy: legal, sociological, and moral.[328] Legally, the Justices should use constitutional materials, arguments, and methodologies that are consistent with the conventions of legal culture.[329] Sociologically, the Supreme Court should operate as an institution that is respected by the American people.[330] And morally, the Justices should issue decisions that are normatively attractive — if not to Americans today, then at least to the Justices themselves and to certain key voices within future generations.[331] Fallon looks to craft an approach to constitutional decision-making that maintains the Supreme Court's legitimacy over time. His approach focuses on the relationship between an interpreter's preferred methodology, her normative preferences, and the Supreme Court's institutional reputation.

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[324] *See* FALLON, JR., *supra* note 42, at 17.

[325] For helpful overviews of pluralistic theories, see GRIFFIN, *supra* note 236, at 143-52, and Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994).

[326] Post, *supra* note 44, at 18.

[327] *See generally* FALLON, JR., *supra* note 42 (providing a comprehensive account of Supreme Court legitimacy).

[328] *See id.* at 3.

[329] *See id.* at 35-36.

[330] *See id.* at 21.

[331] *See id.*

Rather than defending a specific constitutional methodology, Fallon offers a broad theory about constitutional theorizing itself. In the process, Fallon eschews stale debates over grand theories like originalism and living constitutionalism, turns aside "first-order" questions about which theory each interpreter should adopt, and instead offers an account of how interpreters "should go about developing" their own preferred theories over time.[332] While Fallon's approach focuses primarily on the mechanics of the constitutional system as a whole, he *does* offer specific methodological advice to the individual Justice.[333] Generally speaking, each Justice should adopt a methodological approach that legal culture recognizes as legitimate and commit to it over time.[334] By committing to a specific methodology, each Justice demonstrates interpretive good faith to her colleagues and cultivates respect within the wider legal community.[335]

As Fallon explains, "When the Justices adhere consistently to reasonable positions, we can respect their decisions, even if we think that both their methodological commitments and their substantive conclusions are ultimately mistaken."[336] Echoing Herbert Wechsler,[337] Fallon even predicts that this approach may lead certain Justices to reach case outcomes that they oppose on policy grounds.[338] In Fallon's view, this is a "hallmark" of legal legitimacy — proving a Justice's fidelity to the law, not to her own policy preferences.[339] However, the Supreme Court's reputation turns on more than legal legitimacy alone. As a result, Fallon *does* allow for some methodological flexibility.

For Fallon, when approaching a concrete case, each interpreter begins with a preferred constitutional methodology and normative preferences about a case's specific outcome. Over time, Fallon calls on each interpreter to reach a "reflective equilibrium" between her

[332] *See id.* at 127.

[333] *See id.* at 126-27.

[334] *See id.* at 126.

[335] *See id.* at 126, 146.

[336] *Id.* at 131.

[337] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

[338] *See* FALLON, JR., *supra* note 42, at 18.

[339] *See id.*

methodological commitments and her "provisional, quasi-intuitive judgments" about "just and legitimate results" in a given case.[340] When an interpreter's methodology and normative preferences collide — in other words, when "hard cases . . . test" the interpreter's core "principles" — Fallon argues that she should generally follow her preferred methodology.[341] Even so, Fallon *does* concede that an interpreter's normative preferences should sometimes win out.[342] In those rare cases, the interpreter should openly admit error, "reconsider and revise [her] previously articulated methodological theor[y]," and apply this revised methodology in future cases — *both* learning from past mistakes *and* committing anew to principled decision-making.[343]

Of course, this approach is susceptible to *the* central critique of constitutional pluralism. With no specific methodology to constrain her and no constitutional hierarchy to guide her, the interpreter exercises considerable discretion when deciding a given case.[344] As a result, critics may fear that interpreters will rely on their own normative preferences to shape the outcomes of important cases and reserve their commitment to methodological consistency (and restraint) for the less significant ones. At the same time, Fallon's approach privileges the independent judgment of elites — both legally and morally. However, the Supreme Court's reputation turns on not only its legal and moral legitimacy, but also on the Court's sociological legitimacy — its ability to attract support from the American people.[345] To respond to these critiques, Fallon might turn to the Constitution's popular meaning to ensure that an interpreter's methodological commitments remain in reflective equilibrium with the American people's considered judgments.

Popular meaning fits seamlessly within Fallon's approach to constitutional decision-making. Within this revised framework, the

[340] *See id.* at 127.

[341] *See id.*

[342] *See id.*

[343] *Id.*; *see id.* at 145 ("We can say, and should say without apology, that we now believe our prior judgments to have been mistaken."); *id.* at 146 (explaining the importance of "publicity or candor in acknowledging a change of methodological view").

[344] *See* Solum, *supra* note 248, at 1262-71, 1292-93.

[345] *See* FALLON, JR., *supra* note 42, at 21.

interpreter would still apply her preferred methodology to a given case. She would still make pragmatic judgments about the consequences of a given decision. And she still would consult her own intuitions about morality, fairness, and good policy. However, her constitutional analysis wouldn't end there. Before reaching a final constitutional conclusion, she would also consult the Constitution's popular meaning — drawing on concrete indicators of public opinion to determine the contours of popular constitutional opinion.

At its best, this move would force each interpreter to check her own independent judgment against the constitutional views of the American people. Over time, this turn to the Constitution's popular meaning might bolster the Supreme Court's sociological legitimacy by drawing on the power of popular consensus — with the interpreter looking to find a reflective equilibrium between her preferred methodology, her moral (and policy) intuitions, and the considered judgments of the American people.[346] In turn, this approach would force the interpreter to reach beyond her *own* individual judgments about morality, fairness, or good policy and consult the collective wisdom of the American people.

Of course, popular meaning need not win out in any given case. For Fallon, methodological consistency might still trump *both* an interpreter's normative preferences *and* the Constitution's popular meaning. However, by combining Fallon's existing theory with popular meaning, this new framework might offer an attractive blend of legal craftsmanship, practical wisdom, and constitutional common sense.

