THE CONSENSUS CONSTITUTION

Justin Driver*

An ascendant view within constitutional law contends that the Supreme Court almost inevitably interprets the Constitution in a manner that reflects the "consensus" beliefs of the American public. Given that many of the Constitution's key provisions contain indeterminate language, this view claims that Supreme Court Justices imbue those phrases with the prevailing sentiments of the times. This increasingly influential approach—one that is articulated by some of the most prominent voices within modern legal academia—aims to correct what it deems a romantic myth regarding the Court's ability to protect minority rights.

This Article challenges the ascendant view by identifying and critiquing the defining features of what it labels "consensus constitutionalism." Despite being grounded in history, consensus constitutionalism reveals no familiarity with a defining debate that flourished among American historians that stretches back to the 1950s—a debate that resulted in conflict-based history supplanting its consensus-based counterpart. Consensus constitutionalism offers an unsatisfying understanding of history, as it obscures the deep cleavages that often divide Americans regarding constitutional questions. Consensus constitutionalism also offers an unsatisfying understanding of law, as it invites a foreordained conception of constitutional decisionmaking and an anemic notion of the Court's countermajoritarian capabilities. Reexamining Brown v. Board of Education *and* Loving v. Virginia, *this Article provides an alternate approach to exploring legal history—contested constitutionalism—which honors the significance of both ideological conflict and the Court's countermajoritarian capacities.*

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* Assistant Professor, The University of Texas School of Law. I received particularly helpful comments on earlier drafts from Katharine Bartlett, Stuart Banner, Mitchell Berman, Alan Brinkley, Alfred Brophy, Josh Chafetz, Sherry Colb, Karen Engle, Laura Ferry, Cary Franklin, Joseph Fishkin, William Forbath, David Garrow, Jacob Gersen, Julius Getman, Jamal Greene, Ariela Gross, Lani Guinier, Pratheepan Gulasekaram, Pamela Harris, Bert Huang, Amy Kapczynski, Sanford Levinson, Jennifer Laurin, Richard Markovits, David Oshinsky, James T. Patterson, Lucas A. Powe, Jr., David Pozen, John Robertson, David Rabban, Lawrence Sager, Suzanna Sherry, Reva Siegel, Kevin Stack, Jordan Steiker, Gerald Torres, and Mark Tushnet. I also received useful feedback from faculty workshop participants at the University of Chicago, the University of Texas, and Vanderbilt University. Charles Mackel, Michael Raupp, Christine Tamer, and Mark Wiles provided excellent research assistance.

Introduction

Fifteen years ago, Professor Michael Klarman issued a clarion call urging his fellow law professors to examine the Supreme Court's twentieth-century constitutional decisions from an external vantage point.[1] In contrast to scholarship that analyzes doctrinal developments in hermetic isolation, the "external perspective" places judicial decisions within their larger social and political context.[2] Although externalists long ago succeeded in illuminating some nineteenth-century constitutional decisions,[3] Klarman lamented what he perceived as the method's near abandonment regarding constitutional decisions of more recent vintage.[4] In Klarman's assessment, legal academics—besotted by the Warren Court's landmark decisions—rejected externalism because they were dedicated to advancing the wrongheaded notion that the Court possessed a robust capacity for issuing decisions that protect marginalized groups. "It is my belief that the myth of the Court as countermajoritarian savior is largely responsible for this gap in the literature," Klarman contended.[5] "It is time for constitutional historians to explode that myth, to identify and describe the parameters within which judicial review actually operates, and to create a richer and more credible account of the twentieth century's civil rights and civil liberties revolutions."[6]

In many respects, it would appear that legal academia has heeded Klarman's call. External examinations of twentieth-century constitutional law, though never as neglected as Klarman suggested,[7] now constitute nothing less than a dominant mode of understanding Supreme Court decisionmaking. Indeed, many of the most distinguished professors writing today view modern constitutional law through the external lens.[8]

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1. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 67 (1996).

2. *Id.* at 66–67.

3. *See id.* at 66 (citing DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978); STANLEY I. KUTLER, PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE (1971)).

4. *Id.* at 66.

5. *Id.* at 67.

6. *Id.*

7. The Court's shifting response to New Deal legislation—perhaps the most closely examined period of twentieth-century constitutional law—has often been attributed to external forces. Many scholars have suggested that President Franklin D. Roosevelt's outside political pressure played a role in Justice Owen Roberts's "switch in time." *See, e.g.*, William E. Leuchtenburg, *Franklin D. Roosevelt's Supreme Court "Packing" Plan*, *in* ESSAYS ON THE NEW DEAL 69, 69–95 (Harold M. Hollingsworth & William F. Holmes eds., 1969). Professor Barry Cushman's account of this period is revisionist precisely because it seeks to understand the Court's response to the New Deal from an internal, law-based perspective rather than an external, politics-based perspective. *See* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 206–07, 257–61 (1994).

8. *See infra* notes 79–83 and accompanying text.

In other respects, though, the clarion call has not yet been answered—or even fully heard. Though Klarman sought "a richer and more credible account" of constitutional decisions from the last century,[9] the leading scholarship employing externalism is notable for neither its richness nor its credibility. Today's external legal history is marred by what this Article labels "consensus constitutionalism," the claim that the Supreme Court interprets the Constitution in a manner that reflects the "consensus" views of the American public. This view is exemplified in recent major works by prominent legal academics including Klarman,[10] Barry Friedman,[11] Jeffrey Rosen,[12] and Cass Sunstein.[13] Those scholars—with their fixations on societal "consensus"—paint American legal history with a disfiguringly broad brush, obscuring the deep divisions that typify public response to constitutional questions.

This consensus school of constitutional interpretation results in scholarship with two primary deficiencies. First, it makes for bad history. Second, it makes for worse law.

The flight to consensus among law professors during the last decade eerily echoes a movement to consensus among history professors that began in the wake of World War II. In reaction to what they asserted was an overemphasis on the role that conflict played in prior examinations of the past, a group of scholars led by Richard Hofstadter contended that historical inquiries should instead focus upon American commonality.[14] The search among historians for unity rather than division burned incandescent during the 1950s, but its heyday proved brief. In 1959, historian John Higham wrote a devastating article deriding the "consensus school" of American history for its homogeneous conception of the past, a conception that elided the profound disagreements that have shaped the nation's history.[15] Higham's article succeeded in restoring conflict to its central place in historical interpretation, ultimately convincing even the founder of consensus-based history of the school's severe methodological limitations.[16]

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9. Klarman, *supra* note 1, at 67.

10. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

11. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

12. JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006).

13. CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE (2009).

14. *See infra* text accompanying notes 27–30.

15. *See* John Higham, *The Cult of the "American Consensus": Homogenizing Our History*, 27 COMMENT. 93, 94 (1959) ("[C]urrent scholarship is carrying out a massive grading operation to smooth over America's social convulsions.").

16. *See infra* text accompanying notes 60–72.

Although consensus constitutionalists (to varying extents) ground their scholarship in historical matters, their work bears no trace of the central debate that roiled history departments for many years. That debate among historians would seem to contain essential lessons regarding the potential pitfalls of external legal history, and it generated conclusions that are perfectly adverse to the way that law professors invoke "consensus" today. Part I reviews that debate in some detail because many modern legal academics either never learned its lessons or once knew but have now forgotten them.

The regrettable consequences of consensus-based scholarship are, moreover, of even greater significance for law than they were for history. The consensus school of constitutional interpretation suffers from three central analytical shortcomings, addressed in Part II. First, consensus constitutionalism often misconceives the American people as fundamentally united when ideological divisions in fact pervade society. Second, consensus constitutionalism's notion that the Court's decisions reflect the zeitgeist leads to the misguided impression that judicial decisions are inevitable, meaning that the Court's composition is largely irrelevant. Third, if the Justices accept consensus constitutionalism's warning about the dangers of the Court outpacing public opinion, the theory contains distressing normative implications regarding the Court's ability to clash with majority preferences.

Simply because the execution of externalism has thus far been wanting, however, does not mean that the underlying methodology should be jettisoned altogether. To the contrary, this Article in Part III proposes an external methodology called "contested constitutionalism." This alternate externalist approach observes that the Court's interpretation of our founding document typically arises in the face of ideological conflict, not ideological consensus. Rather than only abstractly exploring this concept, this Article illustrates how contested constitutionalism plays out in practice by providing a revised account of the Court's role in recognizing black Americans as full citizens during the 1950s and 1960s. When the Court decided *Brown v. Board of Education*,[17] the racial attitudes of Americans revealed greater complexity and inner conflict (both regionally and racially) than the consensus-constitutionalist narrative generally allows. Drawing upon the Court's decision invalidating prohibitions on interracial marriage in *Loving v. Virginia*,[18] this Article contends, against the consensus-constitutionalist account, that the Court has historically played a significant role in protecting minority interests—and further argues that it could (and should) do so again if it ultimately addresses a claim involving same-sex marriage.[19] Although no societal consensus currently exists regarding same-sex marriage, it is easy

17. 347 U.S. 483 (1954).

18. 388 U.S. 1 (1967).

19. *See infra* section III(B)(2).

to overlook that a much smaller percentage of Americans approved of interracial marriage when the Court decided *Loving* than now approve of same-sex marriage.

Given that consensus constitutionalism offers a distorted view of *Brown* and *Loving*, it stands to reason that contested constitutionalism would similarly enhance our understanding of many constitutional decisions that have received less scholarly attention. Accordingly, this Article concludes by challenging scholars to employ contested constitutionalism to explore the full range of American legal history in all of its nuance, complexity, and ambiguity.

I. The Rise and Fall of Consensus-Based History

A. The Rise

In December 1947, as the book that would become known as *The American Political Tradition* underwent final revision, Richard Hofstadter received a disconcerting letter from his publisher.[20] Alfred A. Knopf, the legendary founder of the eponymous publishing house, suggested that the thirty-one-year-old Columbia University historian should compose an introduction designed to link the various chapters offering reassessments of historical figures that formed the book's core.[21] "We want, as far as possible, to get away from the idea that it is just a collection of essays," Knopf explained.[22] "I feel that the introduction is . . . very important."[23] This letter, Hofstadter would later reveal, invited him to undertake precisely the task that he had hoped to avoid: positing a unified theory of American history.[24] Despite his trepidation, Hofstadter recognized Knopf's request as reasonable. "And so I hazarded my six-page introduction," Hofstadter recalled years later, "which has probably made as much trouble for me as any other passage of comparable length."[25] Although this claim sounds somewhat overwrought, Hofstadter errs, if anything, on the side of understatement.

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20. DAVID S. BROWN, RICHARD HOFSTADTER: AN INTELLECTUAL BIOGRAPHY 50–51 (2006). At that time, Hofstadter's book was known in-house as *Men and Ideas in American Politics*. *Id.* at 51.

21. *Id.*

22. *Id.* (internal quotation marks omitted).

23. *Id.* (internal quotation marks omitted).

24. Hofstadter later noted:

> I suppose that this had been exactly the challenge I had been trying to evade, since I was in a period of intellectual transition and had sense enough to know that I had not arrived at a point in my life at which I was either learned or settled enough to be ready to put together a synthetic statement about the meaning of the American political tradition.

RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT xxii (1973 ed. 1985) (1948).

25. *Id.*

Indeed, over time, *The American Political Tradition*'s six introductory pages would be understood as nothing less than the opening salvo in one of the defining historical debates that occurred during the latter half of the twentieth century.[26]

Hofstadter's introduction asserted that U.S. historians had, for at least a generation, placed excessive emphasis on the role that conflict played in shaping American society. Hofstadter charged that, as a result of the Progressive historians' obsession with conflict, historians had misunderstood Americans as being defined more by their differences than by their commonalities.[27] Where the Progressives saw division, Hofstadter saw unity. "The following studies in the ideology of American statesmanship have convinced me of the need for a reinterpretation of our political traditions which emphasizes the common climate of American opinion," Hofstadter wrote.[28] "The existence of such a climate of opinion has been much obscured by the tendency to place political conflict in the foreground of history."[29] Whatever their superficial differences, Hofstadter contended that Americans shared a common set of beliefs—a mindset that served to avert any potential for fundamental strife. "The fierceness of the political struggles has often been misleading," Hofstadter suggested, because "the range of vision embraced by the primary contestants in the major parties has always been bounded by the horizons of property and enterprise."[30] In Hofstadter's estimation, American dissidents (such as they are) do not wish to overthrow the economic system; they want only a larger piece of it.

Extending his claim of fundamental commonality beyond the economic and political realms, Hofstadter further suggested that Americans held a united set of cultural views. "Above and beyond temporary and local conflicts there has been a common ground, a unity of cultural and political tradition, upon which American civilization has stood," Hofstadter wrote.[31] "That culture has been intensely nationalistic and for the most part isolationist; it has been fiercely individualistic and capitalistic."[32] Given that

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26. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 332–521 (1988) (examining historiographical trends sparked by the dispute over consensus history); BERNARD STERNSHER, CONSENSUS, CONFLICT, AND AMERICAN HISTORIANS *passim* (1975) (detailing the wide-ranging debate over consensus- and conflict-based theories of history); Carl Degler, Book Review, 76 J. AM. HIST. 892, 893 (1989) (noting that in the wake of the consensus–conflict debate "[t]he eruption of black, ethnic, women's, and public history put an end, at least for the foreseeable future, to the dream of a unitary history"); David Oshinsky, *The Humpty Dumpty of Scholarship*, N.Y. TIMES, Aug. 26, 2000, at B9 (examining the continuing legacy of the consensus–conflict debate).

27. *See* HOFSTADTER, *supra* note 24, at xxix–xxxi (lamenting the focus on conflict in American history and the resulting neglect of significant commonalities).

28. *Id.* at xxix.

29. *Id.*

30. *Id.* at xxx.

31. *Id.* at xxxii.

32. *Id.*

ordinary Americans contemplated a menu of severely constrained options, it is far from surprising that Hofstadter viewed their political leaders as generally following suit:

> The range of ideas . . . which practical politicians can conveniently believe in is normally limited by the climate of opinion that sustains their culture. They differ, sometimes bitterly, over current issues, but they also share a general framework of ideas which makes it possible for them to co-operate when the campaigns are over.[33]

Underscoring his argument's breadth, Hofstadter observed expansively that this insight "can profitably be extended to the rest of American history."[34]

Knopf issued *The American Political Tradition* in the fall of 1948 to glowing reviews and, eventually, to surprisingly brisk sales.[35] Before his death in 1970 at the age of fifty-four, Hofstadter wrote several extremely important (and extremely marketable) books, leading him to be saluted by Eric Foner, among many others, as "the finest historian of his generation."[36] Yet it is *The American Political Tradition*, perhaps aided by its hastily composed introduction, that Hofstadter biographer David S. Brown plausibly claims has "earned a singular position in the annals of professional historical writing," and enabled its author to "succeed[] Charles Beard as the most influential and intellectually significant American historian of his time."[37]

B. The Fall

Not everyone applauded the succession. In February 1959, slightly more than a decade after Hofstadter assumed Beard's mantle, John Higham wrote a critical essay in *Commentary* magazine called *The Cult of the "American Consensus": Homogenizing Our History.*[38] Higham portrayed the preceding five decades of U.S. historical scholarship as a narrative of decline. Before the fall, Higham wrote, "[a]n earlier generation of historians

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33. *Id.* at xxxi.

34. *Id.* at xxxii.

35. BROWN, *supra* note 20, at 145–46; *see, e.g.*, Gerald W. Johnson, *Some Tenants of the White House*, N.Y. TIMES, Sept. 19, 1948, at BR1 (book review) (describing the work as "shrewd, bold, honest—and, on occasion, brilliantly illuminating"); Arthur R. Kooker, Book Review, 18 PAC. HIST. REV. 253, 253 (1949) (stating the work "stamps [Hofstadter] as one of the brilliant young scholars of our generation").

36. Eric Foner, *The Education of Richard Hofstadter*, NATION, May 4, 1992, at 597. *See also* Daniel Walker Howe & Peter Elliott Finn, *Richard Hofstadter: The Ironies of an American Historian*, 43 PAC. HIST. REV. 1, 1 (1974) ("In his originality of thought, pervasiveness of influence, felicity of expression, and range of interests, he had few if any equals in his profession. Indeed, he was probably the most prominent member of a distinguished generation of American historians."); Arthur Schlesinger Jr., *The Ferocious Strains in Our National Past: American Violence*, N.Y. TIMES, Oct. 25, 1970, at BR10 (calling Hofstadter "the most distinguished American historian of his generation").

37. BROWN, *supra* note 20, at 50. Foner concurs that the book "propelled [Hofstadter] to the very forefront of his profession." Foner, *supra* note 36, at 600.