4. Lessig's Constitutional Translation: Fidelity to Popular Meaning

Lawrence Lessig envisions America's living constitution as a process of "constitutional translation."[347] This is a powerful constitutional

[346] *See id.*

[347] *See generally* LESSIG, *supra* note 11 (offering a book-length account of his theory of constitutional translation); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (introducing his influential account of constitutional translation); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125 (describing how the Justices reshaped federalism in *United States v. Lopez*); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (exploring how to

metaphor — with the interpreter using the traditional tools of legal analysis to derive the Constitution's original meaning and then adapting constitutional doctrine in ways that address key changes in society over time.[348] However, for Lessig, Supreme Court decision-making turns on more than just a Justice's best reading of the legal materials. Instead, many Justices try to strike the right balance between (what Lessig refers to as) "fidelity to meaning" and "fidelity to role" — between a Justice's best reading of the law and a Justice's sense of how legal elites will read it themselves.[349]

Fidelity to meaning goes to Lessig's account of constitutional translation. For Lessig, a Justice must understand *both* the Constitution's text *and* today's shifting context.[350] To that end, she must study the Constitution's original meaning, understand the assumptions against which a given provision was written, and identify how any of those assumptions may have changed over time.[351] From there, she must ask how best to "preserve the meaning of the Constitution's text within the current interpretive context."[352] A Justice maintains fidelity to meaning when she rules in a way consistent with her own best reading of the law — regardless of the expectations (and reactions) of legal elites.

When turning from fidelity to role, the Justice asks a different question. Rather than focusing exclusively on her best reading of the law, she also asks how she might balance this reading against the Supreme Court's proper role in our constitutional system.[353] Or as Lessig puts it, "How much of a nut do I want to be seen to be?"[354] In this sense, many Justices find themselves constrained by the expectations of legal culture.

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reconcile constitutional change with a commitment to constitutional fidelity). Lessig labels his own approach a version of originalism. LESSIG, *supra* note 11, at 64. But it's best understood as a vision of living constitutionalism — a theory for how to legitimate constitutional change over time.

348 LESSIG, *supra* note 11, at 48.

349 *Id.* at 5.

350 *Id.*

351 *Id.* at 16.

352 *Id.*

353 *Id.* at 17.

354 *Id.*

Lessig gives the powerful example of the constitutional amendment process. Leading scholars — like Bruce Ackerman and Akhil Amar — argue that Article V isn't the only way to amend the Constitution.[355] And after reviewing the scholarly materials himself, Lessig reaches a similar conclusion.[356] However, he then explains the institutional constraints facing a given Justice: "Sure, the Framers might well have thought Article V was not exclusive. But that was a particular group of people at a particular time and place. Today that idea is for most people crazy. So, is 'crazy' what I want to be known as?'"[357] For Lessig, the perceptions of legal elites — or, at least, a Justice's predictions about how elite legal culture will react to a given decision — inevitably shape the actions of many Justices.[358]

While shifts in popular constitutional opinion *could* play a part in Lessig's theory, public opinion plays little explicit role in his existing story. Instead, Lessig's account is largely a story of legal elites adapting constitutional doctrine to changes in the world based on their own independent judgment — *their* best reading of the legal materials, *their* predictions about the reactions of elite legal culture, and *their* intuitions about how best to construct wise constitutional doctrine.[359] This approach has its virtues. It values a Justice's professional expertise. It leverages traditional legal techniques like analogical reasoning and common law decision-making. And it ensures that a Justice's translations are in conversation with the legal profession and its conventional wisdom.[360]

However, Lessig's approach also raises the familiar dangers of judicial arrogance and a constitutional law dominated by legal elites — dangers that Lessig magnifies by leveraging a Justice's own independent legal

[355] *See* 2 ACKERMAN, *supra* note 51, at 3-31 (studying the American constitutional tradition and concluding that the American people can amend the Constitution through processes of higher lawmaking outside of the formal requirements of Article V); Amar, *Philadelphia Revisited*, *supra* note 22, at 1044 (arguing that the American people can amend the Constitution through a simple vote outside of the Article V amendment process).

[356] LESSIG, *supra* note 11, at 17.

[357] *Id.*

[358] *Id.*

[359] *Id.* at 346.

[360] *Id.* at 48.

judgment and her own perceptions about elite legal culture as core components of his theory. To counteract these dangers, Lessig might turn to the Constitution's popular meaning. Just as Lessig already uses fidelity to role as a check to ensure that a Justice's translations are in conversation with legal common sense, so Lessig might add popular constitutional analysis to his theory as a way of ensuring that an interpreter's new translations are also responsive to any concrete shifts in popular constitutional opinion.

This turn to the Constitution's popular meaning fits well with the overall structure of Lessig's theory. With fidelity to meaning, a Justice looks back at the American constitutional tradition — offering her best reading of the Constitution's text, history, and structure and then translating that reading into new doctrines that fit new contexts. With fidelity to role, she makes a predictive judgment — attempting to anticipate elite legal culture's reactions to a given ruling. And with fidelity to popular meaning, she studies the American people's constitutional views — turning to concrete indicators of public opinion and searching for any areas of popular constitutional consensus. In the process, this new approach might provide Lessig with a way of ensuring that a Justice confronts the considered judgments of the American people in a self-conscious way before shifting constitutional doctrine.

In this new approach, neither fidelity to role nor fidelity to popular meaning would function as a clear constitutional trump. Even so, each of these indicators might improve a Justice's acts of constitutional translation — ensuring that they remain in conversation with the constitutional common sense of both legal elites and the American people themselves.

5. Strauss's Common Law Constitutionalism: Popular Meaning, Popular Precedent, and the Evolution of the Constitutional Common Law

For David Strauss, America's living constitution exists as a system of constitutional common law.[361] Strauss builds his account of common

[361] *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (providing a comprehensive account of the theory of living constitutionalism); Strauss, *Common Law Constitutional Interpretation*, *supra* note 5 (explaining how the Supreme Court takes a

law constitutionalism from legal conventions and a concern with legal craft.[362] Over time, the common law constitutionalist reads cases, employs analogical reasoning, and develops constitutional doctrine in an incremental manner.[363] While the Constitution's text constrains at times, judges mostly wrestle with doctrine.[364] And constitutional law itself is largely a conversation between judges across generations, with each judge working to adapt existing doctrine to meet society's changing needs.[365] For Strauss, that's how America's living constitution *both* keeps faith with America's past *and* evolves in a way that meets the challenges of the present (and future).

While critics may charge that common law constitutionalism leaves interpreters in an "anything goes" world, Strauss counters that the common law constitutionalist is constrained by her own professional training and the norms and conventions of legal culture.[366] These norms and conventions shape the types of constitutional arguments available to her and her own sense of a judge's proper role in our constitutional system.[367] At the same time, Strauss is candid that when traditional legal resources run out — or when a result is sufficiently out of line with a judge's normative commitments — that 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."[368]

In the end, Strauss offers a modest approach to living constitutionalism. At the same time, he does little to counter the dangers of a constitutional common law that follows the opinions of legal elites, not the American people. Strauss's account is short on

common law approach to shaping constitutional doctrine); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) (arguing that most constitutional change happens inside the courts, not through the formal amendment process).