38. Higham, *supra* note 15.

. . . nurtured in a restless atmosphere of reform, had painted America in the bold hues of conflict."[39] When historical interpretation flourished, Higham contended: "It was East vs. West . . . ; farmers vs. businessmen . . . ; city vs. country; property rights vs. human rights; Hamiltonianism vs. Jeffersonianism. These lines of cleavage were charted continuously from the Colonial period to the present."[40]

Higham lamented that modern historians, rather than identifying the conflict that divided the nation, emphasized the consensus that united it. "Instead of two traditions or sections or classes deployed against one another all along the line of national development," Higham contended, "we are told that America in the largest sense has had one unified culture. Classes have turned into myths, sections have lost their solidarity, ideologies have vaporized into climates of opinion."[41] Higham blamed domestic conservatism following World War II for the "deadening effect on the historian's ability to take a conflict of ideas seriously," as "[e]ither he disbelieves in the conflict itself (Americans having been pretty much of one mind), or he trivializes it into a set of psychological adjustments to institutional change."[42] Understanding American history as devoid of significant conflict caused historians to see a "placid, unexciting past" inhabited by a people that were "above all—remarkably homogeneous."[43] This new, dreadfully wrong turn in American history, Higham wrote, required society to "pay a cruel price in dispensing with [the Progressive historians'] deeper values: an appreciation of the crusading spirit, a responsiveness to indignation, a sense of injustice."[44]

The principal targets of Higham's critique were two monographs written in the mid-1950s,[45] Louis Hartz's *The Liberal Tradition in America*[46] and Daniel J. Boorstin's *The Genius of American Politics*.[47] Somewhat surprisingly, Higham's essay addressed Hofstadter's work only briefly—almost incidentally. Instead of invoking *The American Political Tradition*, moreover, Higham criticized Hofstadter's latest publication, *The Age of Reform*.[48] That book, Higham suggested, fueled the modern historical trend of depicting social movements not as mounting challenges to the prevailing order but instead as efforts to achieve mere restoration, principally motivated

39. *Id.* at 94.
40. *Id.*
41. *Id.* at 95.
42. *Id.* at 100.
43. *Id.* at 94.
44. *Id.* at 100.
45. *Id.* at 95–96.
46. LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (2d ed. 1991).
47. DANIEL J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1958).
48. RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. (1955).

by nostalgia for a bygone era.[49] Higham contended that Hofstadter "presents Populism in the 1890's and Progressivism in the early 20th century not as mighty upheavals but as archaic efforts to recapture the past."[50] Despite *The Age of Reform*'s espousal of a generally consensus-oriented approach to history, Higham may have spared Hofstadter from more sustained (and withering) scrutiny because the book at least succeeded in "recogniz[ing] fairly radical changes in the recent past" regarding the "elements of social revolution in the New Deal."[51]

Whatever the explanation for Higham leveling the consensus charge at Hofstadter somewhat halfheartedly, later historians would hurl it with considerably more vigor.[52] Over the years, Hofstadter's admirers have repeatedly—and tirelessly—attempted to beat back the consensus label on his behalf. In 1973, Christopher Lasch, a former graduate student of Hofstadter's and a major intellectual figure in his own right,[53] wrote an introduction to a new edition of *The American Political Tradition*, which mainly sought to refute the idea that the book should be understood as an exercise in consensus history.[54] Although conceding that "Hofstadter undoubtedly helped to prepare the way for the consensus theorists of the 1950's," Lasch asserted that the book "had nothing in common with the celebration of American 'pragmatism'" and viewed widespread agreement within the nation "as a form of intellectual bankruptcy."[55] By 1989, however, Lasch sought to shift the battle to different terrain by arguing not so much that Hofstadter did not practice consensus history, but that the significance of the

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49. Higham, *supra* note 15, at 94 ("We have learned that the Jacksonians yearned nostalgically to restore the stable simplicity of a bygone age, and that the Populists were rural businessmen deluded by a similar pastoral mythology.").

50. *Id.* at 94–95.

51. *Id.* at 94.

52. *See* BROWN, *supra* note 20, at 50.

53. *See* ERIC MILLER, HOPE IN A SCATTERING TIME: A LIFE OF CHRISTOPHER LASCH (2010) (analyzing Lasch's intellectual contributions, including—perhaps most significantly—*The Culture of Narcissism*).

54. Christopher Lasch, *Foreword* to HOFSTADTER, *supra* note 24, at x–xii.

55. *Id.* at xii. Historians echoed Lasch's defense of Hofstadter in the mid-1970s. *See also* Howe & Finn, *supra* note 36, at 2 ("To be sure, Hofstadter thought there was an identifiable mainstream of American life and that it was best described as middle-class capitalism. He devoted most of his professional efforts to studying movements he felt were within this consensus. However, he did not celebrate the virtues of the tradition he identified."); Harry N. Scheiber, *A Keen Sense of History and the Need to Act: Reflections on Richard Hofstadter and* The American Political Tradition, 2 REV. AM. HIST. 445, 451 (1974) ("Far from admiring or extolling consensus, Hofstadter reserves for it his most chilling and occasionally contemptuous rhetoric."). More than thirty years later, historians continue to defend Hofstadter. *See* David Greenberg, *Richard Hofstadter Reconsidered*, RARITAN, Fall 2007, at 144, 149 (rejecting Higham's grouping of Hofstadter with Hartz, Boorstin, and Clinton Rossiter, and contending that "[a] cursory reading makes plain that Hofstadter was lamenting the narrow boundaries of the political culture").

consensus–conflict debate itself had been sorely overblown, amounting to little more than academic intramural squabbling.[56]

C. *The Fallout*

Scholarly disputes seldom yield an undisputed victor. But in the conflict–consensus dispute, it quickly became clear that only the conflict-based historians could plausibly assert victory.[57] And Higham was far from shy in so asserting. "The vogue of this quest for national definition proved devastatingly brief," Higham wrote in 1979.[58] "In a few years of the early and midsixties what was called 'consensus' history suddenly lost credibility. The entire conceptual foundation on which it rested crumbled away. As an analytic construct, national character was largely repudiated in all of the social sciences in which it had flourished."[59]

Perhaps no testimony better illustrates consensus history's demise than the words of Hofstadter himself. Toward the end of his career, Hofstadter acknowledged (however tersely) that with respect to the fight over consensus he got better than he gave. Hofstadter seized *The American Political Tradition*'s publication in Hebrew in 1967 to write a preface that sought to distance his work from other scholars in the consensus school, making public a stance that he had long adopted in private.[60] The debate over consensus

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56. Christopher Lasch, *Consensus: An Academic Question?*, 76 J. AM. HIST. 457, 458 (1989) ("[T]he controversy about 'consensus' has always struck me as artificial and unimportant—one of those nondebates that academic historians invent for their own amusement, for the making and breaking of academic reputations."); *cf.* Alan Brinkley, *Richard Hofstadter's* The Age of Reform*: A Reconsideration*, 13 REVS. AM. HIST. 462, 476 (1985) ("Critics of modern historiography have spent a large and perhaps inordinate amount of time and energy arguing over whether Hofstadter was truly a member of the 'consensus school' that came to dominate historical writing in the 1950s.").

57. *See* Nicholas Lemann, *The New American Consensus: Government of, by and for the Comfortable*, N.Y. TIMES, Nov. 1, 1998, 37, 70 (Magazine) ("The consensus school in American history, such as it was, lay in ruins within a few years of the publication of Higham's devastating article.").

58. John Higham, *Introduction* to NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY, at xii (John Higham & Paul K. Conkin eds., 1979); *see also* John Higham, *Changing Paradigms: The Collapse of Consensus History*, 76 J. AM. HIST. 460, 464 (1989) ("The flight from consensus was so precipitous as to suggest that the paradigm was not only fragile and incomplete but that it somehow invited its own destruction.").

59. Higham, *Introduction* to NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY, *supra* note 58, at xii.

60. *See* BROWN, *supra* note 20, at 50 (noting that Hofstadter "privately much resisted" his title as a consensus historian). The preface to the Hebrew edition also attempted to contextualize *The American Political Tradition*'s by then infamous six-page introduction:

> This book was not written in order to establish some single overarching theory about American politics or American political leadership, but rather to make a number of interpretive and critical comments on certain political figures on whom I had done some special work or who particularly captured my interest. Circumstances, however, made it seem in the end somewhat more ambitious than it had been meant to be, and these had to do mainly with changes suggested by the publisher as it moved toward

history, Hofstadter wrote, "has been very awkward for me, in the sense that it has linked me with other historians with whom I have significant differences, and because I have some serious misgivings of my own about what is known as consensus history."[61] After mounting an extremely narrow defense of consensus as "only an assertion about the frame or the configuration of history and not about what goes on in the picture," Hofstadter sharply criticized the blinkered history that stems from overemphasizing national cohesion.[62] "Americans may not have quarreled over profound ideological matters, as these are formulated in the history of political thought, but they quarreled consistently enough over issues that had real pith and moment," Hofstadter wrote. "And their unappeasable conflicts finally brought them in 1861 to one of the momentous and tragic political failures in modern history."[63] But such conflict, Hofstadter emphasized, was far from confined to the Civil War. "Even in more tranquil phases of our history, an obsessive fixation on the elements of consensus that do undoubtedly exist strips the story of the drama and the interest it has."[64]

With the publication of *The Progressive Historians* in 1968,[65] Hofstadter offered a still more critical assessment of consensus history. Acknowledging that the notion of consensus has "intrinsic limitations *as history*," Hofstadter suggested that historians would do well to contemplate the series of questions that sociologists and political scientists have posed regarding the boundaries of consensus:

> Who is excluded from the consensus? Who refuses to enter it? To what extent are the alleged consensual ideas of the American system—its preconceptions, for instance, about basic political rights—actually shared by the mass public? (So far as the masses are concerned, what we call consensus is often little more than apathy.)[66]

Historians, Hofstadter suggested, need not search particularly hard to find meaningful conflict throughout American history.[67] Referencing various societal tumults ranging from the American Revolution through the upheaval of the 1960s, Hofstadter stated, "Surely these episodes evoke a record of significant conflict to which we cannot expect to do justice if we write our history in terms of the question whether or not Americans were disagreeing

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publication. My original title, which was less demanding and more faithful to the random and unsystematic character of my intentions, was *Men and Ideas in American Politics*.

HOFSTADTER, *supra* note 24, at xxi–xxii.

61. *Id.* at xxiii.

62. *Id.* at xxiv.

63. *Id.*

64. *Id.*

65. RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS (1968).

66. *Id.* at 452–53.

67. *Id.* at 458–59.

with John Locke."[68] The Civil War, Hofstadter again observed, posed a particularly awkward fit for historians dedicated to advancing consensus.[69] "In the face of [the 1860s] political collapse," Hofstadter wrote, "what does it matter if Professor Hartz reassures us that, because the Southern states were simply adhering to their own view of the Constitution which they incorporated into the Confederate constitution, the Civil War does not represent a real failure of the American consensus?"[70]

The most striking feature of the debate regarding consensus-based history versus conflict-based history is the limited ground on which the debate occurred. After a brief period, the real action in the debate centered not on which framework made for better history, but whether the charge of consensus—once leveled—proved warranted. Hofstadter and his defenders resisted the charge so intently for so long because to admit to embracing consensus history was to confess to practicing an inferior mode of historical inquiry. Few serious historians trained in the United States would today contend that consensus, as opposed to conflict, offers the superior lens with which to examine the American past. Regrettably, the widespread embrace of conflict within the history department has yet to migrate across campus to

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68. *Id.* at 459.

69. *Id.* at 460–62. Notably, Higham's classic essay suggested that consensus historians underplayed the Civil War precisely because the facts were so desperately inconvenient: "Among earlier crises, the Civil War alone has resisted somewhat the flattening process. Yet a significant decline has occurred in the number of important contributions to Civil War history from professional scholars. One is tempted to conclude that disturbances which cannot be minimized must be neglected." Higham, *supra* note 15, at 95.

70. HOFSTADTER, *supra* note 65, at 461. Here, Hofstadter echoes the critique of J.R. Pole, who wrote of Hartz's claim regarding the alleged consensus that undergirded the Civil War: "At this point consensus may be thought to have lost its usefulness. Might one not as well suggest that the French Wars of Religion do not represent a real religious cleavage because both Catholics and Huguenots avowed their faith in the Christian religion?" J.R. Pole, *The American Past: Is It Still Usable?*, 1 J. AM. STUD. 63, 75 (1967).

Was Hofstadter being unduly self-critical by acknowledging the affinity of at least some of his work with consensus history? The core of the case for Hofstadter's defenders, as described above, hinges on the contention that Hofstadter expressed contempt, rather than admiration, for the consensus that he identified. *See, e.g.*, Scheiber, *supra* note 55, at 451. This claim is true so far as it goes, but it does not get Hofstadter completely off the consensus hook. After all, Hartz too criticized the consensus that he described in *The Liberal Tradition*, a point that Higham himself made in his initial essay. Higham, *supra* note 15, at 96. Why should Hofstadter be pardoned when Hartz is hanged? Hofstadter loyalists can at best make out a claim that he—and Hartz, for that matter—practiced a less troubling form of consensus history than the celebratory form practiced most prominently by Boorstin. *See* Greenberg, *supra* note 55, at 149–50 (explaining that, in contrast to Boorstin and company, Hofstadter's writings are not "expressions of gratitude for the absence in this country of the class strife and instability that wracked Europe"). The principal problem with consensus history, however, was not whether its adherents cheered or booed the notion of an undivided nation. Rather, the problem with consensus history stemmed from the inaccurate identification of consensus in the first instance. After a relatively brief infatuation with consensus following World War II, U.S. historians returned to the emphasis on conflict because they concluded that the Progressives' mode of historical interpretation provided a more discerning lens with which to view the American past.

the law school.[71] As a result, too much of the leading scholarship on American constitutional history written by law professors inaccurately portrays the Supreme Court as interpreting the Constitution in a manner that articulates the consensus ideals of the American people.[72]

II. Consensus Constitutionalism in Legal Scholarship

More than five decades after John Higham identified and criticized the consensus school of American historians, the use of consensus as an explanatory device has become virtually extinct—at least among historians. Among law professors, however, consensus-driven historical interpretation not only exists but is flourishing, as many distinguished scholars currently writing legal history examine the past through consensus-tinted spectacles. These scholars contend that, throughout Supreme Court history, the Justices have read the Constitution so as to reflect Americans' consensus views.

Although the move toward consensus seems an especially awkward fit for constitutional law, today's consensus constitutionalism nevertheless flows from the same scholarly wellspring as the consensus history of the 1950s. Both groups of scholars write out of an effort to correct what they regard as the interpretive excesses of their predecessors. Hofstadter made plain in *The Progressive Historians* that his historical approach emphasized consensus because of the previous generation's emphasis on conflict.[73] Prior

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71. I do not mean to suggest, of course, that no law professors demonstrate an awareness of the consensus–conflict debate. One particularly apposite example of such awareness appears in Professor G. Edward White's anguished preface to the second edition of his overtly Hofstadter-inspired volume, *The American Judicial Tradition*:

> In the first edition I disclaimed any particular approach to historiographical issues. In particular, I indicated that my delineation of a 'tradition' of American appellate judging should not be taken as evidence of a 'consensus' approach to history. In retrospect, I think the institutional emphasis of the chapter subtitles may undermine that claim. I do want to say, however, that at the time of the first edition the connection between 'consensus history' and an institutionally oriented approach to appellate judging was not clear in my mind, so that if I held a 'consensus' perspective it was unconscious. That, of course, does not make the perspective any less significant: indeed, it now seems to me that I was more imprisoned by the structures of Process Jurisprudence, with its emphasis on the relative competence of various institutional decisionmakers in American society, than I would have cared to admit.

G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES xxii (3d ed. 2007). This preface, which White penned in 1988, reveals how large the consensus–conflict debate loomed decades after it began.

72. This instance is far from the first time that history's lessons have failed to make the journey to law schools. For important examinations of the sometimes awkward relationship between law and history, see Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L.J. 1917 (1999); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

73. HOFSTADTER, *supra* note 65, at 439.

historians "had pushed polarized conflict as a principle of historical interpretation so far that one could go no further in that direction without risking self-caricature," Hofstadter wrote.[74] "The pendulum had to swing in the opposite direction: if we were to have any new insight into American history, it began to appear that we had to circumvent the emphasis on conflict and look at the American past from another angle."[75]

In a similar vein, consensus constitutionalists writing today view their work as counteracting the excessive faith in the Supreme Court's ability to protect minority rights that once flourished in legal academia. According to this assessment, many legal scholars—basking in the reflected glory of the Warren Court's great liberal decisions—permitted themselves to be swept up in the wrongheaded belief that the Court can actually protect minorities from majorities. "The romantic image of the Court as countermajoritarian savior is shattered by historical reality," Klarman has explained.[76] Klarman has gone so far as to contend that legal scholars rely upon the myth that the Court can protect minority rights as a "psychological" crutch, which supports "our need to be comforted in the face of a terrifying reality: majorities can and do perpetrate many awful deeds."[77] Consensus constitutionalists portray their work as throwing the cold water of reality onto overheated and even delusional conceptions of judicial capacity. "The decisions of the justices on the meaning of the Constitution must be ratified by the American people," Friedman writes. "That's just the way it is."[78] Klarman has explained that "[m]ajority rule can be a scary thing," and that "[w]hile one can appreciate the psychological imperative for believing in the Court's countermajoritarian heroics, the historical record plainly suggests that such a view is chimerical."[79]

Despite the similarities, at least two significant analytical differences distinguish the views of Higham's consensus historians from the views of the scholars identified here as consensus constitutionalists. First, the two sets of consensus scholars differ on the question of American ideological dynamism. Whereas consensus historians emphasized that Americans shared a constant set of foundational beliefs, consensus constitutionalists note that Americans have repeatedly altered their conceptions and preferences. For the historians,

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74. *Id.*

75. *Id.*

76. Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U.L. REV. 145, 161 (1998); *accord* ROSEN, *supra* note 12, at 6 ("[M]ajoritarian scholars have argued that there's no need to worry about judges thwarting the will of the people, because the vision of antidemocratic courts protecting vulnerable minorities against tyrannical majorities is, in some sense, a romantic myth.").

77. Klarman, *supra* note 1, at 19.

78. FRIEDMAN, *supra* note 11, at 381.

79. Klarman, *supra* note 1, at 23–24.

Americans held an identifiable and static mindset.[80] For the law professors, Americans subscribe less to a mindset than to a particular set of views, and that particular set of views can (and has) undergone significant revision over time.[81]

This first difference leads to a second, which involves the additional work that the term *consensus* performs for consensus constitutionalists. For these legal scholars, *consensus* describes not only a mindset, but also a process of constitutional interpretation. Thus, consensus constitutionalists believe that, when the American people reach extremely broad agreement on a particular issue, the Supreme Court will almost inevitably issue an opinion in accordance with that extremely broad agreement.[82] The Court's opinion may slightly precede or slightly follow the crystallization of consensus, but the Court resists articulating public consensus only at its own peril.

A. Identifying Consensus Constitutionalism

Unlike consensus historians writing during the 1950s, who did not generally invoke the term *consensus* in describing American unity, consensus constitutionalists repeatedly avail themselves of that term—and of the undergirding ideology. For consensus constitutionalists, the notion of consensus does not, moreover, act as a marginal phenomenon. Rather, consensus acts as the central analytical device, as it encapsulates their core theory of how Supreme Court Justices interpret the Constitution.[83] When American citizens have reached (or, alternatively, are poised to reach) consensus regarding a particular issue, Supreme Court Justices amplify that consensus through constitutional interpretation. This process occurs, according to consensus legal scholars, because many of the most important provisions in the Constitution contain indeterminacy. The Fifth Amendment's demand for "due process of law," the Eighth Amendment's prohibition on "cruel and unusual punishments," and the Fourteenth Amendment's requirement of "equal

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80. *See* Higham, *supra* note 15, at 95 ("[W]e are told [by consensus historians] that America in the largest sense has had one unified culture.").

81. *See, e.g.*, ROSEN, *supra* note 12, at 3–4 (identifying parallels between the development of Supreme Court doctrine and changes in public opinion); SUNSTEIN, *supra* note 13, at 4–5 (arguing that an array of Supreme Court antidiscrimination decisions reflect endorsement of advancements in popular thinking).

82. For nineteenth-century scholarly adumbrations of this view regarding the public's influence on law, see DAVID M. RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY ch. 11 (forthcoming 2011 Cambridge University Press) (manuscript on file with the author) (observing that several leading American legal scholars during the late nineteenth century believed that "evolving custom is the ultimate basis for constitutional law" and that "[w]hen evolving custom advances beyond existing law . . . the law must change").

83. As the text above states, I am principally concerned with identifying and critiquing the core theory that unites consensus constitutionalism. The group of scholars identified here as subscribing to this school sometimes strike slightly different notes of emphasis and include minor qualifications of their overarching theory. Although I periodically address these modest differences and qualifications, I primarily address the main lines of their analyses.

protection"—to name only a few phrases—all demand considerable interpretive work. Supreme Court Justices give content to the document's indeterminate phrases by (both consciously and unconsciously) ascertaining the consensus views of their fellow citizens, and then imposing that view through their decisions.

Klarman's *From Jim Crow to Civil Rights* contains an early and particularly lucid expression of the consensus-constitutionalist thesis. The passage, which arrives toward the book's conclusion, merits quoting at length:

> Most of the Court's race decisions considered in this book imposed a national consensus on a handful of southern outliers. Reading dominant public opinion into the Constitution is a natural temptation for any interpreter. When people strongly favor a particular policy about which the Constitution offers no determinate guidance, they are understandably inclined to construe the document to support that policy. Because the justices broadly reflect society, if most people feel strongly about a particular policy, it is likely that most justices will as well. They will then face the same temptation to constitutionalize the position that they support as a policy matter.[84]

The "tendency to constitutionalize consensus and suppress outliers," according to Klarman, is far from limited to the Court's decisions regarding race.[85] Rather, in a sweeping manner reminiscent of Hofstadter's expansive and ill-fated introduction,[86] Klarman contends the trend can be broadened to explain wide swaths of constitutional law. "This book argues that because constitutional law is generally quite indeterminate," Klarman explains, "constitutional interpretation almost inevitably reflects the broader social and political context of the times . . . . In the absence of determinate law, constitutional interpretation necessarily implicates the values of the judges, which themselves generally reflect broader social attitudes."[87]

Other consensus constitutionalists similarly invoke the term *consensus* and the accompanying understanding of how the Court functions. Friedman embraces the consensus framework in the conclusion to *The Will of the People* to explain the Court's increased commitment to racial equality during the twentieth century:

> Consensus was a long time developing, but when it did, the justices' interpretation of the Constitution gave way to popular will. The justices in *Brown v. Board of Education* argued they were protecting

84. KLARMAN, *supra* note 10, at 453.

85. *Id.* at 453–54.

86. *See supra* text accompanying notes 20–26.

87. KLARMAN, *supra* note 10, at 5–6.

> constitutional rights, but once again it was evolving national views that supported the Court's judgment and enabled its enforcement.[88]

Sunstein's *A Constitution of Many Minds* also embraces consensus as a crucial dynamic in explaining how the Supreme Court operates. "[T]he Court is much more tightly connected to public consensus than we often acknowledge," Sunstein explains.[89] "Those who like popular constitutionalism, or who believe that most people are likely to be right, should be comforted to find that when the Court innovates, it almost always does so in a way that is responsive to a widely held social judgment, or one that is clearly emerging."[90] Finally, related to Sunstein's last point, Rosen's *The Most Democratic Branch* cautions the Supreme Court about "trying to anticipate a constitutional consensus that has not yet occurred."[91]

Consensus constitutionalists repeatedly emphasize that Supreme Court Justices are products of the times in which they live. In an effort to explain why the Court generally imposes consensus ideals upon the nation, Sunstein contends that "[p]erhaps [the] most important" explanation is that "members of the Court are part of the society whose constitution they interpret."[92] Friedman has similarly claimed, "Like all the other segments of society, courts simply are, *and will remain*, participants in American political life."[93] Klarman, who appropriately (but too intermittently) observes that Justices are drawn from an elite strata of society,[94] nevertheless suggests that the significance of the judiciary being composed of elites is likely trumped by the nation's overall social milieu. "Though the culturally elite values of the justices open space for them to deviate from popular opinion in their constitutional interpretations," Klarman writes, "that space is limited. The fact that the justices live in the same historical moment and share the same

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88. FRIEDMAN, *supra* note 11, at 381.

89. SUNSTEIN, *supra* note 13, at 142.

90. *Id.* Even that supposedly staunch defender of minority rights—the Warren Court—can, in Sunstein's estimation, be more accurately understood as an articulator of national consensus: "For all its aggressiveness, the Warren Court can itself be seen, most of the time, as reflecting rather than spurring social change." *Id.* Sunstein does, to his credit, acknowledge that no consensus exists in at least some constitutional cases. "If there is a consensus within the relevant community on a question of law, or on a question that bears on the right answer to a question of law, then judges should pay attention to that consensus," Sunstein explains. *Id.* at 176. "But in hard constitutional cases, a consensus will be rare, and judges will in any case be unlikely to want to rule in a way that rejects it." *Id.* Sunstein's book—taken as a whole—seems to contend that such hard constitutional cases seldom arise.

91. ROSEN, *supra* note 12, at 200.

92. SUNSTEIN, *supra* note 13, at 142. Sunstein continues: "They are unlikely to interpret that constitution in a way that society as a whole finds abhorrent or incomprehensible." *Id.*

93. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993).

94. *See* KLARMAN, *supra* note 10, at 452 (contending that *Brown* may have been decided when it was because racially egalitarian views were more widespread among elites in 1954 than among the nation as a whole); *id.* at 6 (noting that, at the beginning of the twenty-first century, "most justices continue to regard . . . prayer [in public schools] as unconstitutional, even though 60–70 percent of Americans disagree").

culture as the general population is probably more important to their constitutional interpretations than the fact that they occupy a distinct socioeconomic subculture."[95]

Viewing the Justices alongside their fellow citizens leads consensus constitutionalists to a rare gesture toward the significance of constitutional text: "We the People."[96] As its title suggests, Friedman's *The Will of the People* strikes the populist chord with particular force. "Ultimately, it is the people (and the people alone) who must decide what the Constitution means," Friedman writes.[97] "Judicial review provides a catalyst and method for them to do so. Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values."[98] In a similar vein, Rosen contends, "The courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people."[99] Even in the absence of judicial review, Sunstein contends that popular views shape modern constitutional understandings.[100] The prevailing conception of executive power in the field of national security, Sunstein writes, "is a product of judgments of a variety of persons and institutions and, in an important sense, of We the People."[101]

Friedman advances an unusually hardy version of the claim that society controls constitutional interpretation. Although the Court may—as a formal matter—issue judicial decisions, Friedman contends that the American people will eventually, through an ongoing dialogue with the Court, conjure the constitutional interpretations that they favor. "The magic of the dialogic system of determining constitutional meaning . . . is that it works whether the judges rule properly or not—precisely because everything important happens after they render their decision," Friedman explains.[102] "What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*."[103] Friedman views this process of constitutional interpretation as an iterative one, where the people ultimately will have their way: "It is through the process of judicial responsiveness to public opinion that the meaning of the

95. *Id.* at 452.

96. U.S. CONST. pmbl.

97. FRIEDMAN, *supra* note 11, at 367.

98. *Id.* at 367–68. Friedman's book brims with such sentiments. Consider only one more: "The American people signaled their acceptance of judicial review as the proper way to alter the meaning of the Constitution, but only so long as the justices' decisions remained within the mainstream of popular understanding." *Id.* at 196.

99. ROSEN, *supra* note 12, at 210.

100. SUNSTEIN, *supra* note 13, at 4.

101. *Id.*

102. FRIEDMAN, *supra* note 11, at 382.

103. *Id.*

Constitution takes shape. The Court rules. The public responds. Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public."[104] Klarman possesses a similar—though less extravagant—understanding of the close connection between the views of the American people and Supreme Court decisions. "[I]f the Court's constitutional interpretations have always been influenced by the social and political contexts of the times in which they were rendered, perhaps it is impossible for them not to be," Klarman writes.[105] "If that is so, then arguing against the inevitable seems pointless."[106]

The people's constitutional views, according to the consensus constitutionalists, can generally be obtained by examining public opinion. "In the modern era," Friedman explains, "the supposed tension between popular opinion and judicial review seems to have evaporated."[107] Although the meaning of "public opinion" has changed dramatically over time,[108] consensus constitutionalists appear to use that term interchangeably with polling data.[109] "[T]he Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup poll," Friedman writes.[110] For his part, Klarman favors the phrase "dominant public opinion" to Friedman's unmodified version: "Constitutional law generally has sufficient flexibility to accommodate dominant public opinion, which the justices have little inclination, and limited power, to resist."[111] When facing "dominant public opinion," Klarman contends Supreme Court Justices are powerless to act. "The justices reflect dominant public opinion too much for them to protect truly oppressed groups."[112]

Consensus constitutionalists use strikingly similar language to describe the judicial role. The Supreme Court not only identifies "consensus,"[113] but

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104. *Id.* at 383.

105. KLARMAN, *supra* note 10, at 449.

106. *Id.*

107. FRIEDMAN, *supra* note 11, at 15.

108. *See* William E. Forbath, *The Will of the People?–Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1195–1202 (2010) (tracing the varied meanings that the term "public opinion" has assumed).

109. Consensus constitutionalists sometimes express qualms about using polling data to indicate the people's will. FRIEDMAN, *supra* note 11, at 17; ROSEN, *supra* note 12, at 9; SUNSTEIN, *supra* note 13, at 211. These qualms are brushed aside, however, as consensus constitutionalism often places considerable weight upon polls to support its points.

110. FRIEDMAN, *supra* note 11, at 14; *see also* ROSEN, *supra* note 12, at 109 ("[A]n opinion along these lines would have been consistent with public opinion: in May, 2003, 60 percent of respondents in a Gallup poll said homosexual conduct between consenting adults should be legal.").

111. KLARMAN, *supra* note 10, at 449.

112. *Id.*

113. *E.g.*, FRIEDMAN, *supra* note 11, at 149, 381; KLARMAN, *supra* note 10, at 124, 146, 310, 453; ROSEN, *supra* note 12, at 13, 15, 41, 42, 89, 109, 124, 142, 196, 203; SUNSTEIN, *supra* note 13, at 142, 176.

it then takes that consensus and brings state "outliers"[114] into line with "national values."[115] Justices who wish to avoid "defiance"[116] of their rulings and to preserve the Court's "legitimacy"[117] steadfastly issue decisions consonant with "public opinion."[118] Some consensus constitutionalists suggest, moreover, that judicial decisionmaking amounts to the *ratification* of popular views. Friedman contends that Supreme Court decisions "serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of their Constitution."[119] Sunstein makes the same point: "The authority of the national government is a product of democratic processes, not of the federal judiciary; the Court's role has been largely to ratify what citizens and their representatives have done."[120]

Before critiquing consensus constitutionalism, it should prove helpful to explain briefly how that concept differs from two prominent, somewhat related ideas regarding the judicial function. Consensus constitutionalists sometimes invoke political scientist Robert Dahl's classic work on the Supreme Court.[121] Admittedly, consensus constitutionalists and Dahl are united in believing that the Court should not be viewed in utter isolation from the American public. Along three axes, however, consensus constitutionalism meaningfully departs from the Dahlian perspective. First, where consensus constitutionalism is predicated upon the views of the American people, Dahl's theory primarily addressed a narrower class of "the political elite."[122] Dahl made clear when he suggested the Court cannot long

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114. *E.g.*, FRIEDMAN, *supra* note 11, at 260, 286; KLARMAN, *supra* note 10, at 85, 124, 137, 236, 458–59; ROSEN, *supra* note 12, at 13, 124, 203.

115. *E.g.*, FRIEDMAN, *supra* note 11, at 273. *See also* KLARMAN, *supra* note 10, at 124 (discussing "national norms"); SUNSTEIN, *supra* note 13, at 167, 177 (discussing "social values").

116. *E.g.*, FRIEDMAN, *supra* note 11, at 61, 377; KLARMAN, *supra* note 10, at 210, 314, 317, 320, 358; ROSEN, *supra* note 12, at 24, 42.

117. *E.g.*, FRIEDMAN, *supra* note 11, at 330, 377; ROSEN, *supra* note 12, at xii, xiii, 8, 13–16, 31, 185, 199, 210.

118. *E.g.*, FRIEDMAN, *supra* note 11, at 123, 230, 250, 287, 295, 374–76; KLARMAN, *supra* note 10, at 6, 16, 21, 37, 39, 129, 140, 232, 264, 447, 450; ROSEN, *supra* note 12, at xii, 20, 55, 83, 107, 109, 202; SUNSTEIN, *supra* note 13, at 142–44, 167, 211–12.

119. FRIEDMAN, *supra* note 11, at 16; *see also id.* at 381 (contending that the Justices' constitutional decisions "must be ratified by the American people").

120. SUNSTEIN, *supra* note 13, at 4.

121. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For consensus-constitutionalist invocations of Dahl, see FRIEDMAN, *supra* note 11, at 260; ROSEN, *supra* note 12, at 6.

122. *See* Dahl, *supra* note 121, at 291 (voicing skepticism that the Supreme Court selection process yields "justices [who] would long hold to norms of Right or Justice substantially at odds with the rest of the political elite"). It is this emphasis on the role of governing elites that prevents Lucas A. Powe Jr.'s constitutional history from being included in the consensus camp. Although Friedman and Powe both issued one-volume histories of the Supreme Court within a few months of each other in 2009, the titles of the two works go a long way toward appreciating the considerable differences between the aims of the two scholars. Where Friedman's *The Will of the People* reveals its avowedly populist approach, Powe's *The Supreme Court and the American Elite, 1789-2008* reveals its effort to chronicle not the American people as a whole, but instead a particularly

resist the dominant views of "lawmaking majorities" that he used that term to indicate "a majority of those voting in the House and Senate, together with the president."[123] Second, where consensus constitutionalism advances a weak conception of the Court's ability to resist majority preferences, Dahl's assessment of judicial capacity can be seen—at least compared to consensus constitutionalism's—as potent.[124] "The Supreme Court is not ... simply an *agent* of the [governing] alliance," Dahl wrote.[125] "It is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution."[126] Dahl further suggested that the Court may play an effective policymaking role when its views do not clash with the norms of elected officials: "[A]t very great risk to its legitimacy powers, the Court can intervene in such cases and may even succeed in establishing policy. Probably in such cases it can succeed only if its action conforms to and reinforces a widespread set of explicit or implicit norms held by the political leadership ...."[127] Third, where consensus constitutionalism understands the Court to articulate the views of an American consensus, Dahl noted the role of "conflict" in judicial decisionmaking.[128]

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influential subset of the population. Powe's earlier constitutional history has also explicitly sought to chronicle elite views of governing coalitions, rather than the views of American citizens in their entirety. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS xv (2000) ("I hope to eschew the law professor's traditional Court-centered focus and instead place the Court where it belongs as one of the three co-equal branches of government, influencing and influenced by American politics and its cultural and intellectual currents."). Powe's analysis occasionally struck the chords of consensus constitutionalism, but such occasions do not make up his scholarship's analytical core.