[362] *See generally* Strauss, *Common Law Constitutional Interpretation*, *supra* note 5 (explaining how professional legal expertise is an important constraint on living constitutionalism).

[363] *Id.* at 891.

[364] *Id.* at 892.

[365] *See id.* at 877.

[366] *Id.* at 879.

[367] *Id.*

[368] STRAUSS, *supra* note 361, at 38.

methodological details, short on any criteria for extending (or limiting) a line of precedent, and short on any specific guidance on when to apply an old case and when to overturn it. Instead, Strauss leaves these important decisions to a vague mixture of professional norms, doctrinal reasoning, and normative judgment. While Strauss's account may accurately describe constitutional practice, it risks envisioning a living constitution that speaks in an elitist — rather than popular — voice. To counteract these dangers, the common law constitutionalist might draw on the Constitution's popular meaning to ensure that the constitutional common law remains in conversation with the American people's considered judgments.

On this view, Strauss might add popular constitutional analysis to the common law constitutionalist's methodological checklist. Within this new framework, the common law constitutionalist would still study the existing caselaw, make predictive judgments about potential consequences, and consult her own policy (and moral) instincts. However, to check her own elite biases, she would also look to the Constitution's popular meaning. This approach would constrain the common law constitutionalist by forcing her to ground part of her analysis in concrete indicators of public opinion — not her own vague impressions of the "evolving" constitutional understandings of the American people or her own intuitions about fairness and sound policy.[369]

Of course, other factors may still prove decisive. Perhaps a particular doctrinal approach is clearer and more administrable. Perhaps it is a more faithful synthesis of previous caselaw. Perhaps it is more consistent with the views of elite legal culture. Or perhaps it is fairer, wiser, or more morally sound. For the common law constitutionalist, these factors may outweigh the commands of the Constitution's popular meaning in any given case. However, even when popular meaning loses

[369] *See* Strauss, *Common Law Constitutional Interpretation*, *supra* note 5, at 877. Strauss himself is open to some popular input as part of the common law process; he simply rejects it as a simple trump. *See id.* at 930-31 (explaining that while judges can't help but be shaped by their society's evolving values, judges need not simply yield to public opinion). At the same time, he provides the common law constitutionalist few tools for analyzing popular constitutional opinion. Furthermore, he warns her of the dangers of majoritarian tyranny. *See id.* at 929.

out, this new framework would still force the common law constitutionalist to consider popular constitutional opinion in a self-conscious way before settling on a specific approach to a particular constitutional issue. By turning to the Constitution's popular meaning, Strauss might ensure that America's living constitution remains in conversation with the American people — even when the opinions of legal elites win out.

E. Coda: Charting Living Constitutionalism

When charting the living constitutionalist universe, some accounts of the theory fit neatly into either the "elite" or "popular" category. For instance, a theorist like Ronald Dworkin falls squarely within the "elite" camp — with Dworkin arguing that the Constitution's popular meaning should play no role in constitutional analysis.[370] At the same time, an ardent popular constitutionalist like Richard Parker sorts easily into the "popular" camp — with Parker contending that the Constitution's popular meaning should trump other sources of constitutional authority.[371] However, as with Justice Brennan's own influential account, most theories of living constitutionalism probably fall somewhere in the middle of these two poles, offering a blend of elite judgment and popular constitutional opinion.[372] These theories leave ample room for incorporating popular meaning into their accounts of a living constitution.

Furthermore, the concept of popular meaning provides scholars with a helpful vocabulary for disaggregating the different sources of authority relevant to each theorist's version of living constitutionalism — whether those sources include the traditional tools of legal analysis

[370] *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (exploring the relationship between constitutional fit and an interpreter's moral commitments); RONALD DWORKIN, LAW'S EMPIRE, *supra* note 234 (describing the principles that undergird the development of the law); DWORKIN, A MATTER OF PRINCIPLE, *supra* note 8 (applying many of his philosophical views about the law to modern controversies); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (offering an account of how judges should decide cases).

[371] *See* PARKER, *supra* note 235, at 1-6.

[372] *See, e.g.*, STRAUSS, *supra* note 361 (offering an account that relies on elite decision-making but remains open to influence by public opinion).

(constitutional text, history, structure, and doctrine), independent moral judgment, policy concerns, or the Constitution's popular meaning. When developing their theories, living constitutionalists often blend these sources of authority — obscuring how they relate to one another — but these sources are each separable and susceptible to independent assessment (and critique). Moving forward, living constitutionalists should be clear about which sources of authority are relevant to their theory, how those sources of authority relate to one another, and where each source stands within a given theory's hierarchy of constitutional authority.

By disaggregating these sources of authority in a more precise way, scholars might bring greater coherence to the living constitutionalism literature as a whole. Over time, this sort of analysis may help scholars distinguish between competing forms of living constitutionalism. Furthermore, it may allow them to identify different ways in which disparate versions of the theory remain in conversation. It may also prove useful in constitutional practice.

III. POPULAR MEANING AND SUPREME COURT PRACTICE: FUNDAMENTAL RIGHTS, THE SEARCH FOR POPULAR MEANING, AND THE VALUE OF POPULAR ADVISORY OPINIONS

To see how popular meaning might inform important issues facing the Roberts Court today, let's turn from constitutional theory to Supreme Court practice and end with a concrete example — the battle over fundamental rights in *New York State Rifle & Pistol Association v. Bruen* and *Dobbs v. Jackson Women's Health Organization*.[373] Popular meaning offers a distinct lens through which to analyze one of the most important methodological issues arising from these blockbuster cases — how best to weigh the authority of post-ratification history in these disputes, whether framed as arguments from tradition, convention, historical practice, or constitutional liquidation. In *Bruen* and *Dobbs*, key Justices — most notably, Chief Justice Roberts and Justice Kavanaugh — signal support for using popular sources of authority to shape the recognition and application of key constitutional rights. Moving

[373] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

forward, scholars must continue to develop the tools necessary to make popular constitutionalism work inside the courts. In this Part, I offer one concrete recommendation with deep roots in the American constitutional tradition: *the popular advisory opinion*.

A. Popular Meaning, Post-Ratification History, and Arguments from History, Tradition, and Present Meaning

In her *Bruen* concurrence, Justice Barrett highlights one of the most important interpretive debates on the Roberts Court today: the proper use of post-ratification history in constitutional cases.[374] For the Justices, the key methodological question is whether post-ratification history may only be used to reinforce an interpreter's best reading of the Constitution's original meaning, or whether she may also use it to gloss (or liquidate the meaning of) a snippet of ambiguous or vague constitutional text.[375] In my view, this debate over post-ratification history is best understood as a battle over the proper role of originalism, traditionalism, and popular constitutionalism on the Roberts Court — with Justices from across the methodological spectrum looking to sources of authority outside of the courts to resolve important constitutional issues.