123. Dahl, *supra* note 121, at 284; *see id.* at 283–84 (expressing skepticism about the wisdom of extrapolating from lawmaking majorities to a national majority).

124. Dahl's view of judicial capacity, it bears mentioning, is potent *only* in a comparative sense. *See id.* at 293 ("By itself, the Court is almost powerless to affect the course of national policy."). Although Gerald Rosenberg's *The Hollow Hope* surely influenced the thin conception of judicial capacity espoused by consensus constitutionalists, his work is largely distinct from the school of thought under review. Rather than portraying the Court as an institution that translates the People's views into law, Rosenberg—perhaps due to his training as a political scientist—viewed the Supreme Court principally as a branch of government. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE 71 (1991) ("Only when Congress and the executive branch acted in tandem with the courts did change occur .... In terms of judicial effects, then, *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.").

For an argument that Rosenberg and Klarman both afford insufficient credit to law's transformative power, see generally David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151 (1994).

125. Dahl, *supra* note 121, at 293.

126. *Id.*

127. *Id.* at 294. For a recent empirical study exploring congressional restraints on Supreme Court decisionmaking, see Jeffrey A. Segal, Chad Westerland, Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011).

128. *See* Dahl, *supra* note 121, at 294 (contending that the Court is no exception to the rule that "policy ... is the outcome of conflict, bargaining, and agreement among minorities").

It also merits exploring how consensus constitutionalism parts company with popular constitutionalism.[129] Consensus scholars believe that ordinary people play a role in constitutional interpretation, but that this role is indirect. For consensus constitutionalists, Justices continue to be charged with interpreting the document—at least in the first instance. Thus, American legal history reveals, in Professor Friedman's phrase, a type of "*mediated* popular constitutionalism."[130] The decisions that result from mediated popular constitutionalism effectively remove some of the thorns from the phenomenon that Alexander Bickel famously dubbed the "countermajoritarian difficulty."[131] Unadulterated popular constitutionalists, in sharp contrast to their mediated cousins, principally advocate that everyday people should *directly* interpret the Constitution's text.[132] Popular constitutionalists would, consequently, draw little solace from having Justices perform the work that citizens should perform for themselves.[133]

B. Critiquing Consensus Constitutionalism

Three central problems undermine the consensus constitutionalists' claim that the Supreme Court interprets the Constitution in a manner that re-

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129. The leading scholarly accounts of popular constitutionalism are: LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); and MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). For important critiques of the movement, see generally Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005); L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEXAS L. REV. 855 (2005) (both reviewing KRAMER, *supra*).

130. *See* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2610–13 (2003) (emphasis added) (contending that courts consider popular beliefs in resolving constitutional disputes).

131. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (Yale Univ. Press 2d ed. 1986) (1962). Professor Bickel, sounding much like today's consensus constitutionalists, stated that one function of judicial review is to "declar[e] an existing national consensus; that it is to enforce as law only the most widely shared values, so widely shared that they can be said to have the assent of something like Calhoun's concurrent majorities." *Id.* at 239. Notably, Bickel—like Dahl—espoused a comparatively broad understanding of the Court's ability to shape public opinion. "The Court is a leader of opinion, not a mere register of it," Bickel wrote. *Id.* Here, too, it is important to understand that Bickel's notion of the Court's ability to resist majority preference is broad only in comparison to his intellectual heirs; indeed, Bickel contended that the Court "must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed." *Id.*

132. *See, e.g.*, KRAMER, *supra* note 129, at 247 ("The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means.").

133. It also bears mentioning that popular constitutionalists often emphasize societal conflict between elites and nonelites. *See* Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 655 (2005) (reviewing KRAMER, *supra* note 129) ("As Kramer sees it, American constitutional history is riven by this conflict between the legal aristocracy and popular democracy.").

flects the views of the American people. First, the claim often imputes a unity of thought to American society that conceals the deep cleavages that exist among citizens regarding many constitutional questions. Second, the claim mistakenly portrays Supreme Court Justices (and the opinions they issue) as being almost inevitably in step with the citizens they help to govern. Third, the claim encourages Justices to believe that it is nearly impossible for the Court to protect rights that only a minority of citizens favors and, thus, to behave in a generally conservative fashion—lest they get too far out in front of the American people.

1. America, United.—Consensus constitutionalists insist that the Supreme Court be understood and evaluated in a historically contextualized manner. In this sense, their scholarship converges with one of the more important developments to have occurred in the field of history during the last five decades: the move toward social history. Instead of viewing the past as a series of events shaped singularly by "Great Men," historians have increasingly written works that attempt to chronicle the lives of ordinary citizens.[134] In language that can be understood to speak for the consensus school more broadly, Friedman explains: "Typically, histories of the Supreme Court focus on the justices and their decisions. Here, however, the chief protagonists are the American people."[135] But consensus constitutionalists clash with much modern historical writing because they replace an excessive emphasis on individuals with an excessive emphasis on a too often undifferentiated collective. Although consensus constitutionalists claim that the people exercise firm control over constitutional interpretation, the people simultaneously may want many different things—and sometimes they may not know what they want.

When the Court interprets the Constitution, it does not typically articulate popular consensus, if for no other reason than because doing so is typically not an option. A national consensus (even loosely defined) is simply nonexistent on many constitutional questions that reach the Court. From the nation's founding, Americans have held competing and contradictory conceptions of what the Constitution permits and what the Constitution requires.[136] "[T]he practical crisis of a legal order comes when

134. Prominent examples of social history abound. *See, e.g.*, JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1972); STEVEN HAHN, A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION (2003); JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985).

135. FRIEDMAN, *supra* note 11, at 16.

136. *See* Sanford Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 35, 40 (listing examples of groups and issues where disputes exist regarding the "conceptions of justice," including: masters and slaves; the military during World War II and Japanese-Americans; and abortion).

fundamentally different values are asserted within the political realm, so that one person's notion of justice is perceived as manifest tyranny by someone else," Sanford Levinson explained in 1977, noting that "[t]he lack of common interest between master and slave is obvious."[137] Such fundamental disputes are far from limited to the past. But consensus constitutionalism risks transforming America's motto—*e pluribus unum*—from an aspiration into a statement of fact. "Our present reiteration of the need for the rule of law is eloquent testimony to our yearning for a genuine national community," Levinson explained.[138] "[W]e mistake it at our peril, however, if we regard it as a reality."[139] Instead of articulating consensus, then, the Supreme Court is—to put the point bluntly—in the business of selecting winners and losers.[140] And it is misleading to pretend that we are all (or even nearly all) on the same team.

The notion of constitutional consensus also suggests that the American people have dedicated time to contemplating a particular question and have resolved their feelings about the question in a definitive manner. Friedman strikes this note with considerable force, contending that "as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people."[141] That may well accurately characterize what occurs on occasion, but citizens surely do not approach many constitutional questions (even on salient issues) in that manner.[142] People often feel ambivalent about how a particular question should be resolved, and may even articulate one view but conduct their lives in a manner inconsistent with that view. "How does one isolate and discover a consensus on a question so abstruse as the existence of a fundamental right?" Louis Jaffe queried more than forty years ago. "The public may value a right and yet not believe it to be fundamental . . . . There may be a profound ambiguity in the public conscience; it may profess to entertain a traditional ideal but be reluctant to act upon it."[143] Apart from ambivalence, moreover, many people surely experience apathy regarding how constitutional questions should be resolved. As Jaffe inquired: "[I]n many cases will it not be true that there has been no general thinking on the issue?"[144]

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137. *Id.*

138. *Id.* at 41.

139. *Id.*

140. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW iv (1978) (contending that judicial decisionmaking "inescapably" calls for "taking sides").

141. FRIEDMAN, *supra* note 11, at 14.

142. Consensus constitutionalists observe intermittently that the Supreme Court possesses greater leeway to resist the public's preferences on issues of low salience. *See, e.g.*, FRIEDMAN, *supra* note 11, at 377; SUNSTEIN, *supra* note 13, at 179.

143. Louis L. Jaffe, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986, 994 (1967).

144. *Id.*

Even within their own framework, conflict within society should receive greater emphasis than consensus legal scholars generally allow. After all, the very fact that what constitutes the consensus view changes over time means that there are periods of transition, with some people clinging to the old notion and other people rallying to what will become the new notion.[145] Such periods must, in some measure, be characterized by dissent and tumult and disagreement. One prevailing orthodoxy does not simply yield overnight to a different prevailing orthodoxy. Rather, the transitional process is often prolonged and combative, as individuals seldom cast aside deeply held beliefs without at least some measure of struggle. The consensus constitutionalists, however, generally avoid depicting this transitional reality. In their depiction, American citizens often appear to drift effortlessly en masse from one consensus to another consensus. While certainly not every single American is onboard with the consensus, the vessel contains just about everyone who is decent and thoughtful. Those who are not onboard, moreover, are dismissed as retrograde outliers. But even those outliers can be accommodated within the consensus framework by including them as part of an "emerging national consensus."[146]

An "emerging national consensus," however, is another way of putting a concept that might more accurately be characterized as a "nonexistent national consensus." If it has yet to emerge, after all, there is no consensus. Concededly, it is often possible to make fairly accurate assessments regarding which way the political and demographic winds are blowing, perhaps especially so if the contested issue elicits a stark generational divide.[147] Yet it is important not to assume that such trends will ultimately materialize in the form of an actual consensus.[148] Even after consensus has theoretically emerged, it merits emphasizing that consensus can—at least on occasion—erode. When the Court was in the midst of deciding *Roe v. Wade*,[149] for instance, Justice Harry Blackmun clipped a *Washington Post* article that discussed a June 1972 poll revealing that support for abortion rights stood at

145. *Cf.* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 5–9 (1962) (analyzing the cyclical nature of paradigm shifts in scientific thought).

146. KLARMAN, *supra* note 10, at 310.

147. *See, e.g.*, Andrew Koppelman, *Against Blanket Interstate Nonrecognition of Same-Sex Marriage*, 17 YALE J.L. & FEMINISM 205, 218 (2005) (noting the generational divide in public opinion on same-sex marriage and suggesting that this may ultimately lead to a decline in opposition to such marriage).

148. In encouraging Justices to exercise great caution before vindicating rights, Professor Rosen accounts for the possibility of Justices misreading the tea leaves. *See* ROSEN, *supra* note 12, at 200 ("[J]udges are often inept at constitutional futurology, and the backlashes that wrong guesses tend to provoke may delay the constitutional transformation the judges are attempting to predict. For this reason, if judges are inclined to anticipate the future, they should confine themselves to gentle nudges rather than dramatic shoves.").

149. 410 U.S. 113 (1973).

a then-unprecedented high of 64 percent.[150] In May 2010, however, a Gallup poll revealed that for the second straight year slightly more Americans categorized themselves as "pro-life" than as "pro-choice."[151] A similar erosion of what appeared to be an emerging consensus occurred five decades ago when opposition to the death penalty seemed to be crystallizing into consensus. In 1960, *Time* magazine headlined a piece that appeared to capture the prevailing sentiment: "Capital Punishment: A Fading Practice."[152] Some half a century later, it is now apparent that capital punishment's fade—assuming that it is, in fact, fading—is an unusually prolonged one.[153] This history suggests, then, that although it is occasionally possible to read the political and demographic winds, those winds sometimes swirl.

The notion of an "emerging national consensus" also exposes that consensus constitutionalists sometimes seem to espouse what amounts to a trickle-down theory of ideology. After elite members of society subscribe to a particular notion, consensus scholars suggest that it will not be long before that notion becomes accepted by people with less wealth and less education.[154] But there is no reason to believe that the views of elites necessarily must descend the class and educational ladders. It may well come closer to the mark to suggest that elites sometimes resemble more a class unto themselves than the shape of things to come.[155]

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150. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 91 (2005).

151. *See* Lydia Saad, *The New Normal on Abortion*, GALLUP (May 14, 2010), http://www.gallup.com/poll/128036/New-Normal-Abortion-Americans-Pro-Life.aspx (noting that 47 percent of respondents were "pro-life" and 45 percent of respondents were "pro-choice").

152. *Capital Punishment: A Fading Practice*, TIME, Mar. 21, 1960, at 19, *available at* http://www.time.com/time/magazine/article/0,9171,894775,00.html.

153. *See* Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEXAS L. REV. 353, 355, 360–65 (2010) (observing that, in the nearly six decades since the Advisory Committee to the Model Penal Code Project voted to recommend abolishing the death penalty in 1951, capital punishment has decreased but has not yet been eliminated).

154. *See* KLARMAN, *supra* note 10, at 308–10 (asserting that the *Brown* Justices and the rest of the cultural elite were more opposed to segregation than the general public, but that they were "part of the larger culture and inhabit[ed] the same historical moment" on the way toward a general societal opposition to segregation).

155. College graduates, for instance, have long approved of the Supreme Court's decisions regarding school prayer in higher percentages than people lacking college degrees. *See* Alison Gash & Angelo Gonzales, *School Prayer*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 71 tbl.3.2, 76 (Nathaniel Persily et al. eds., 2008).

The Court's two avowed originalists have—albeit with very different aims than my own—repeatedly pressed the point that the Court serves as a mouthpiece for elite views. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780–81 (2007) (Thomas, J., concurring) ("[I]f our history has taught us anything, it has taught us to beware of elites bearing racial theories."); *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda . . . ."). For a similar caution against elitism in the academic literature, see generally Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767 (1998).

Understanding widespread societal views to *influence* Supreme Court decisions is, of course, an unobjectionable statement. Although it is tempting to think that judges simply do what they think is "correct" in the cases before them, they do not live in isolation from society. At least some of what shapes a judge's conception of the "correct" decision stems from prevailing societal notions.[156] But the word *influence* does not fully capture the role that consensus constitutionalists assign to the people in constitutional interpretation. Rather than judicial opinions merely being *influenced* by the times and by society, it comes closer to the mark to say that consensus constitutionalists understand judicial opinions to be virtually *controlled* by them. For his part, Friedman makes clear his view of society's controlling role in constitutional interpretation by suggesting that the Court's initial decision is irrelevant to the matter's ultimate resolution; all that matters is that the Court places the item on the national agenda for the people to decide.[157]

Although other consensus constitutionalists do not adopt such an absolutist position, they too seem to credit society's control of constitutional interpretation. Consider, for instance, Klarman's assessment of the Supreme Court's performance during the period between World War I and World War II: "One cannot say whether the Supreme Court's race decisions of the interwar period were ahead of or behind the pace of extralegal change, but they certainly were not far out of step in either direction. As the racial attitudes of the country began to change, so did those of the justices."[158] Klarman's assessment of *Shelley v. Kraemer*[159] further underscores the way in which he views Supreme Court decisions as inextricably connected to popular sentiment. "*Shelley* was decided in the same year that a national civil rights consciousness crystallized," Klarman writes.[160] Klarman observes that the Court declined to review racially restrictive covenants in

156. To take an obvious example, imagine that a party filed a lawsuit in 1869 contending that the newly ratified Fourteenth Amendment's Equal Protection Clause provided a federal right to same-sex marriage. It seems safe to believe that such a claim would have been incomprehensible to the Justices serving on the Supreme Court during Reconstruction, and would have been dismissed in short order. In this hypothetical, a judicial decision denying a same-sex marriage claim in 1869 would have been influenced by its times. Probing a little deeper, however, it becomes apparent that *all* judicial opinions are influenced by the times in which they are decided. Should the Court entertain a same-sex marriage claim in the coming years (as appears likely), would it really be persuasive to suggest that a reasoned opinion either denying the claim or validating the claim was not influenced by the times?

157. *See* FRIEDMAN, *supra* note 11, at 382–83 (referring to "[t]he magic of the dialogic system"). Neil Siegel has suggested that this aspect of Friedman's worldview amounts to "a kind of Coase Theorem for constitutional theory: regardless of the way the Court interprets the Constitution and initially assigns constitutional entitlements, Americans will eventually bargain their way towards an interpretation that reflects their considered judgment as a people." Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. (forthcoming).

158. KLARMAN, *supra* note 10, at 169.

159. 334 U.S. 1 (1948).