To bring greater clarity to this methodological debate, the Justices might distinguish between three sources of popular authority: history, tradition, and present meaning. With history, the interpreter surveys

[374] *Bruen*, 597 U.S. at 81 (Barrett, J., concurring).

[375] The latter approach is consistent with the Court's approach in *NLRB v. Noel Canning*, 573 U.S. 513, 577 (2014), and with James Madison's famous statement on constitutional liquidation: "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST NO. 37 (James Madison). In each instance, when the Constitution's original meaning is unclear, the interpreter might turn to post-ratification history to settle the Constitution's meaning. *See generally* Baude, *supra* note 6 (offering the leading account of constitutional liquidation). Even Justices aligned on many constitutional issues have suggested contrasting approaches to post-ratification history. *Compare Bruen*, 597 U.S. at 21-22 (arguing that interpreters should turn to post-ratification history to confirm their reading of the original meaning of a given provision), *with Dobbs*, 597 U.S. at 225-27 (drawing on post-ratification history to overturn *Roe v. Wade*).

evidence from when a given provision was framed and ratified and analyzes the contours of that provision's original meaning. Beginning with the Constitution's text, she tries to discover the best reading of the relevant provision when it was added to the Constitution.[376] From there, she studies the debates that shaped the provision's framing and ratification.[377] Overall, she attempts to understand the Constitution's text and history from the perspective of a reasonable person reading the provision at the time of its ratification.[378] This source of authority is central to originalism.

With tradition, the interpreter turns away from a given provision's founding moment and instead studies its post-ratification history — searching for any evidence of non-court precedents deeply rooted in the American ethos.[379] Depending on the issue, the interpreter might focus on what national, state, and local governments have done over time — studying material like the laws on the books, regulations advanced by the executive branch, arguments made by government lawyers in court, and governmental practices on the ground.[380] In addition, she might focus on indicators associated with the American people themselves — whether enshrined in state constitutions, expressed in state and local ballot measures, or reflected in how Americans have lived their lives over time. Either way, the traditionalist interpreter looks to America's past — in other words, the past laws, actions, and practices of the American people and their elected officials — to resolve constitutional disputes today.

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[376] *See* BOBBITT, *supra* note 43, at 25-38.

[377] *See id.* at 9-24.

[378] *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620-29 (1999); Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 19-22 (2006); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 607-12 (2004).

[379] *See* Balkin, *supra* note 166, at 652 (explaining that interpreters often rely on post-ratification history to construct arguments that appeal to ethos or tradition).

[380] *See, e.g.*, NLRB v. Noel Canning, 573 U.S. 513, 556 (2014) ("[W]e interpret the Constitution in light of its text, purposes, and 'our whole experience' as a Nation."); Baude, *supra* note 6, at 3 ("Constitutional law is . . . rife with claims of authority by historical practice."); Bradley, *supra* note 7, at 60 ("In recent scholarship and Supreme Court opinions, there has been increased attention to the relevance of post-Founding governmental practice . . . .").

Finally, with present meaning, the interpreter turns away from America's constitutional past and studies the views of the American people today. Of course, arguments from tradition and present meaning bear some methodological resemblance to one another. Both forms of argument look to sources of constitutional authority outside of the courts. Both offer approaches that might address constitutional issues when the Constitution's text, history, structure, and doctrine fail to resolve a given constitutional dispute. And both forms of argument draw on similar sources of popular authority. However, while traditionalist arguments focus on America's constitutional past, those rooted in present meaning rely on evidence drawn from current laws, regulations, state constitutions, governmental practices, lived experiences, and popular views.

Of course, this account of history, tradition, and present meaning won't resolve every dispute between the Justices over the use of post-ratification history. However, it may offer them a helpful framework for engaging in these important debates in a principled, clear-headed way. For the popular constitutionalist, this framework may also help clarify the role of post-ratification history in the search for popular meaning.

When studying the Constitution's popular meaning, the interpreter doesn't ignore evidence from America's past. However, to be useful to the popular constitutionalist, this post-ratification evidence must tell her something meaningful about the constitutional views of the American people today. For instance, it might point to valuable evidence about a current view's depth, breadth, longevity, or deliberativeness. In the end, the popular constitutionalist turns to a mix of current indicators (evidence of present meaning) and historical materials (post-ratification history) across a variety of institutions and actors outside of the courts and over time — on the theory that each set of popular sources imperfectly reflects the constitutional judgments of the American people. At times, she uses these materials to search for evidence of *popular rights*.

B. The Fourteenth Amendment and the Search for Popular Rights

Ever since the Supreme Court's first decision interpreting the Fourteenth Amendment's promise of freedom, the Justices have battled over whether (and how) this transformational amendment might

protect some of our nation's most cherished liberties against state abuses.[381] Over time, the Supreme Court has endorsed both unenumerated rights and incorporation.[382] Even so, scholars and Justices continue to disagree over how best to identify new fundamental rights.

Some argue that the answer lies in historical inquiry — leveraging a Justice's professional expertise to recognize any rights "deeply rooted in this Nation's history and tradition."[383] Others turn to a functionalist approach — arguing that a Justice should have the flexibility to recognize some rights and turn aside others based on her own independent judgment about a right's significance.[384] For those relying on history and tradition, the functionalist approach magnifies the countermajoritarian difficulty — forcing a Justice to stray beyond the bounds of her own legal expertise and make judgments about values and policy that are best reserved for the elected branches.[385] And for supporters of a functionalist approach, those relying on history and tradition risk freezing the Constitution in place and binding future generations to outdated values.[386]

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[381] *See generally* Slaughter-House Cases, 83 U.S. 36 (1872) (interpreting the Fourteenth Amendment for the first time at the Supreme Court); Bryan H. Wildenthal, *The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457 (2000) (offering the leading historical account of early battles over the Fourteenth Amendment's protection of freedom); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1116-30 (2000) (covering debates over the Fourteenth Amendment's protection of freedom shortly after its ratification).

[382] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

[383] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[384] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 872, 877 (2010) (Stevens, J., dissenting) (rejecting an historical approach to fundamental rights and calling on Justices to "apply their own reasoned judgment" in this context); Richard Aynes, *Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197 (1995) (exploring Felix Frankfurter's functionalist approach to fundamental rights).

[385] *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1401 (2020) (attacking an earlier Court for "subject[ing] the ancient guarantee of a unanimous jury verdict to . . . functionalist assessment").

[386] *See, e.g.*, BALKIN, LIVING ORIGINALISM, *supra* note 185, at 211 (calling for an approach to fundamental rights that is "dynamic" — not frozen in time).

Popular meaning offers a fresh perspective on this old debate. In short, interpreters might draw on the Constitution's popular meaning to transform the search for fundamental rights into a search for *popular rights*. With this approach, the interpreter analyzes the contours of popular constitutional opinion to determine whether the American people themselves deem a particular right fundamental. Like those drawing on arguments from history and tradition, the popular constitutionalist looks to a range of indicators over time — including laws on the books at the national, state, and local level and the longstanding practices, traditions, and views of the American people and their elected officials. However, the popular constitutionalist only looks to these sources to determine whether today's views are entrenched and longstanding — not whether certain views merely existed at various points in American history. This form of analysis turns not on which views have been "on the table" over time, but instead on whether any of those views remain alive in popular constitutional opinion today.[387]

At the same time, like those drawing on a functionalist approach, the popular constitutionalist isn't constrained by the American constitutional tradition. When determining whether a particular right is fundamental, she doesn't have to settle for old views extending decades (or even centuries) into America's past. Instead, she may recognize new rights that the American people consider fundamental today. However, to reach this conclusion, the popular constitutionalist doesn't draw on her own independent judgment about whether a particular right is worthy of special protection. Instead, she looks to the Constitution's popular meaning.[388] If the classic critique of the Court's search for unenumerated rights is that the Justices have no principled answer to the question of where to discover them in the first place, the popular constitutionalist offers a simple (and powerful) response. The Justices should look to the constitutional views of the American people today.

Importantly, the Roberts Court has often taken up this call. In recent terms, Justices from across the ideological spectrum have embraced

[387] *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 12, at 1.

[388] *See, e.g.*, Amar, *America's Lived Constitution*, *supra* note 120, at 1744 ("The Ninth and Fourteenth Amendment . . . invite [the interpreter] to root his claim of right in the fertile ground of American custom, mythos, and ethos.").

popular sources of authority when determining whether to recognize a particular right as fundamental. On the current Court, only Justices Thomas and Barrett have resisted this move[389] — and even then, Justice Thomas wrestled with post-ratification history in *Bruen* and both Justices signed onto Justice Alito's opinion in *Dobbs*, an opinion that relied on a variety of popular indicators.[390] At this point, every Justice has signed onto at least one opinion relying on the Constitution's popular meaning in this context — with Justices as varied as Ruth Bader Ginsburg on the left and Neil Gorsuch on the right authoring opinions embracing popular meaning as part of their analyses.[391] At the same time, the Justices have continued to battle over important issues like the recognition of certain unenumerated rights and the application of existing rights to new contexts. These debates over fundamental rights are at the heart of two of the most important (and controversial) rulings issued last term: *Bruen* and *Dobbs*.

C. The Roberts Court — A Popular Constitutionalist Court?: Bruen, Dobbs, and the Challenge of Making Popular Constitutionalism Work in Practice

In *Dobbs*, the joint dissent accuses the Roberts Court's conservative majority of limiting the Fourteenth Amendment's reach to the original expected applications of those who framed and ratified that provision.[392]

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[389] *See Ramos*, 140 S. Ct. at 1420-25 (Thomas, J., concurring in the judgment) (declining to adopt an approach to fundamental rights that embraces the Constitution's popular meaning); Timbs v. Indiana, 139 S. Ct. 682, 691-98 (2019) (Thomas, J., concurring in the judgment) (same).

[390] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 27 (2022) (explaining that the Court may "consider whether 'historical precedent' from before, during, *and even after* the founding evinces a . . . tradition of regulation"); *id.* at 26-28 (acknowledging that the Court has turned to post-ratification history to settle the meaning of vague or ambiguous pieces of constitutional text). *But see id.* at 35 ("[W]e must . . . guard against giving postenactment history more weight than it can rightly bear.").

[391] *See Ramos*, 140 S. Ct. at 1400 (drawing on a state legislation count to incorporate the Sixth Amendment's right to a unanimous jury verdict); *Timbs*, 139 S. Ct. at 688-89 (drawing on state constitution counts to incorporate the Eighth Amendment's Excessive Fines Clause).

[392] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 384 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (arguing that the *Dobbs* majority rejects the

If true, such an approach risks tethering constitutional doctrine to the dead hand of the past — and, even worse, to a period when women themselves didn't have the right to vote and American society as a whole treated them as "second-class citizens[]."[393] This is a powerful critique. Even so, it fails to address the preferred constitutional approach of the Roberts Court's median Justice — Brett Kavanaugh. Rather than limiting himself to the constitutional views of previous generations, Kavanaugh embraces the Constitution's popular meaning, arguing that it should shape the Court's approach to both the recognition of new rights and the application of existing ones. In *Dobbs* itself, Kavanaugh is clear on this point. Even so, Kavanaugh's approach is susceptible to a powerful popular constitutionalist critique — one suggesting a future path for popular constitutionalism itself.

Kavanaugh begins his *Dobbs* concurrence by embracing one of the dissent's core critiques of the *Dobbs* majority — agreeing with the dissenters that "the Constitution does not freeze the American people's rights" in place at the time that a provision is added to the Constitution.[394] For Kavanaugh, the Court might extend existing constitutional protections "to situations that were unforeseen in 1791 or 1868 — such as applying the First Amendment to the Internet or the Fourth Amendment to cars."[395] In addition, Kavanaugh acknowledges that "the Constitution authorizes the creation of new rights — state and federal, statutory and constitutional" — that didn't exist when the Reconstruction generation added the Fourteenth Amendment to the Constitution.[396] However, rather than empowering judges to exercise their own independent judgment in this context, Kavanaugh embraces the Constitution's popular meaning.

constitutional right to an abortion "because (and only because) the law offered no protection to the woman's choice in the 19th century").

[393] *Id.* at 372-73 ("As an initial matter, note a mistake in the just preceding sentence. We referred to the 'people' who ratified the Fourteenth Amendment: What rights did those 'people' have in their heads at the time? But, of course, 'people' did not ratify the Fourteenth Amendment. Men did.").

[394] *Id.* at 340 (Kavanaugh, J., concurring).

[395] *Id.*

[396] *Id.*

As Kavanaugh explains, while the Supreme Court may recognize new rights unknown to those who framed and ratified the Fourteenth Amendment, "[t]he Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties based on our own moral or policy views."[397] Instead, when weighing the recognition of a new constitutional right, the Justices should look to translate the American people's constitutional views — expressed through a variety of popular indicators — into constitutional doctrine. Like the ardent popular constitutionalist, Kavanaugh supports a division of labor between the Justices and the American people. In Kavanaugh's view, the American people should use the existing "processes of democratic self-government contemplated by the Constitution—state legislation, state constitutional amendments, federal legislation, and federal constitutional amendments" — to signal their own constitutional views.[398] From there, the Justices should then use those popular indicators to apply existing rights and recognize new ones. In short, Kavanaugh endorses the search for popular rights.