160. KLARMAN, *supra* note 10, at 215.

1945, but just three years later the Court issued a unanimous decision prohibiting judges from giving effect to such agreements.[161] "Rarely have the justices changed their minds about an issue so swiftly and unanimously. But then, rarely has public opinion on any issue changed as rapidly as public opinion on race did in the postwar years."[162]

Friedman's account of the Supreme Court's two decisions involving anti-sodomy statutes offers a particularly arresting account of the seemingly inextricable link between societal views and judicial views:

> Gay rights, which raised so much ire among some conservatives (particularly the religious right) was a screamingly evident case of the Court's running right along the tracks of popular opinion . . . . Prior to *Bowers v. Hardwick*, the 1986 decision denying gay claims, gay organizations had been making headway against societal discrimination. Then, amid the general conservatism of Ronald Reagan's 1980s, gay activism engendered its own backlash. Anita Bryant, previously famous as the advertising personality for the orange juice industry, launched the first successful repeal of a gay rights ordinance . . . . *Bowers* also was decided at the height of public hysteria about the AIDS epidemic. While polls from 1977 to 2003 showed a steady increase in public willingness to accept the decriminalization of sodomy, data collected right around the time that *Bowers* was decided revealed a sharp reversal in this trend, with only 33 percent of the country supporting legalization.[163]

Meanwhile, by the time that the Supreme Court decided *Lawrence v. Texas*[164] in 2003, Friedman notes public opinion had become considerably more critical of criminalizing sodomy.[165]

There is little reason to believe, though, that Court decisions are so closely tied to such fleeting blips of polling data. *Bowers*,[166] it is worth recalling, was decided by a Court divided 5–4. Justice Lewis F. Powell Jr., one of the Justices in the majority, famously agonized over his decision in the case and publicly announced in 1990 that he regretted upholding the anti-sodomy provision.[167] It seems absurd even to intimate that Powell's vote in *Bowers* was motivated more by the public's response to AIDS, say, than by Powell's (mistaken) belief that he had never met a gay person.[168] On the

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161. *Id.*

162. *Id.*

163. FRIEDMAN, *supra* note 11, at 359.

164. 539 U.S. 558 (2003).

165. *See* FRIEDMAN, *supra* note 11, at 359–60 (describing political, social, and judicial developments that illustrated increasing acceptance of gays and lesbians).

166. Bowers v. Hardwick, 478 U.S. 186 (1986).

167. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 530, 537 (Fordham Univ. Press 2001) (1994) (recounting that Justice Powell struggled intensely with his decision in *Bowers*).

168. *Id.* at 521.

strongest understanding of this societally mandated view, Justice Kennedy's statement for the Court in *Lawrence* that *Bowers* "was not correct when it was decided" comes close to being a non sequitur.[169] Calling a Court decision wrong on the day that it was decided is, for consensus constitutionalists, not wholly dissimilar from calling the clouds wrong for raining. Ill-conceived judicial opinions, like days of stormy weather, are not to be criticized; they are to be endured.

Friedman's take on *Bowers* is illuminating because it demonstrates the way consensus constitutionalism can comfortably accommodate many cases, regardless of how they are decided. If the Court had—as was a distinct possibility[170]—invalidated the anti-sodomy statute in *Bowers*, it is easy to envision a consensus constitutionalist attributing the decision to an emerging national consensus regarding the impermissibility of treating homosexuals as second-class citizens. Consensus constitutionalism, then, is sometimes marred by a nonfalsifiable approach that prevents assessment of the theory's validity.[171]

2. The Inevitability of Judicial Decisions.—Given that the consensus-based approach to legal history is predicated on understanding Justices to march along with society at large, it is not surprising that they also view judicial decisions as seemingly inevitable. Consensus constitutionalists come dangerously close to viewing Supreme Court decisions as being somehow foreordained by the zeitgeist. On this telling, in order to know what the Court will decide on a given constitutional question, one needs to know only the views of the American people. But consensus constitutionalism's emphasis on judicial inevitability makes for an unsatisfying approach to history because it examines the past through the wrong end of the telescope. Judicial decisions are a good deal more contingent and indeterminate than consensus constitutionalism allows, and judges have a considerably wider

169. *Lawrence*, 539 U.S. at 578.

170. Klarman, it is worth noting, has suggested that had the Supreme Court invalidated anti-sodomy statutes in 1986, the decision would not have been countermajoritarian. *See* Klarman, *supra* note 1, at 11 (referencing opinion polls that suggested half of the country would have supported a contrary result in *Bowers*).

171. *See* MARK TUSHNET, WHY THE CONSTITUTION MATTERS 105–06 (2010) ("If the Court invalidates an unpopular policy, it's simply acting against an outlier. If it invalidates a popular one, it's simply doing what the nation's elites want . . . . There's nothing you can't explain in this way."). Rendering theories incapable of being disproven is a commonplace practice within legal academia. For a critique of one such instance in the race-relations arena, see Justin Driver, *Rethinking the Interest-Convergence Thesis*, 104 NW. U.L. REV. (forthcoming 2011) (contending that the validity of the interest-convergence thesis cannot be assessed in light of its identification of "contradiction closing" cases).

range of viable options open to them than consensus constitutionalism admits.[172]

Although consensus constitutionalists view themselves as being more attuned to history than other constitutional scholars, they too often advance an overly determined conception of judicial possibilities that existed in a particular historical moment. Instead of contemplating and explicating the *range of potential opinions* that the Court could have issued at a particular time, Justices are presented as having only one practical route in deciding a given case—which is no decision at all. That consensus constitutionalism even gestures toward history is heartening. But it would be more desirable still if historically minded legal scholars sought to capture the choices alongside the constraints that pervade Supreme Court decisionmaking.

Because consensus constitutionalists view Court decisions as being principally driven by the values of the American people, they underemphasize the role played by judicial personnel in shaping constitutional understandings. Though liberals today express concern about the current Court,[173] Friedman, for instance, suggests that they need not worry: "[T]he long-run fate of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line."[174] This quotation vividly captures how consensus constitutionalism understands society to place extremely tight parameters upon the Court's ability to resist popular preferences.[175]

Sunstein's account of *District of Columbia v. Heller*[176] illustrates how consensus constitutionalists permit societal explanations for judicial decisions to overshadow explanations involving the Court's composition. In determining that the Second Amendment protects an individual's—as distinct from a militia's—right to possess firearms three years ago, Sunstein contends:

> [T]he Court was greatly influenced by the social setting in which it operated, where that judgment already had broad public support. In recent years, there has come to be a general social understanding that the Second Amendment does protect at least some kind of individual right; and that understanding greatly affects American politics.[177]

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172. *See* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070 (2010) (qualifying Professor Friedman's statement that the Court stays within the "mainstream of public opinion" by noting that "the mainstream of opinion can be a broad current, encompassing a range of controversial viewpoints").

173. *See, e.g.*, ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2010).

174. FRIEDMAN, *supra* note 11, at 369.

175. *See id.* at 378 ("The Supreme Court decides few enough cases, and the decisions are of sufficient import, that interested eyes always are watching the docket.").

176. 128 S. Ct. 2783 (2008).

177. SUNSTEIN, *supra* note 13, at 5.

Rather than attributing *Heller* to five Republican-appointed Justices, Sunstein contends that the Court issued the decision in light of a public consensus regarding firearms: "The Supreme Court's ruling in favor of an individual's right to bear arms for military purposes was not really a statement on behalf of the Constitution, as it was written by those long dead; it was based on judgments that are now widespread among the living."[178] Although Sunstein does not cite any corroborating polling data, a 2008 *USA Today* poll verifies that a large percentage of Americans favored the right conferred by the Court in *Heller*.[179] Seventy-three percent of respondents contended that the Second Amendment protects an individual right; just 20 percent of respondents understood the Second Amendment to confer a right only to militias.[180]

Was *Heller* motivated principally by "a general social understanding" and "judgments that are now widespread among the living"? Or, instead, was *Heller* motivated principally by an ideological commitment to firearm ownership that has emerged to become a part of orthodoxy in elite conservative legal circles? Finding greater explanatory force in the second explanation would at least have the virtue of helping to explain *Heller* being decided 5–4, with the five Justices in the majority all adhering to Federalist Society precepts more often than each of the four dissenting Justices.[181] Consensus constitutionalism, with its emphasis on the zeitgeist and its disregard for judicial ideology, has difficulty accounting for such a voting pattern. If a magic genie granted an advocate of firearm control a single wish, would it be wiser to use the wish to: (a) change the minds of 150 million Americans on the meaning of the Second Amendment, or (b) replace a single conservative Justice in the *Heller* majority with a judge of one's choosing? It seems quite probable that the second option would be the prudent course if the goal were to have the Court uphold the District of

178. *Id.*

179. Joan Biskupic, *Do You Have a Legal Right to Own a Gun?*, USA TODAY (Feb. 26, 2008), http://www.usatoday.com/news/washington/2008-02-26-guns-cover_N.htm.

180. *Id.* But even this overwhelming disparity in public opinion may not mean, as Sunstein suggests, that "a general social understanding" exists regarding the Second Amendment's meaning. Indeed, recent law review issues teem with evidence belying this alleged "general social understanding." *See, e.g.*, David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. REV. 1295, 1295 (2009) (disagreeing with *Heller* on the Second Amendment's meaning). Public opinion percentages—even overwhelmingly large percentages—can be misleading. This is so, in part, because polls seldom measure the intensity of the beliefs they quantify. In other words, people may not only disagree with *Heller*'s interpretation of the Second Amendment, but many of them may disagree vehemently.

181. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1068 (2001) ("Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties.").

Columbia's firearms ordinance.[182] None of the foregoing should be taken as discounting the role that social movements may play in influencing constitutional interpretation.[183] It is, however, to suggest that legal scholars should not attempt to understand outcomes in Supreme Court cases primarily by examining the attitudes of 300 million Americans toward constitutional questions when they can get a better read by paying attention to the attitudes of just nine.[184]

Consensus constitutionalists also adopt an exceedingly thin conception of the field of law itself. Indeed, the triumphant manner in which some consensus scholars trumpet the democratic influence upon constitutional interpretation makes it tempting to lose sight of the fact that the consensus school seems to believe that law is simply politics by another name.[185] A Justice's job does not, of course, involve merely applying existing law to new facts in order to derive legal conclusions. To the contrary, judging often calls for the exercise of judgment—especially when dealing with the Constitution's open-ended clauses. Acknowledging this reality, however, does not mean believing that constitutional interpretation is divorced from text, precedent, and principle, or that political considerations alone give content to law's indeterminate provisions. When judges hear cases, in other words, they do not fly by the seats of their robes and allow themselves invariably to get swept up in whatever happens to be the moment's prevailing mood. Among other tasks, Justices examine constitutional text and structure, parse prior cases, contemplate historical practices, and think about the conse-

182. "Quite probable" does not, of course, mean "certain," as many members in good standing on the legal left have come around to the view that the Second Amendment protects an individual right. *See, e.g.*, Adam Liptak, *A Liberal Case for Gun Rights Helps Sway Federal Judiciary*, N.Y. TIMES, May 6, 2007, at A1 (analyzing liberal support for individual Second Amendment rights and including Akhil Amar, Sanford Levinson, and Laurence Tribe among "leading liberal constitutional scholars" espousing that belief).

183. *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192–93 (2008) (arguing that the decision in *Heller* was based on "understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism" as opposed to originalism).

184. Nothing here, of course, should be taken as contending that the Justices can be understood in utter isolation from the cultures (legal and otherwise) that produced them and that they in turn produce. *Cf.* Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (analyzing the interrelated nature of law and culture). Indeed, the appointment of a Justice can usefully be understood as an instance where a particular political regime attempts to transform its views into law. *See* TUSHNET, *supra* note 129, at 106–12; Balkin & Levinson, *supra* note 181, at 1068.

185. *See* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 125 (2009) (observing that the "belief that constitutional law is not really law at all, but politics, is also becoming more explicit in the work of some constitutional scholars"); Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 977 (2005) ("Contemporary critics of judicial review . . . view constitutional questions not as legal questions but as political ones.").

quences of ruling in a particular manner.[186] But to contend that constitutional interpretation in all but the most straightforward cases contains virtually no craft or content is to revive a peculiar form of a practice that was once labeled "trashing."[187]

Consensus constitutionalism's assertion that Justices are products of their times, moreover, leads to a distorted understanding of judicial capacity. On a superficial level, of course, this statement is completely unobjectionable. On another level, though, this notion seems to border on the tautological. What, precisely, would it mean to have a Justice who was not a product of the times in which he or she lived? Can a Justice actually be produced by another time?[188] The very questions sound like nothing so much as a conceit from a science-fiction film. By this statement, the consensus constitutionalists must mean a good deal more than that Justices do not possess the ability to travel across time. Yes, Justices' conceptions of law and morality are surely influenced by the times in which they live. But American society contains a widely diverging range of opinions on many questions at any particular time. Members of the same society and even members of the same class can and do hold radically competing conceptions regarding what is good for society. After all, despite being drawn from an elite subset of American society, Supreme Court Justices articulate a relatively broad array of viewpoints. Consensus constitutionalists have, in sum, too often depicted Justices as operating in more ideologically constrained societal circumstances than actually existed during their careers.[189]

The emphasis on contextual limitations that consensus constitutionalists generally espouse also spurs them to evaluate Justices—and the opinions they write—in a manner that is, above all, nonjudgmental.[190] In contrast to legal scholars who praise judicial decisions that they like and condemn judi-

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186. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (identifying the modalities of "constitutional argument").

187. *See generally* Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

188. There may be no stronger rebuttal to these rhetorical questions than the very existence of Justice David Hackett Souter. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 43 (2007) (noting that Souter "had the habits of a gentleman from another century. During the day, he would leave the lights off in his office and maneuver his chair around the room, reading briefs by the sun.").

189. *See* Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1629 (1986) (criticizing Schmidt for not "judging the justices in a broader context that would have placed higher demands upon their conduct").

190. Among consensus constitutionalists, Sunstein's book affords the most room for judges at least to contemplate undercutting majority preferences. *See, e.g.*, SUNSTEIN, *supra* note 13, at 215 ("Of course judges are not going to rule in a social vacuum; they live in the world. But those who live in the world sometimes do best if they ask, with some seriousness, whether a challenged practice really is justified, not whether most people like it."); *id.* at x ("In many areas of constitutional law, judges should pay respectful attention to the considered judgments of their fellow citizens. But in some of the hardest cases, again in the domain of equality, the judgments of We the People are a product of confusion or bias."). The general thrust of the book, alas, counsels against that tack.

cial decisions that they dislike, consensus constitutionalists often adopt the pose of neutral arbiters. It makes little sense either to applaud or to boo judicial decisions and their authors, after all, if these decisions simply reflect the times in which they were issued. It may feel gratifying to attack the moral shortcomings of prior generations when that immorality appears in the form of legal doctrine, but such attacks make for shoddy history if they are leveled without regard to the historical context in which those decisions are issued. As Klarman explains in his book's introduction:

> One implication of this perspective on constitutional interpretation is that the justices are unlikely to be either heroes or villains. Judges who generally reflect popular opinion are unlikely to have the inclination [to issue countermajoritarian decisions], and they may well lack the capacity, to defend minority rights from majoritarian invasion.[191]

Klarman subscribes to this theory so ardently that he seriously contemplated calling his book *Neither Hero Nor Villain*, rather than *From Jim Crow to Civil Rights*.[192]

Klarman has contended that railing against anticanonical cases constitutes not merely cheap moralizing but a dangerous form of self-delusion. He has decried what he regards as the "pervasive tendency to reflect upon constitutional issues in light of today's deeply-ingrained assumptions and social context, rather than seriously endeavoring to reconstruct the past horizons of those judges actually charged with resolving constitutional disputes."[193] Instead of dismissing *Plessy v. Ferguson*[194] as "a product of racist judging,"[195] he contends that constitutional scholars should instead stress that the decision was a product of its times. "Background social, political, economic, and ideological forces created a climate within which judicial invalidation of a railway segregation law would have been dramatically countermajoritarian, and indeed virtually unthinkable," Klarman suggests.[196] "The *Plessy* decision was, indeed, so fully congruent with the dominant racial norms of the period that it elicited little more than a collective yawn of indifference from a nation that would have expected precisely that result from its Supreme Court."[197] Deploying similar analysis, Klarman

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191. KLARMAN, *supra* note 10, at 6.

192. *See* Michael Klarman, *Neither Hero Nor Villain: The Supreme Court, Race, and the Constitution in the Twentieth Century* (Univ. of Va. Sch. of Law Legal Studies Working Papers Series, Working Paper No. 99-3a, 1999), *available at* http://ssrn.com/abstract=169262.

193. Klarman, *supra* note 1, at 31.

194. 163 U.S. 537 (1896).