To translate this broad constitutional vision into a concrete interpretive approach, Kavanaugh embraces outlier analysis — using state legislation (and constitution) counts to determine the contours of the Constitution's popular meaning. This approach is most obvious in Kavanaugh's short (three-page) concurrence in *Bruen*. There, Kavanaugh describes the New York concealed-carry permitting regime at issue in the case as "*unusual*" and as an "outlier."[399] As Kavanaugh explains, New York's "may-issue" regime "grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense."[400] In his view, "[t]hose features of New York's regime . . . in effect deny the right to carry handguns for self-defense to many ordinary, law-abiding citizens."[401] Importantly, by Kavanaugh's count, only six states (and the

397 *Id.*

398 *Id.*

399 N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 79 (2022) (Kavanaugh, J., concurring).

400 *Id.*

401 *Id.*

District of Columbia) "employ[]" a discretionary regime like the one on the books in New York.[402] For Kavanaugh, this state legislation count — an analysis of present meaning — renders the New York licensing regime constitutionally suspect.

Similarly, Kavanaugh draws on evidence of the Constitution's popular meaning to justify his vote to overrule *Roe v. Wade*. To begin, he signs onto Justice Alito's majority opinion in *Dobbs*. There, Alito analyzes certain popular indicators available when the Fourteenth Amendment was framed and ratified (an argument from history) and when the Burger Court initially recognized the right to an abortion in 1973 (an argument from tradition). According to Alito, "For the first 185 years after the adoption of the Constitution, each State was permitted to address [the issue of abortion] in accordance with the views of its citizens."[403] Between the Founding and *Roe*, "[n]o state constitutional provision had recognized [the right to an abortion]."[404] Finally, by then, abortion itself "had long been a crime in every single State."[405] While Justice Alito's analysis draws on arguments from history and tradition, it tells us nothing about the American people's constitutional views today — the Constitution's present meaning.

In his own *Dobbs* concurrence, Kavanaugh draws on certain contemporary evidence to support his vote to overturn *Roe*. There, he argues that pro-choice advocates have failed to secure a popular constitutional consensus in support of their views today. To reach this conclusion, Kavanaugh studies the contours of the public debate over abortion rights in America — observing that this debate is far from settled, with "tens of millions of Americans" failing to "accept *Roe* even 49 years later."[406] From there, Kavanaugh highlights the wave of anti-abortion laws passed by "a significant number" of dissident states in recent years — with those states "enact[ing] abortion restrictions that directly conflict with *Roe*."[407] In Kavanaugh's view, these laws shouldn't be understood as "political stunts" or as "outlier[s]," but instead as

[402] *Id.* at 80.

[403] *Dobbs*, 597 U.S. at 225 (majority opinion).

[404] *Id.* at 241.

[405] *Id.* at 217.

[406] *Id.* at 344 (Kavanaugh, J., concurring).

[407] *See id.*

"collectively represent[ing] the sincere and deeply held views of tens of millions of Americans."[408] Finally, Kavanaugh uses a state litigation count to reinforce this popular constitutional argument, noting that, in *Dobbs* itself, "a majority of the States — 26 in all — ask the Court to overrule *Roe* and return the abortion issue to the States."[409] For Kavanaugh, each of these indicators signal ongoing divisions over abortion rights in America. With the Constitution's text silent on abortion and the American people divided over the issue, Kavanaugh concludes that the Court should return the issue of abortion to the elected branches.[410]

From a popular constitutionalist perspective, the majority's arguments in *Dobbs* are susceptible to a variety of critiques. To begin, the *Dobbs* dissenters (and many scholars) have offered reasons to impeach much of the popular evidence cited by Justice Alito in his *Dobbs* opinion.[411] While Alito uses state legislation (and constitution) counts to argue that the Constitution's history and tradition run against abortion rights, critics counter that Alito's evidence represents a constitutionally problematic tradition unworthy of serious weight — one based on laws passed with improper motives and without the political participation of women.[412]

Even granting a charitable reading of the *Dobbs* majority's arguments, Justice Alito's opinion only tells us that *Roe* was inconsistent with state legislation and constitution counts when the Fourteenth Amendment was ratified and when the Supreme Court decided *Roe* itself. It tells us nothing about the American people's constitutional views today — the Constitution's present meaning. At the same time, Justice Kavanaugh's concurrence *does* note that a certain (unspecified) number of states have passed dissident laws — based on their own conclusion that *Roe* was wrongly decided. And Kavanaugh reminds us that a bare majority of

[408] *Id.*

[409] *Id.*

[410] *Id.*

[411] *Id.* at 372 (Breyer, Sotomayor & Kagan, JJ., dissenting); Siegel, *supra* note 182, at 1127.

[412] For a classic account of the motivations behind abortions restrictions earlier in American history, see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 265 (1992).

states (twenty-six) — all led by Republicans — asked the Court to overrule *Roe* in *Dobbs*. Ideally, the popular constitutionalist would want additional information about the constitutional views of the American people today — in other words, evidence of present meaning — before overturning a longstanding precedent like *Roe*. In fact, she might even draw on other popular evidence to make an affirmative argument in favor of *Roe* and its progeny, pointing to suggestive data — both pre- and post-*Dobbs* — that abortion rights might have fared better in the court of public opinion than they did before the newly constituted Roberts Court.

Prior to the *Dobbs* decision, a series of public opinion polls suggested that strong majorities agreed with *Roe* and opposed a move by the Roberts Court to overturn it.[413] And following the *Dobbs* decision itself, additional polling data reinforced those results — with the vast majority of Americans disagreeing with the Roberts Court's decision to overturn *Roe*.[414] Other key data points further supported these findings, including an important referendum win on abortion rights in Kansas,[415] Democratic overperformance in post-*Dobbs* special elections,[416] and a shift in the congressional generic ballot towards Democrats in the weeks and months following the *Dobbs* decision.[417] The 2022 midterm election

[413] For a collection of polls on abortion rights, see *Abortion and Birth Control*, POLLINGREPORT.COM, https://www.pollingreport.com/abortion.htm (last visited Dec. 20, 2023) [https://perma.cc/9B8C-ERQX]. For instance, a Suffolk University/*USA Today* poll in mid-June showed 61% opposing a decision overturning *Roe v. Wade*. *Id.* A May 2022 Gallup poll showed similar numbers (58% oppose and 35% support). *Id.*

[414] For a collection of polls on abortion rights, see *id.* For instance, an August 2022 a Fox News poll showed 60% of Americans disapproving of the Roberts Court's decision in *Dobbs* and only 38% approving of it. *Id.*

[415] Ailsa Chang, Alejandra Marquez Janse & Justine Kenin, *Why Conservative Kansas Handed Victory to Abortion Rights*, NPR (Aug. 3, 2022, 4:24 PM EDT), https://www.npr.org/2022/08/03/1115455939/why-conservative-kansas-handed-victory-to-abortion-rights [https://perma.cc/KS87-BHWY].