195. Klarman, *supra* note 1, at 26.

196. *Id.*

197. *Id.* at 26–27 ("How can a ruling that could not realistically have come out the other way be 'a grave mistake,' 'ridiculous and shameful,' or 'a catastrophe'?").

contends *Korematsu v. United States*[198] logically springs from the 1940s era in which it was decided.[199]

In neither *Plessy* nor *Korematsu* was, in Klarman's estimation, "a contrary outcome realistically possible. Only by ignoring the background historical context of these decisions can we delude ourselves into thinking otherwise."[200] Whatever the truth of the aphorism that people who do not know history are doomed to repeat it,[201] Klarman believes that historical knowledge does nothing to inoculate people from the doom of repetition. Klarman has criticized the pervasive belief among the legally sophisticated that U.S. citizens have learned a valuable and lasting lesson from the Court's widely maligned decision in *Korematsu*. "We pride ourselves on believing that the Japanese-American exclusion and internment could not take place today, even under similar wartime exigencies, and that if it somehow did the Court would rightly strike it down," Klarman wrote.[202] Klarman expressed deep skepticism regarding the proposition that the United States had learned anything that would not prove ephemeral in the face of national trauma. "But this interpretation of *Korematsu* seems quite dubious," Klarman continued.[203] "Only by ignoring the context in which the military exclusion order and the executive decree authorizing it were issued can we confidently conclude that a 'right-thinking' Supreme Court would have invalidated it."[204]

Viewing the legal question presented in *Korematsu* as resulting in the inevitable validation of the detention program represents a kind of legal fatalism. That case, it merits emphasizing, was decided by a 6–3 margin.[205] If a legal position can garner three votes at the Supreme Court, it does not seem beyond the realm of the possible that two additional Justices could have voted to invalidate the program.[206] *Korematsu*'s three dissenting Justices, moreover, did not offer milquetoast critiques of the U.S. military policy and the Court's decision upholding that policy. Rather, the dissenting Justices critiqued the program in language that sounds stirring to contemporary ears. Justice Murphy's dissenting opinion, for instance, expressed the ideas of a

198. 323 U.S. 214 (1944).

199. *See* KLARMAN, *supra* note 10, at 449; Klarman, *supra* note 1, at 28–29.

200. Klarman, *supra* note 1, at 31.

201. *See* GEORGE SANTAYANA, THE LIFE OF REASON 82 (Prometheus Books 1998) (1905) ("Those who cannot remember the past are condemned to repeat it.").

202. Klarman, *supra* note 1, at 28.

203. *Id.*

204. *Id.*

205. Korematsu v. United States, 323 U.S. 214, 225–33 (1944) (Roberts, J., dissenting); *id.* at 233–42 (Murphy, J., dissenting); *id.* at 242–48 (Jackson, J., dissenting).

206. Klarman notes the existence of *Korematsu*'s three dissenters, but only to suggest that the number would have been smaller had the case been decided earlier. Klarman, *supra* note 1, at 29 ("[T]he pressure for internment was so great in early 1942 that one might plausibly question whether there would have been as many as three dissenters on the Court had *Korematsu* been decided while the outcome of the war was still genuinely in doubt, rather than in December 1944.").

modern racial egalitarian in excoriating the program as "fall[ing] into the ugly abyss of racism."[207] In a similar vein, Justice Roberts referred to the "so-called Relocation Centers" as "a euphemism for concentration camps."[208]

Consensus constitutionalism is admirable to the extent that it can be understood as encouraging legal scholars to distinguish hindsight-driven judicial criticisms from judicial criticisms that faithfully recreate a given time's constraints. But its adherents err by inaccurately diminishing the range of historical possibilities that exist at a particular historical moment and by discounting the very real value that stems from maintaining an anti-canon of despised cases in constitutional law.[209] When legal scholars and the public criticize decisions from the past (even if they do so in a somewhat ahistorical fashion), they endeavor to shape and improve the nation's constitutional future. Law professors signal to their students, and simultaneously remind themselves, that some judicial decisions are so wrongheaded that they merit scorn and condemnation. A similar process unfolds on the national stage when nominees to the Court and Senators serving on the Judiciary Committee inveigh against the evils of *Korematsu*.[210] Excoriating judicial decisions, then, can serve a valuable purpose—one that should not be discarded quite so readily.

Even assuming that some of the vituperation directed at anticanonical cases contains an element of "presentism,"[211] such criticism inculcates the indispensable lesson that historical assessments unfold (and change) over the course of decades. This lesson encourages law students, some of whom will one day become judges and even Justices, to take the long view. Chief Justice Warren's otherwise honorable legacy is stained by his participation in the exclusion of Japanese citizens while he served as California's attorney general during World War II.[212] The way in which United States Senators roundly vilify *Korematsu* during confirmation hearings instills in not only the

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207. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

208. *Id.* at 230 (Roberts, J., dissenting).

209. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998) ("The construction of an academic theory canon is accompanied by the formation of an 'anti-canon' of cases that any theory worth its salt must show are wrongly decided."); Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 245 (1998) ("Constitutional law . . . has not only a canon composed of the most revered constitutional texts but also an anti-canon composed of the most reviled ones. *Lochner* and *Plessy* are anti-canonical cases.").

210. *See* Adam Liptak, *Path to Court: Speak Capably But Say Little*, N.Y. TIMES, July 12, 2009, at A1 ("Here is the basic script: the nominee is expected to praise Brown . . . and deplore cases like Dred Scott . . . and Korematsu . . . .").

211. *See* V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 992 n.191 (2009) (defining presentism as "the tendency to look at the past through contemporary eyes").

212. *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 75 (1998) (surveying Chief Justice Warren's discriminatory actions against Japanese citizens).

nominee, but the public at large, the lesson that race-based banishment clashes with the nation's modern constitutional values.[213] The point here is not to contend that a program of ethnic exclusion of U.S. citizens could *never* occur after *Korematsu*. (Such a contention would, in any event, veer too close toward the inevitable view of history that I seek to challenge.) The ritualized condemnation of *Korematsu*, however, may well reduce the likelihood that such an exclusionary program will recur. It is certainly plausible that a desire to avoid reenacting the shameful wartime exclusionary practices that received validation in *Korematsu* motivated President George W. Bush's speech that he delivered on September 20, 2001, just nine days after the terrorist attacks.[214] In that speech, of course, President Bush repeatedly emphasized the need to avoid viewing an entire race or an entire religion as the enemy of the United States.[215]

3. Normative Implications.—Consensus constitutionalists internally divide upon whether their work should be read as exclusively describing historical developments or whether it also contains normative implications. Rosen and Sunstein, for their parts, have made clear that Supreme Court Justices not only do (as a descriptive matter) generally follow consensus in their constitutional interpretations, but that they should (as a normative matter) almost always be applauded for doing so. Friedman and Klarman, in contrast, frame their arguments as occupying only the descriptive realm and eschew drawing normative conclusions. If Justices receive the dire message about judicial capacity that Friedman and Klarman send, however, their arguments, too, could be understood as containing normative implications.

Neither Rosen nor Sunstein buries the contention that it is, on the whole, desirable for the Court to constitutionalize consensus. "My point is that judges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable and then enforce those views as consistently as possible," Rosen writes.[216] In his conclusion, Rosen puts the point categorically: "The courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people."[217] Sunstein likewise suggests that judges should generally exhibit great caution about

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213. *See Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 209–10 (1993) (statement of Sen. Paul Simon, Sen. Comm. on the Judiciary) (criticizing the Court's deference to public opinion in that "tragic decision").

214. *President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, Sept. 21, 2001, at B4.

215. *Id.* ("The enemy of America is not our many Muslim friends. It is not our many Arab friends. Our enemy is a radical network of terrorists and every government that supports them.").

216. ROSEN, *supra* note 12, at 13.

217. *Id.* at 210.

issuing potentially divisive rulings. "In unusual but important cases, judges are likely to have enough information to know whether outrage will exist and have significant effects, and in such cases they should hesitate before imposing their view on the nation," Sunstein writes.[218]

Friedman and Klarman purport merely to describe—rather than to assess normatively—historical trends in constitutional interpretation. Friedman poses an open-ended question toward the end of his volume:

> What we ought to care deeply about, what we ought to be asking, is how much capacity the justices have to act independently of the public's views, how likely they are to do so, and in what situations. Is the Court even capable of standing up for constitutional rights when they are jeopardized by the majority?[219]

In the concluding chapter of *From Jim Crow to Civil Rights*, Klarman similarly disclaims drawing prescriptive lessons from the nearly 450 pages of preceding history that chronicles some seven decades of constitutional history. "Whether social and political context *should* play such a large role in constitutional interpretation is beyond the scope of this book," Klarman writes.[220]

The division between the descriptive and the normative, however, cannot be maintained quite as tidily as Friedman and Klarman would have it. The two scholars contend that the Court is nearly powerless to protect minority viewpoints and admonish that judges who attempt to offer such protection will likely succeed only in inflicting damage upon the judiciary and may even retard the very cause that they wish to advance. "It simply is the case that the judiciary's capacity to give the Constitution meaning, to protect minority rights, always has been limited by popular support for those

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218. SUNSTEIN, *supra* note 13, at 164. Sunstein writes this sentence in the context of discussing how "Justice Bentham" might resolve cases before him. There is no reason to believe, however, that Justice Bentham's views on this score deviate appreciably from Sunstein's. Indeed, earlier in the book, Sunstein (undoubtedly speaking for Sunstein) writes: "I conclude that in unusual but important cases, judges should indeed hesitate if many people disagree with their initial inclinations." *Id.* at 15.

Sunstein has long been on record as suggesting that he believes that law professors, unlike historians, write history with a normative slant. *See* Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995) (suggesting that rather than merely "uncovering the 'facts,' . . . constitutional lawyers, unlike ordinary historians, should attempt *to make the best constructive sense out of historical events associated with the Constitution*"); *id.* at 605 ("The historian is trying to reimagine the past, necessarily from a present-day standpoint, but subject to the discipline provided by the sources and by the interpretive conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture's repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future.").

219. FRIEDMAN, *supra* note 11, at 373.

220. KLARMAN, *supra* note 10, at 449. Klarman's scholarly work often disavows normative implications. *See, e.g.*, Klarman, *supra* note 1, at 24 ("For present purposes, though, the key point is positive, not normative. . . .").

decisions," Friedman explains.[221] Commentators who worry that judicial review will stifle democratic preferences and commentators who hold out hope that judicial review will protect minorities share an "underlying assumption" that is "deeply problematic": "that the judiciary even has the *capacity* of running contrary to the will of the majority."[222] Klarman contends, "The justices are too much products of their time and place to launch social revolutions. And, even if they had the inclination to do so, their capacity to coerce change is too heavily constrained."[223] He further explains: "Constitutional law generally has sufficient flexibility to accommodate dominant public opinion, which the justices have little inclination, and limited power, to resist."[224] A Supreme Court Justice who heeded the historical warnings of consensus constitutionalism would surely be less willing to protect minority rights, given that doing so would almost certainly constitute a quixotic effort. At least to the judge's ear, then, the purportedly descriptive assumes a distinctly normative ring.

The work of Friedman and Klarman also seems to contain not-so-subtle normative warnings regarding the dangers of judges getting too far out in front of the public. Friedman writes:

> The most telling reason why the justices might care about public opinion, though, is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics. Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction. If the preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.[225]

It seems difficult to believe that Justices reading this language and taking it seriously would not experience great apprehension about issuing decisions they suspect will prove unpopular. Few Justices welcome the opportunity to bring "bad things" upon themselves and the institution they serve. Klarman, commendably, avoids such menacing language. But one lesson of Klarman's famed "backlash" thesis suggests that the Court may succeed in (temporarily,

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221. FRIEDMAN, *supra* note 11, at 380–81.

222. *Id.* at 370; *see id.* ("To the extent that the judges have had freedom to act, it has been because the American people have given it to them. Judicial power exists at popular dispensation.").

223. KLARMAN, *supra* note 10, at 468.

224. *Id.* at 449.

225. FRIEDMAN, *supra* note 11, at 375; *see also id.* at 376 (invoking the political science terminology of "anticipated reaction," Friedman suggests that "[t]he justices don't actually have to get into trouble before retribution occurs; they can sense trouble and avoid it. The people do not actually have to discipline the justices; if they simply raise a finger, the Court seems to get the message.").

at least) harming groups it seeks to help.[226] Accepting Klarman's account, reasonable Justices could conclude that the wisest way to aid an oppressed minority would be to refrain from issuing countermajoritarian decisions and allow society to proceed at its own majoritarian pace. Justices can perhaps help minorities mainly, in other words, by simply getting out of the way.

By portraying American history in a manner that underplays significant and substantial conflict, consensus constitutionalists make it appear that Justices generally lack the desire (and may well lack the capacity) to issue opinions that clash with popular preferences. In its boldest articulation, this theory views the Court as merely bringing a few outliers into line with the national mainstream. Consequently, judicial opinions that have in actuality required selecting sides in hotly contested arenas—decisions, that is, that required some measure of courage—are rendered easy. Consensus constitutionalism's tendency to emphasize ideological homogeneity, where ideological diversity actually reigned, has the potential effect of imbuing Justices with an inaccurately high conception of the threshold of societal agreement that is necessary to issue a decision protecting minority rights. As a result, if current Justices heed the lesson that consensus constitutionalism purports to teach, they may prove reluctant to issue decisions protecting minority rights on divisive questions—even if they believe that the decision can be legitimately grounded in constitutional law.

Consensus constitutionalists, thus, offer an anemic notion of the judiciary's capacity to protect minority rights against the majority's will. Indeed, they suggest that scholars who believe that the Court plays a significant role in checking majority preferences are misguided at best and delusional at worst. But at the risk of being labeled both a hopeless "romantic" and "psychological[ly]" weak,[227] it requires observing that consensus constitutionalism offers an unduly bleak assessment of the Court's ability to protect rights favored by only a minority of Americans.[228] History emphatically does not reveal that the Court invariably follows in the direction that the public would lead. Instead, modern history suggests the Court acts with some frequency as a countermajoritarian force in American society.

Although this Article does not present the occasion to mount an expansive defense of the claim that courts have often protected disfavored groups, it bears mention here that the Court not only has offered protection to

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226. *See* KLARMAN, *supra* note 10, at 385–442; Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85–149 (1994); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994) (all arguing that *Brown* encouraged southern politicians to espouse hardline views opposing racial desegregation and eliminated the political space available for racial moderates).

227. Klarman, *supra* note 1, at 6, 23–24.

228. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) ("In our view the pendulum has swung too far, from excessive confidence in courts to excessive despair.").

minorities, but that it has done so in cases that are of high salience to the American people. In a forthcoming work, I intend to defend at length the claim that the Court has in fact offered minorities a "haven[] of refuge."[229] Two brief examples from the Court's recent decisions will need to suffice for present purposes. First, the Court served as a plainly countermajoritarian entity when it decided *Boumediene v. Bush* three years ago.[230] Indeed, public opinion polling found that only 34 percent of Americans thought that noncitizen terrorism suspects being held in Guantanamo Bay should be permitted to use the civilian court system to challenge their detention and 61 percent thought that they should not be permitted to do so.[231] Even assuming that terrorism has somewhat declined among Americans' priorities since September 2001,[232] the legal protection afforded suspected terrorists remains a topic capable of evoking intense reactions.[233] Second, on the heels of *Boumediene*, the Supreme Court in *Kennedy v. Louisiana* invalidated the imposition of capital punishment upon defendants who rape (but do not kill) a minor.[234] A poll taken after the decision revealed that only 38 percent of respondents opposed capital punishment for rapists of children, and 55 percent favored the death penalty in such cases.[235] *Kennedy* attained its high degree of salience both because of its sensational subject matter and because Barack Obama and John McCain denounced it during a closely followed presidential campaign. Even after the Court decided *Kennedy*, moreover, it became clear that the Court and the parties had overlooked that in 2006 Congress revised the Uniform Code of Military Justice to render military personnel convicted of raping a child eligible for capital punishment.[236] Yet no sustained public outcry greeted either *Kennedy* or the Court's refusal to reconsider its decision in light of a congressional statute passed just two years prior that permitted the very punishment that *Kennedy* forbade.

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229. Justin Driver, The Supreme Court as Haven of Refuge (unpublished manuscript) (on file with author). Justice Black first characterized courts as "havens of refuge" in his opinion for the Court in *Chambers v. Florida*. 309 U.S. 227, 241 (1940). Klarman has expressly suggested that courts do not serve this function. *See* Klarman, *supra* note 1, at 17–18 ("[T]he Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.").

230. 553 U.S. 723 (2008).

231. John Cohen, *Behind the Numbers: SCOTUS Gitmo Ruling*, WASH. POST (June 17, 2008), http://voices.washingtonpost.com/behind-the-numbers/2008/06/scotus_gitmo_ruling.html.

232. *See* Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 26 (2006) ("Americans' relative concern about terrorism has plummeted to levels far below those that existed in the very first months after September 11.").

233. *See* Jack Goldsmith, Op-Ed., *Don't Try Terrorists, Lock Them Up*, N.Y. TIMES, Oct. 9, 2010, at A17 (lambasting efforts to try terrorists in civilian courts and arguing that the United States should rely exclusively on military detention).

234. 554 U.S. 407 (2008).

235. *American Voters Oppose Same-Sex Marriage*, QUINNIPIAC UNIV. (July 17, 2008), http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194.