[416] Nathaniel Rakich, *Yes, Special Elections Really Are Signaling a Better-Than-Expected Midterm for Democrats*, FIVETHIRTYEIGHT (Aug. 24, 2022, 12:19 PM), https://fivethirtyeight.com/features/yes-special-elections-really-are-signaling-a-better-than-expected-midterm-for-democrats/ [https://perma.cc/WS7U-KD3A].

[417] Nate Silver, *Maybe Dobbs Did Change the Race. We'll Need More Time to Know For Sure*, FIVETHIRTYEIGHT (July 8, 2022, 8:34 AM), https://fivethirtyeight.com/features/

results reinforced this popular constitutional argument — with Democrats outperforming expectations overall[418] and abortion rights advocates winning a series of key ballot measures, including in traditionally Republican states like Kentucky and Montana.[419]

Of course, none of these data points serves as decisive proof that *Dobbs* itself runs contrary to the Constitution's popular meaning.[420] However, these findings *do* further highlight the difficulty of building a persuasive popular constitutional argument in *Dobbs*. In turn, it suggests the need for a better set of popular indicators in future cases.

For the future of popular constitutionalism, perhaps the most significant development in *Bruen* and *Dobbs* is that Justice Kavanaugh — the Court's median Justice — committed to the use of popular sources of authority to shape the recognition and application of key constitutional rights. Importantly, Chief Justice Roberts also signed onto this approach in *Bruen*. With Roberts and Kavanaugh at the Court's ideological center, no shift in constitutional doctrine is possible across many substantive areas without the support of at least one of them. As a result, popular constitutionalism may prove as important to the future of constitutional law inside the Roberts Court as its more famous methodological cousin, originalism. Moving forward, scholars must recommend institutional reforms that provide the Court with clearer signals of popular constitutional opinion. For now, I offer some preliminary suggestions.

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maybe-dobbs-did-change-the-race-well-need-more-time-to-know-for-sure/ [https://perma.cc/4UJZ-FJLM].

[418] Jordan Fabian & Jenny Leonard, *Biden Hails "Strong Night" as Democrats Beat Expectations*, BLOOMBERG (Nov. 9, 2022, 4:56 PM PST), https://www.bloomberg.com/news/articles/2022-11-09/biden-hails-strong-night-for-democrats-in-midterm-victory-lap.

[419] *Abortion on the Ballot*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html (last updated Dec. 20, 2022) [https://perma.cc/X4VX-XSD6].

[420] Of course, public opinion polling — as a source of popular constitutional authority — is an imperfect proxy for the constitutional views of the American people, whether due to the effects of sampling error, question wording, or other methodological challenges. 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 344 (Scalia, J., dissenting) (calling the majority's use of polling data "[f]eeble").

D. Popular Meaning, Fundamental Rights, and the Value of Popular Advisory Opinions

Following *Bruen* and *Dobbs*, popular meaning is alive and well on the Roberts Court, with key Justices — most notably, Chief Justice Roberts and Justice Kavanaugh — signaling support for using popular sources of authority to shape the recognition and application of key constitutional rights. Moving forward, scholars must offer these Justices (and their colleagues) concrete ways of making popular meaning work across a range of cases. Part of the answer lies in interpretive method — the primary focus of this Article. However, part of it also turns on the ability of scholars to develop better tools for capturing the American people's constitutional views. This requires an institutional turn in constitutional theory.

In previous work, I've made a start — exploring an institutional reform advanced by Theodore Roosevelt in response to certain anti-regulatory decisions by federal and state courts in the early twentieth century,[421] the public reconsideration of judicial decisions or (as I refer to it) a "*people's veto*."[422] Roosevelt failed to attract support for his idea over a century ago. (I haven't had much luck either!) However, to make popular constitutionalism work today, scholars need not propose such a controversial measure. With important Justices committed to using popular sources of authority inside the courts, scholars might focus instead on developing new popular indicators capable of facilitating this form of analysis. One answer lies in a modest reform — one rooted in the American constitutional tradition, responsive to methodological trends on the Roberts Court, and targeted towards the specific challenge of making popular constitutionalism work inside the courts: *the popular advisory opinion*.

This proposal draws its inspiration from Thomas Jefferson, James Madison, and one of the most famous episodes in American

[421] Theodore Roosevelt, Speech to the Ohio Constitutional Convention (Feb. 21, 1912), *in* OHIO CAPITAL J. (Mar. 31, 2023, 7:00 PM), https://ohiocapitaljournal.com/2023/03/31/teddy-roosevelts-speech-to-the-1912-ohio-constitutional-convention/ [https://perma.cc/7M3Q-9WUE].

[422] *See* Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 164-65.

constitutional history: the Alien and Sedition Acts controversy.[423] In *Federalist* No. 46, Madison discussed the role of the states in shaping constitutional meaning.[424] While many Anti-Federalists feared that the new national government would abuse its powers and swallow up the states, Madison predicted that the states would play a key role in checking national abuses — channeling the constitutional views of "the people themselves" and sending "signals of general alarm."[425] Madison would later work with Jefferson to translate this theoretical vision into political (and constitutional) practice.[426]

In the 1790s, the political atmosphere was particularly fraught, with the rise of the partisan press and the arrival of early political parties.[427] One of the key issues dividing the parties was the war between Great Britain and France.[428] While Adams's Federalists sided with Great Britain, Vice President Jefferson and his allies maintained their support for France — criticizing the Adams Administration for siding with the monarchical British over the liberal revolutionary French.[429]

In response to this partisan atmosphere, the Federalist Congress — with the support of the Adams Administration — passed the Sedition Act of 1798. This Act criminalized the publication of any "false, scandalous, and malicious writing" attacking the national government.[430] From a modern perspective, this Act undermined one of the core rights enshrined in the First Amendment — the right to criticize the government. Channeling the vision of state constitutionalism advanced in *Federalist* No. 46, Jefferson and Madison

[423] Popular advisory opinions are also consistent with contemporary constitutional practice. *See* 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/U8QA-ZKQY] (discussing the use of advisory ballot measures to assess public support for overturning *Citizens United v. FEC*).

[424] THE FEDERALIST NO. 46 (James Madison).

[425] *Id.*

[426] FRIEDMAN, *supra* note 24, at 75-77.

[427] *See* KRAMER, *supra* note 27, at 133.

[428] GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 240 (2009).

[429] *See* KRAMER, *supra* note 27, at 133.

[430] Sedition Act of 1798, ch. 54, 1 Stat. 566, 566-69.

fought back with the Virginia and Kentucky Resolutions of 1798.[431] For purposes of this Article, these resolutions are *the* classic examples of popular advisory opinions.

Drafted in secret by Jefferson and Madison, these resolutions — passed by the state legislatures of Kentucky and Virginia — condemned the Sedition Act as unconstitutional.[432] For Jefferson and Madison, the Act exceeded Congress's power under the Constitution and violated our nation's commitment to free speech and a free press. For instance, Madison argued in his Virginia Resolutions that the Sedition Act "ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right."[433] Because of the importance of communicating thoughtful opinion, Madison believed that freedom of speech and of the press was central to the survival of the republic. The Sedition Act subverted the core of this republican vision.

In the end, the Virginia and Kentucky Resolutions energized Jefferson's political supporters and helped him defeat Adams in the election of 1800.[434] Once in office, Jefferson allowed the Sedition Act to expire and pardoned those still in jail for committing offenses under it.[435] While the Supreme Court never ruled on the constitutionality of the Sedition Act, the Warren Court would later write this Madisonian vision of robust free speech and free press protections into First Amendment doctrine.[436]

In their own time, the Virginia and Kentucky Resolutions called on Congress to repeal the Sedition Act. Today, reformers might use similar popular advisory opinions to facilitate the use of popular meaning inside the courts. These new popular indicators might take the form of

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[431] For texts of the Virginia and Kentucky Resolutions, see 1 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 37-40 (Kurt T. Lash ed., 2021).

[432] FRIEDMAN, *supra* note 24, at 76.

[433] 17 THE PAPERS OF JAMES MADISON 185-91 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds., 1991).

[434] KRAMER, *supra* note 27, at 137-38.

[435] *See* KRAMER, *supra* note 27, at 137.

[436] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

resolutions passed by state governments or state ballot measures voted on by the American people directly — with either approach providing the American people with a concrete way of registering their views on important constitutional issues.

On the one hand, these popular advisory opinions might express simple statements about a specific constitutional issue. *Roe* (or *Dobbs*) is right. Reproductive choice is a constitutional right (or not). The Second Amendment applies outside of the home (or not). On the other hand, they may also take the form of more elaborate constitutional analyses — akin to those written by Jefferson and Madison in the Virginia and Kentucky Resolutions. Either way, popular advisory opinions would provide the Justices with new resources for engaging with the Constitution's popular meaning — making it easier to draw on the method of state-counting to assess the contours of popular constitutional opinion. Rather than requiring acquiescence or defiance by dissenting states, the widespread use of popular advisory opinions might allow the American people and their elected officials to enter into a more direct, concrete, and continuous form of constitutional dialogue with the courts.[437]

These new popular indicators may be especially helpful in the context of a case like *Dobbs*, which required the Court to evaluate an existing line of well-established precedent. By issuing a ruling that takes sides in a constitutional debate, the Supreme Court risks closing off (or at least chilling) future legislation that challenges the Court's constitutional conclusions.[438] As J. Harvie Judge Wilkinson explains, "One may subscribe fully to the need and necessity of judicial review and yet recognize that the club of unconstitutionality is a weapon of last resort, precisely because it so often knocks every other player out of the ring."[439] By handing a decisive victory to one side of a political debate, the Supreme Court often constricts the policymaking space of the elected branches, while also offering the winning side a new political advantage — as David Strauss describes it, "the ability to claim that an attack on its position is an attack on the legitimacy of the courts or,

[437] For thoughtful reflections on constitutional dialogue, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580 (1993).

[438] *See* BICKEL, *supra* note 15, at 91.

[439] WILKINSON III, *supra* note 243, at 106-07.

indeed, an attack on the Constitution."[440] Furthermore, once the Court issues an important ruling, it rarely reconsiders it — further freezing the new constitutional status quo in place.[441] This may chill state constitution-making or new state legislation — distorting important popular signals.

Popular advisory opinions offer an alternative path for constitutional dissenters — one that is preferable to other legislative efforts designed to challenge Supreme Court precedent. For instance, contrast a popular advisory opinion with a law like Texas S.B. 8.[442] With this law, Texas looked to promote a specific constitutional view — namely, that *Roe* was wrongly decided. However, rather than addressing *Roe* directly, the Texas law used procedural gymnastics to evade judicial review — calling on private citizens (not state actors) to enforce a broad ban on abortions.[443] Like Texas S.B. 8, a popular advisory opinion challenges judicial supremacy and values constitutional voices outside of the courts. However, the popular constitutionalist rejects Texas S.B. 8's path of constitutional evasion — an approach that allows each state to nullify certain rights based on that state's own constitutional views, even if those views represent a national outlier.

With a popular advisory opinion, each state is able to register its dissenting views directly — both challenging existing Supreme Court precedent and advancing an alternative constitutional vision. However, this dissenting vision only becomes enforceable — both within the state itself and elsewhere — once it attracts the broad support of the American people. In short, popular advisory opinions honor both the value of constitutional dissent and the authority of the Constitution's popular meaning.

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[440] Strauss, *The Modernizing Mission*, *supra* note 14, at 899.

[441] *See* Cass R. Sunstein, *If the People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 159 (2007).

[442] For a helpful description of Texas S.B. 8, see Whole Woman's Health v. Jackson, 595 U.S. 30, 35 (2021).

[443] *Id.*

CONCLUSION

Popular sovereignty is at the core of the American constitutional tradition. Even so, it remains an elusive concept. While popular constitutionalists have made popular sovereignty central to their theory, critics have long attacked them for offering few clues for how popular constitutionalism might work inside the courts. In this Article, I've made a start. Furthermore, popular meaning holds out the promise of addressing a range of longstanding theoretical challenges. It also offers a distinct lens through which to analyze ongoing debates on the Roberts Court over how best to weigh the authority of post-ratification history.

No constitutional theory is perfect. Popular constitutionalism is no exception. Even so, popular meaning remains an important way of ensuring that constitutional law remains in conversations with the constitutional voice of the American people. Constitutional law isn't just for the legal elite. It's for "We the People."