236. Pub. L. No. 109-163, § 552(b), 119 Stat. 3136, 3263 (2006).

Although the centrality of *Brown v. Board of Education* is certainly understandable within the narratives of consensus scholars, that case may well occupy an excessive amount of space in the nation's constitutional consciousness.[237] Even acknowledging that the Court failed to eliminate America's race problem during the 1950s, that acknowledgment provides scant guidance regarding whether the Court can affect change in other, less charged contexts.[238] The effort to achieve school desegregation involved many moving parts and required compliance from many actors—including judges, school board officials, parents, and children. Judicial decisions generally have a considerably lower degree of difficulty to execute successfully than was involved in *Brown*. Contemplate, for example, how much easier it was to implement *Miranda v. Arizona*, another controversial decision of the Warren Court, which called for compliance principally from police officers.[239] Consider, too, how many fewer actors would need to comply in order to effectuate a hypothetical Court decision invalidating capital punishment. Believing that the Court could not unilaterally eliminate black subordination—perhaps this nation's most deep-seated social issue—does not require believing that the Court is powerless to shape society regarding less intractable problems. In other words, using *Brown* to derive conclusions about law's capacity for change has only slightly less to recommend it than using cancer to derive conclusions about medicine's capacity for healing.[240]

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237. Yes, this Article may well, alas, be regarded as part of the problem rather than part of the solution on this score. *See infra* subpart III(A).

238. Klarman's book betrays considerable inconsistency in explaining how broadly the conclusions it reaches should be understood to extend beyond the racial sphere. In the introduction, as discussed above, Klarman offers a sweeping statement regarding the book's extensive applicability. *See* KLARMAN, *supra* note 10, at 5–6 ("This book argues that because constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times . . . . In the absence of determinate law, constitutional interpretation necessarily implicates the values of the judges, which themselves generally reflect broader social attitudes."). The book's conclusion—which moves beyond race cases to incorporate discussions of, *inter alia*, *Pierce v. Society of Sisters*, *Griswold v. Connecticut*, *Miranda v. Arizona*, *Roe v. Wade*, *Furman v. Georgia*, and the Hawaii Supreme Court's gay marriage decision from 1993—appears to embrace the seemingly boundless applicability of the consensus constitutionalist framework. At least one sentence in the book's conclusion, however, seems to undercut the wisdom of extending the book's insights beyond the racial realm. *See id.* at 463 ("This lesson may not be applicable outside of the race context, as few social reform movements in the United States confront regimes that are as totalitarian as was Jim Crow Mississippi."). Yet, this caution against extrapolating from race arrives at the very end of a paragraph that contains an extremely broad topic sentence. *See id.* ("One lesson to draw from this history regarding the consequences of Court decisions is ironic: Litigation is unlikely to help those most desperately in need."). Taken as a whole, the book militates toward broad applicability.

239. 384 U.S. 436 (1966).

240. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 71 n.246 (1997) (observing that, although judicially prompted reforms generally have less practical impact than case law may suggest, certain judicial directives and rules are easier than others for official actors to sidestep).

One of the oddities of consensus constitutionalism is the way it tends to treat the judicial capacity for protecting minority rights as static rather than dynamic. It seems relatively uncontroversial to venture that the modern Supreme Court possesses a good deal more power as an institution than, say, the fledgling outfit that John Marshall joined as Chief Justice in 1801.[241] In a similar regard, today's Court possesses considerably more institutional power to protect minority rights than the Court of 1950, before it had issued many landmark and widely hailed decisions that are (accurately or inaccurately) broadly understood to protect minorities.[242] Although consensus constitutionalists sometimes acknowledge that the Court enjoys diffuse support,[243] they underemphasize that today's Court should—given its enhanced status in American life—enjoy a greater ability to protect minority rights than it possessed before it issued those landmark decisions. Even if the consensus constitutionalists believe that the Court's ability to protect minorities remains quite limited, they would do well to underscore that it holds much greater capacity than it once did.[244]

Consensus constitutionalists, to be clear, do not insist that the Court has *never* played a countermajoritarian role. They generally acknowledge two instances where the Court has decided cases in a manner that flatly contravenes the wishes of clear majorities: its invalidation of flag-burning statutes in *Texas v. Johnson*,[245] and its limitation of the role that religion plays in public schools in cases like *Lee v. Weisman*.[246] Consensus constitutionalists seek to explain these instances of the Court's countermajoritarian conduct primarily by noting that, though large majorities of the American public disagree with these decisions, elite Americans generally believe that they were

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241. The enhanced status of the modern Supreme Court forms a major theme of how at least one current Justice assesses that institution's history. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 22–72 (2010) (noting how the Court's decision in *Worcester v. Georgia*, 31 U.S. 515 (1832), was essentially disregarded, but then chronicling the Court's ensuing reputational ascent during the twentieth century).

242. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 74 (1980) (crediting the Warren Court with "clearing the channels of political change" and correcting discrimination against minorities).

243. *See, e.g.*, FRIEDMAN, *supra* note 11, at 379; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2635 (2003).

244. Among consensus constitutionalists, Professor Friedman addresses the Court's increased status most prominently. When doing so, however, he quickly notes that the People keep the Court on an extremely tight leash:

> In a sense, today's critics of judicial supremacy are right: the Supreme Court does exercise more power than it once did. In another sense, though, they could not be more wrong. The Court has this power only because, over time, the American people have decided to cede it to the justices. The grant of power is conditional and could be withdrawn at any time. The tools of popular control have not dissipated; they simply have not been needed.

FRIEDMAN, *supra* note 11, at 14.

245. 491 U.S. 397 (1989).

246. 505 U.S. 577 (1992).

correctly decided.[247] Given that the Justices are drawn from the elite, consensus scholars contend that it is not especially surprising that they interpret the Constitution in a manner that imposes the consensus views of their class upon the nation.[248]

This class-based explanation, however, cannot possibly bear the weight that consensus constitutionalists place upon it. It seems strikingly odd that if the Justices are in fact merely imposing their class views in the form of constitutional interpretation that these cases should be decided by such razor-thin margins. Both *Johnson* and *Weisman*, after all, were 5–4 decisions.[249] Viewing the Justices as class representatives, then, would seem to require believing that some Justices either are traitors to their class (to put the point cynically) or are more closely attuned to the democratic ethos (to put the point benignly). Even though two changes in Court personnel meant that only seven Justices played a role in resolving both *Johnson* and *Weisman*, three of those Justices switched sides in the cases. Justice O'Connor and Justice Stevens went from being democrats in *Johnson* to being elitists in *Weisman*, and Justice Scalia made the journey in reverse.[250] A narrative could perhaps be concocted to explain each Justice's vote in the cases, but it seems clear that such a narrative would exceed the explanatory power of class and perhaps even exceed the explanatory power of biography.

It also merits emphasizing that these two cases involved neither arcane areas of law nor witnessed the Court assist groups that were on the verge of winning victories in the legislative arena. First, it would be difficult to imagine two cases having greater public salience than *Johnson* and *Weisman*. Few matters arouse greater passion among the American public than patriotism and God. Second, *Johnson* and *Weisman* did not involve the Court stepping in to protect something that could be characterized as an "emerging national consensus." Indeed, *Johnson* invalidated flag-burning statutes in an overwhelming 48 states,[251] and *Weisman* invalidated prayer at public-school graduations—an extremely widespread practice.[252] If the Court is capable of offering protection to minorities in such sensitive areas in the face of

247. *See* FRIEDMAN, *supra* note 11, at 378 ("If a justice is in tune with his peer group, and his peers have elite views not shared by most of the country, the justice will seem to be going his own way."); KLARMAN, *supra* note 10, at 6 (qualifying the notion that judges reflect broader social attitudes by observing that judges are members of an elite subculture); ROSEN, *supra* note 12, at 169 (acknowledging that some of the Court's school-prayer decisions are difficult to understand on majoritarian terms); SUNSTEIN, *supra* note 13, at 10 (stating that federal judges "tend to come from a small segment of a society, limited to lawyers and usually part of a wealthy elite").

248. *See, e.g.*, KLARMAN, *supra* note 10, at 210–11 (contending that the elite subculture's disavowal of Jim Crow contributed to the Court's desegregation opinions).

249. *Weisman*, 505 U.S. at 579; *Johnson*, 491 U.S. at 398.

250. *Compare Johnson*, 491 U.S. at 398, *with Weisman*, 505 U.S. at 579.

251. *See Johnson*, 491 U.S. at 429 (Rehnquist, C.J., dissenting) ("[T]he laws of 48 of the 50 States . . . make criminal the public burning of the flag.").

252. *Weisman*, 505 U.S. at 635–36 (Scalia, J., dissenting).

vigorous opposition, it seems appropriate to wonder whether the Court's countermajoritarian capacity is not considerably more formidable than consensus constitutionalism allows.

Consensus constitutionalists also too often express an excessively narrow conception of the Court's ability to withstand attacks upon its legitimacy. "If the Court engenders widespread resistance," Friedman writes, "it threatens its legitimacy; even lower levels of defiance eat away at its credibility."[253] Rosen contends, "Paradoxically, the courts, often derided as the least democratic branch of government, have maintained their legitimacy over time when they have been more rather than less democratic in their constitutional views."[254] Although Sunstein acknowledges that the Court may be "unduly sensitive to the risk to its own authority" and allows that "[j]udicial self-preservation should be only a small part of the picture," he nevertheless suggests, "If the Court is concerned about its own place in the constitutional order, and wants to maintain its legitimacy and power, it might take account of outrage as a method of self-preservation."[255]

Contrary to consensus constitutionalism, however, judicial decisions that generate some initial public "defiance" and "outrage" may serve to enhance rather than to diminish the Court's authority. If after a period of open disagreement with a judicial decision much of the public comes to accept (or even to applaud) the decision, the Court's reputational authority may increase—a development that could well enable it to issue subsequent opinions that promote a constitutional vision that most Americans have yet to adopt.[256] In terms of the social optimum, the number of judicial decisions generating defiance will be greater than zero.[257] Too much public defiance of judicial orders could surely imperil the Court's ability to govern, but consensus constitutionalism tends to presume that defiance is something to be avoided at all costs. In this spirit, Rosen asserts that the Court may "have an opportunity to enforce a constitutional principle that neither the president nor Congress are willing enthusiastically to embrace *as long as there is no danger of active resistance*."[258] But the "no danger" standard has dangers of its own.

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253. FRIEDMAN, *supra* note 11, at 377.

254. ROSEN, *supra* note 12, at xiii.

255. SUNSTEIN, *supra* note 13, at 153.

256. This dynamic helps to explain the public celebration of the Court's decision in *Brown*. That decision became the most celebrated constitutional decision in Supreme Court history not despite massive resistance, but because of it. *See supra* text accompanying note 88.

257. *Cf.* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1010–11 (2008) (commending the clarifying power of interbranch conflicts); *see also* Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1122-28 (2011) (exploring the potential of "separation-of-powers multiplicity").

258. ROSEN, *supra* note 12, at 200 (emphasis added).

Any message to the contrary has the potential to act as an extremely conservatizing force on the judiciary. Judges who subscribe to the consensus theory of constitutional interpretation may not be intimately familiar with the degree of divisiveness surrounding many judicial controversies of yesteryear. Judges are likely, however, to be acutely aware of the intense feelings stirred by today's divisive issues. Moreover, current controversies are generally portrayed as morally complicated issues upon which reasonable minds can differ. To the extent that Supreme Court Justices internalize the tenets of consensus constitutionalism (and there is at least some evidence that they have),[259] they will move ever more meekly to protect minority rights than their predecessors.

In reaction to what they regard as the romantic myth of the Court as countermajoritarian protector of the downtrodden, the consensus constitutionalists (and many other members of the legal left besides) appear to have accepted the notion that courts simply cannot protect minority rights.[260] Whereas liberals once erred in thinking that courts could do everything, they now err in thinking that courts can do just about nothing. Liberals should concededly not direct *all* of their hopes for societal advancement at the courts,[261] but neither should they believe that the judiciary

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259. *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 166 (2003) ("[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus."). Discussing one of the most controversial cases decided by the Court, then-Judge Ginsburg wrote:

> *Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court. The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.

Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385–86 (1985).

In a forthcoming work, I identify some of the various doctrinal areas—including capital punishment, substantive due process, and obscenity—in which the Court expressly understands itself to be imposing consensus on the nation through constitutional interpretation. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005) (identifying the existence of a "national consensus" against the death penalty for minors); Lawrence v. Texas, 539 U.S. 558, 571–72 (2003) (examining state practices to observe "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"); Roth v. United States, 354 U.S. 476, 489 (1957) (requiring courts to contemplate "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"). I then criticize that methodology as degrading the judicial function. *See* Justin Driver, Courting Consensus (unpublished manuscript) (on file with author).

260. *See* ROSEN, *supra* note 12, at 15 ("[J]udges have tended to maintain their legitimacy and independence in the past by deferring to the constitutional views of the American people . . . [and] they should continue to do so in the future.").

261. *See* BARACK OBAMA, THE AUDACITY OF HOPE 83 (2006) ("Still, I wondered if, in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy."); Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U.

cannot play a significant role in facilitating that advancement. By emphasizing judicial fragility and minimizing judicial capacity, consensus constitutionalism has the regrettable consequence of recommending that Justices delay recognizing rights of minorities that they believe are constitutionally grounded.

III. The Contested Constitution

This Part aims to supplant consensus constitutionalism with contested constitutionalism. Instead of misleadingly overemphasizing the role that (a generally nonexistent) national consensus plays in Supreme Court decisionmaking, constitutional history that provides an external perspective on the judiciary should instead depict more fully and accurately the wide range of viewpoints and often-clashing ideological perspectives that citizens hold in the United States. Using the term *consensus* to describe the ideas of some 300 million Americans on a particular constitutional question typically elides more than it exposes.

Contrary to the assertions of consensus constitutionalism, the meaning of the Constitution usually emerges not from consensus but from contestation—an ideological conflict that has occurred throughout American history regarding what the nation's foundational document permits and requires. Externalists, who are committed to the idea that everyday people influence constitutional interpretation, should emphasize that Justices do not interpret constitutional meaning by waiting for consensus to materialize and then articulating that consensus viewpoint. Instead, they decide cases in the often cacophonous context that typifies life within the United States, where the People are neither of one mind nor of one voice. Constitutional conflict, moreover, unfolds not only between (and among) various groups of citizens, but within individual citizens themselves. Indeed, contested constitutionalism reveals that even a single person can be of many minds on a particular constitutional question.

Contested constitutionalism does not, of course, suggest that the Court invariably—or even generally—sides with the downtrodden members of society. Such a claim would be absurd. In the pages that follow, however, this Article does argue that the Court has issued countermajoritarian decisions more frequently than is commonly appreciated today. In so doing, I intend to acknowledge what I regard as the constitutive relationship of legal scholarship to Supreme Court decisionmaking. If law professors wish the Court to have the capacity to resist majority preferences and protect minority interests, they should tout the instances when the Court has done so rather than attempt to sweep them under the nation's jurisprudential rug.

PA. J. CONST. L. (forthcoming 2011) ("The revolution will not be litigated, just as it will not be televised, and everyone should know that by now.").

But even if the Court had never in its history issued a decision that clashed with majoritarian political preferences, contested constitutionalism would nonetheless offer a superior framework to understand American legal history than its consensus-based counterpart. That is so because legal history attuned to ideological contest more accurately captures the public's relationship to questions of constitutional law. Contested constitutionalism encourages legal scholars to explore and to communicate the profound disagreements and deep cleavages that exist alongside the Supreme Court's resolution of constitutional questions. Where consensus constitutionalism minimizes those disagreements and cleavages, contested constitutionalism deems them essential to comprehending American constitutional history in its full complexity.[262]

This Part attempts to restore the role of ideological contestation to its central place in constitutional interpretation by making two principal points. First, this Part illustrates the rich diversity of thought that existed within the United States regarding race in the 1950s and 1960s. *Brown*, far from articulating a consensus viewpoint or even the view of an emerging consensus, was decided in a context where apathy characterized the racial attitudes of the overwhelming majority of citizens. Second, in the context of two claims regarding marriage, this Part argues that the Court has in fact advanced racial equality when doing so was not supported by prevailing attitudes (when it

262. Some exemplary work by legal scholars has examined history through the lens of what this Article refers to as contested constitutionalism. *See, e.g.*, Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intraracial Conflict*, 151 U. PA. L. REV. 1913, 1970 (2003) ("Rather than suggesting that African American communities held a uniform and easily discernable point of view on *Brown*, this narrative demonstrates that African Americans held many points of view about the proper approach to achieving educational equality over time."); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (examining constitutional development over decades as an arena of contest, and tracing alternate, reform-minded interpretations of constitutional meaning for economic life, as that meaning is initially fashioned by social movements, reformers, and scholars, and then reworked and embraced by lawmakers, and, ultimately, courts); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1236 (1989) ("[T]he language of law in America is best conceived as a tradition of discourse with divergent and conflicting strands."); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1612 (2001) (observing that during the mid-twentieth century, "'civil rights' did not refer to a unified, coherent category; the content of the term was open, changing, and contradictory, carrying resonances of the past as well as of several possible contending futures"); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 272 (2005) (emphasizing "the conflicting objectives and perceptions of black lawyers in the era of segregation"); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1329 (2006) ("Typically, it is only through sustained conflict that alternative understandings are honed into a form that officials can enforce and the public will recognize as the Constitution.").

For an argument extolling the virtues of conflict and disagreement in the statutory context, see Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 48–58 (2010), http://yalelawjournal.org/2010/7/30/leib_serota.html.

validated the right to interracial marriage[263]) and that it could do so in the immediate future (should it hear a case regarding same-sex marriage) without unduly imperiling its legitimacy.

A. Restoring Conflict and Complexity to Brown

Consensus constitutionalists view the Court's involvement in the quest for racial equality during the mid-twentieth century as the imposition of national norms on regional outliers. Friedman suggests that, although remedying the legal subordination of blacks ranked low among the nation's priorities for a long time, eventually a national consensus prevailed regarding racial egalitarianism.[264] "Consensus was a long time developing, but when it did, the justices' interpretation of the Constitution gave way to the popular will," Friedman explains.[265] "The justices in *Brown v. Board of Education* argued they were protecting constitutional rights, but once again it was evolving national views that supported the Court's judgment and enabled its enforcement."[266] Similarly, in a truly remarkable passage, Klarman's *From Jim Crow to Civil Rights* frames the Court's 1954 decision as the codification of "an emerging national consensus" regarding race:

> By the early 1950s, powerful political, economic, social, and ideological forces for progressive racial change had made judicial invalidation of segregation conceivable. Slightly more than half of the nation supported *Brown* from the day it was decided. Thus, *Brown is not an example of the Court's resistance to majoritarian sentiment, but rather of its conversion of an emerging national consensus into a constitutional command.* By 1954, the long-term trend against Jim Crow was clear. Justices observed that segregation was "gradually disappearing" and that it was "marked for early extinction." They understood that *Brown* was working with, not against, the current of history.[267]

Elsewhere, Klarman has offered perhaps the pithiest articulation of the consensus school's understanding of *Brown*: "It thus became increasingly difficult for one region (the South) to maintain social practices or traditions (de jure forms of Jim Crow) that deviated significantly from those of the nation as a whole."[268]

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263. Loving v. Virginia, 388 U.S. 1 (1967).

264. FRIEDMAN, *supra* note 11, at 381.

265. *Id.*

266. *Id.*

267. KLARMAN, *supra* note 10, at 310 (emphasis added) (footnote omitted). Writing eight years after the Court decided *Brown*, Professor Bickel also understood the decision to stem from an emerging consensus on racial equality. *See* BICKEL, *supra* note 131, at 241 ("Even as of 1954, national consensus on the racial problem was immanent.").

268. Klarman, *supra* note 1, at 34.

Sunstein offers a particularly aggressive version of the claim that national consensus produced *Brown*, suggesting that white Americans had lost their taste for racial discrimination well before the Court got around to invalidating segregation in public schools. The Court, Sunstein notes,

> is never acting in a social vacuum. Often it is endorsing, fairly late, a judgment that has long attracted widespread social support from many minds. The ban on racial discrimination, signaled above all by the Court's invalidation of school segregation, attracted strong support in the nation long before the Court acted.[269]

Sunstein further contends: "*Brown* was issued by the Supreme Court, not by the American public as a whole. But even so, . . . [b]y 1954, the American public was no longer committed to racial segregation, and there can be little doubt that most of the nation and its leaders rejected it."[270]

1. Racial Attitudes During the Brown *Era.*—The consensus reading of *Brown*, which is now commonly understood to offer the leading scholarly account of the decision,[271] provides a myopic view of a deeply conflicted historical context and the judiciary's role in mediating that conflict. An approach to understanding *Brown* steeped in contested constitutionalism requires exploring the racial attitudes of white northerners, white southerners, and black citizens with greater subtlety and nuance than the consensus constitutionalists' account generally provides. The following analysis represents an effort to illustrate the way in which Justices who are deciding cases typically confront a nation better characterized by conflict than by consensus. Portraying these conflicts—conflicts that occur between, among, and even within the nation's regions, groups, and individuals—provides a richer understanding of American legal history.

a. White Northerners.—Consensus constitutionalism too often gives the sorely mistaken impression that racial attitudes among white northerners during the 1950s were generally the product of a racially enlightened worldview. It likely comes closer to the truth to say that many white northerners simply did not dedicate much time to contemplating the treatment of their fellow black citizens. Among northern whites, the predominant reaction to black subordination might be more accurately characterized as apathy

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269. SUNSTEIN, *supra* note 13, at 4. *But see* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 205 (2010) (contending that, in the fight against Jim Crow, the "law took the lead, defending the equal rights of African-Americans long before Americans had come to a consensus about racial matters").

270. SUNSTEIN, *supra* note 13, at 41.

271. *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 904 n.194 (2009) ("The definitive account of the background and aftermath of *Brown* . . . is Klarman, *From Jim Crow to Civil Rights* . . . ."). Strauss also suggests that when the Court decided *Brown* "[a] national consensus against segregation had been building for a generation." *Id.* at 904.

rather than as enmity.[272] Indeed, consensus constitutionalism generally obscures the wide range of racial opinion among northern whites when *Brown* was decided. On this score, Heman Sweatt, who would become the first black student to attend the University of Texas School of Law, noted the conflicting opinions regarding race that existed among people outside of the South. "[A]s far as attitudes regarding the problem of segregated education are involved, unanimity of opinion does not exist anywhere," Sweatt explained.[273] "Very assuredly, I did not find such a state at Michigan University during my study there toward the master's degree."[274]

i. Polling.[275]—Sweatt's assessment is supported by polling data suggesting that even after *Brown* most whites did not experience a moral awakening to racial injustice. The results of a January 1956 poll revealed that, when asked whether most blacks in the United States were being treated fairly or unfairly, 63 percent of respondents indicated that the treatment of blacks was fair, and just 32 percent stated that blacks were treated unfairly.[276] A poll published in *Scientific American* in December 1956, which also asked whether most blacks were being treated fairly, revealed no sharp regional disagreement.[277] Where the December 1956 poll found that 69 percent of the white public contended that most blacks were being treated fairly, 65 percent

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272. Klarman's book does not wholly ignore the lack of resolve associated with white northerners' support for *Brown*. When Klarman mentions this matter, however, the brief discussion risks overstating that support. Klarman writes: "*Brown* increased the salience of the segregation issue, and in 1954 many Americans, if forced to take a position, could only be integrationists. Yet, endorsing a position and being strongly committed to it are very different things." KLARMAN, *supra* note 10, at 366. As the ensuing discussion will make clear, it seems doubtful that many white northerners in the mid-1950s truly earned the appellation "integrationist." By "being strongly committed" to *Brown*, moreover, Klarman means that individuals supported "the use of federal troops to enforce it, or cutting off federal education funds to districts that defied it, or breaking a southern filibuster in the Senate over legislation to implement it." *Id.* at 365. Establishing such an extraordinarily high threshold for evincing a "strong[] commit[ment]" to *Brown*, and then noting that northern whites fell short of it, obscures precisely how anemic white northerners' integrationist commitments were during the 1950s—even as a concept in the abstract. It is regrettable that Klarman does not dedicate more time to exploring the shallowness of white northerners' pro-*Brown* sentiment, as that phenomenon undermines the notion that the Court in *Brown* articulated a consensus or an emerging consensus.

273. Heman Marion Sweatt, *Why I Want to Attend the University of Texas*, TEXAS RANGER, Sept. 1947, at 20, 40.

274. *Id.*

275. I harbor serious reservations about the ability of polling data to capture the full complexity of Americans' views of constitutional questions. One of the principal weaknesses of much polling data is its failure to even attempt to capture the *intensity* that individuals attach to their responses. In addition, polling data often probes respondents' policy preferences rather than their constitutional views. *See infra* note 409 and accompanying text. Nevertheless, given that polling data composes such an important device in the consensus constitutionalists' tool kit, it seems appropriate to dedicate some time to exploring how—even using a preferred methodology of consensus constitutionalists—contested constitutionalism more accurately captures the dynamic on the ground.

276. Hazel Gaudet Erskine, *The Polls: Race Relations*, 26 PUB. OPINION Q. 137, 139 (1962).

277. Herbert H. Hyman & Paul B. Sheatsley, *Attitudes Toward Desegregation*, SCI. AM., Dec. 1956, at 35, 39.

of white northerners agreed with the sentiment (in comparison to 79 percent of white southerners).[278] The willingness of northern whites to accept the treatment of blacks as second-class citizens proved surprisingly stable, even after the inception of the direct-action phase of the civil rights movement. Indeed, a study conducted in 1963 among only northern whites found that 51 percent thought American blacks were treated about right, 38 percent thought they were treated insufficiently well, and an astounding 11 percent thought that blacks were treated excessively well.[279] When Gallup asked the open-ended question of whether any group was being treated unfairly in the United States in 1963, an overwhelming 80 percent said no.[280] Although 5 percent indicated blacks were being treated unfairly, 4 percent indicated that whites were unfairly treated.[281]

The decidedly limited commitment to racial equality on the part of white northerners after *Brown* can perhaps best be glimpsed by comparing their attitudes with white southerners in subsequent years. In September 1956, when asked whether black students and white students should attend the same schools, 60 percent of white northerners indicated that they should attend the same schools.[282] By comparison, in mid-1965, 55 percent of white southerners responded that students should attend integrated schools.[283] Few people today, of course, would contend that the white South had resolved its profound racial problems as early as mid-1965, a time that precedes even the Voting Rights Act's passage.[284] Yet given the similarity in poll responses, it is extremely difficult to reconcile the vision of racially enlightened northern whites during the mid-1950s with the suggestion of racially backward southern whites during the mid-1960s.[285]

Polling data has also captured the way in which support for affirmatively achieving racial integration among many white northerners was connected to the understanding that they were commenting on a distinctly southern phenomenon. As the authors of a comprehensive volume analyzing changes in racial attitudes over time have noted, "Support for federal desegregation efforts was high in the early 1960s, especially among more educated Northern whites, because attention was focused on ending *de jure*

278. *Id.* at 39.

279. Stewart Alsop & Oliver Quayle, *What Northerners Really Think of Negroes*, SATURDAY EVENING POST, Sept. 7, 1963, at 17, 20.

280. ROSENBERG, *supra* note 124, at 129.

281. *Id.*

282. *See* Paul B. Sheatsley, *White Attitudes Toward the Negro*, 95 DAEDALUS 217, 219 chart 1 (1966).

283. *Id.* at 235.

284. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006) (codified on August 6, 1965).

285. This point may also serve as a cautionary tale regarding polling data's limitations.

segregation in the South."[286] During the early 1960s, the media had largely framed the issue of federal involvement as a necessary tool to control obstreperous southern whites who were dedicated to defying the Supreme Court.[287] When the efforts to integrate schools expanded beyond the South, however, many northerners rapidly retreated from their expansive support for racial desegregation: "Northern support began to erode at the beginning of the 1970s, when attention shifted to altering *de facto* segregation in the North, especially but not only through court-ordered busing."[288] During this period, the northern commitment to extolling the principle of integration in the abstract increased, even as the northern commitment to seeing integration in practice plummeted.[289] The chasm between rhetoric and reality is, of course, a sadly familiar tradition in American history.

It is also important to understand that a failure to register objection to school integration should not be mistaken for a desire among northern white adults to have their children attend integrated schools. In 1963—a full nine years after *Brown* and just one year before the passage of the celebrated 1964 Civil Rights Act—a study asked northern white adults the following: "Suppose you yourself had school-age children, other things being equal, would you prefer that they went to [an] integrated school, all white, or would it make no difference to you?"[290] Although 41 percent responded that the racial composition of the school would make no difference, 42 percent of white northerners responded that they would prefer an "all white" school.[291] A mere 17 percent of white northerners expressed a preference for an "integrated" school.[292]

ii. Social Histories.—Recent works by historians Thomas Sugrue,[293] Martha Biondi,[294] and Jeff Wiltse[295] helpfully complicate the over-simplified idea that a racially enlightened North was utterly distinct from a

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286. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 127 (rev. ed. 1997).

287. *Id.*

288. *Id.*

289. *Id.* at 126 fig.3.8; *see also id.* at 192 ("[T]here is noticeably less support for the implementation of principles than for principles as such."); Lawrence D. Bobo, *The Color Line, the Dilemma, and the Dream*, *in* CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II 31, 31–55 (John Higham ed., 1997) (describing the persistent disparity between the embrace of racial integration in principle and the failure to implement true integration in practice).

290. Alsop & Quayle, *supra* note 279, at 20.

291. *Id.*

292. *Id.*

293. THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2008).

294. MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003).

295. JEFF WILTSE, CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA (2007).

racially unenlightened South. Sugrue's sardonically titled *Sweet Land of Liberty* shifts the traditional frame of the civil rights movement from the South to the North, emphasizing that cities like Chicago, Detroit, and Newark witnessed struggles for racial equality that have been misleadingly omitted from the conventional civil rights narrative.[296] Although many people know that movement martyrs James Chaney, Michael Schwerner, and Andrew Goodman were abducted from Philadelphia, Mississippi,[297] Sugrue insists that too few students of civil rights history understand the mid-twentieth century events that prompted many blacks to refer derisively to Philadelphia, Pennsylvania, as "Up South."[298] As this nickname may implicitly suggest (given its identification of the South as the touchstone for black subordination), black citizens did in fact enjoy less constrained racial lives in the North than they did in the South.[299] Nevertheless, as Sugrue repeatedly underscores, allowing that the South was, in some meaningful sense, racially "worse" than the North hardly suggests that northern race relations were unblemished by racism.[300] "Less bad," in other words, does not mean "good."

Sugrue also details the way in which *Brown* sparked racial reactions among white northerners. Sugrue notes that, contrary to popular belief, some towns in northern states (including York, Carlisle, and Steelton, Pennsylvania) continued to operate officially segregated schools for a brief period even after the Court issued *Brown* in 1954.[301] Apart from official segregation, moreover, Sugrue reconstructs the way in which many white northerners rationalized the all-white schools their children attended as somehow meaningfully distinct from the all-white schools that existed in the South: "'There is, of course, no official segregation in the city,' noted a *New York Times* columnist in 1957. 'It is illegal.' Using the passive voice, thus making the process of segregation seem the inevitable consequence of impersonal forces beyond control, he argued that segregation 'is caused by the residential pattern.'"[302] Where the South engaged in Massive Resistance,[303] the North, thus, engaged in a phenomenon that might be dubbed "Passive

296. *See* SUGRUE, *supra* note 293, at xiv, 325 (opining that the exclusion of the North from accounts of the civil rights struggle, or its "selective inclusion" as a foil to the South, ignores the history of racial conflict in the North, as illustrated by violent, and sometimes deadly, "clashes between young black men and the police" in the cities of Chicago, Detroit, and Newark).

297. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 553 (1996).

298. SUGRUE, *supra* note 293, at xiv, xxi.

299. *Id.* at 256.

300. *See id.* at 257 ("Despite improvements in the aggregate, the economic reality for most northern blacks was starkly unequal.").

301. *Id.* at 183.

302. *Id.*

303. *See* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (Louisiana paperback ed. 1999) (1969).

Resistance."[304] Southerners actively segregated their schools, according to the Passive Resistance mindset, but in the North, well, schools were not so much segregated as they were non-integrated in light of racially distinct neighborhoods—a phenomenon that arose by sheer happenstance. "Whites could deny responsibility for racial segregation, for their choices about where to live and where to send their children to school were individualized and ostensibly race-neutral," Sugrue writes.[305] "The logical conclusion of this line of reasoning was that it was the natural order of things that the vast majority of whites lived in all-white communities and that blacks were confined to segregated neighborhoods and mostly minority schools."[306] This rationalization, as Sugrue notes, was designed to remove any notion of wrongdoing from the North's racial equation: "Like lived with like, birds of a feather flocked together. No one was at fault."[307]

Where Sugrue offers a panoramic vision of the civil rights struggle throughout the urban North after World War II, Biondi's *To Stand and Fight* provides an in-depth examination of that struggle in one particular locale: New York City. Biondi notes that, although racially segregated public schools were deemed unconstitutional throughout New York State in 1938, education officials facilitated racial segregation long after that theoretical expiration date.[308] Among other techniques designed to maintain racially defined schools, New York City Board of Education officials redrew school attendance lines, located new schools in strategic sites, and bused white students in order to avoid them attending nearby black schools.[309] Biondi recalls how Kenneth Clark, a City College professor who provided expert testimony that the Court relied upon in *Brown*, delivered a speech at an Urban League dinner shortly after the Court issued its decision where he stated that segregated schools existed in New York just as surely as they existed in the Deep South.[310] Biondi explains, "Civil rights activists like Clark knew that comparisons between northern and southern racism tended to unnerve northern white leaders."[311] Clark's speech proved no exception.

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304. I use this term in a somewhat different fashion than Professor Cho has used it. *See* Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from* Brown *to* Grutter, 7 U. PA. J. CONST. L. 809, 824 (2005) (using the term "passive resistance" to describe the efforts of "affirmative action advocates . . . [who] mounted a quiet, behind-the-scenes resistance to the parts of the [*Bakke*] decision they did not like").

305. SUGRUE, *supra* note 293, at 184.

306. *Id.*

307. *Id.*

308. BIONDI, *supra* note 294, at 241.

309. *Id.* at 241–42.

310. *Id.* at 246; *cf.* Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 110–11 (2004) (noting that the Kenneth Clark doll experiments relied upon in *Brown* revealed in fact that black students in the North need not be racially segregated in order to internalize feelings of racial inferiority).

311. BIONDI, *supra* note 294, at 246.

Hewing to the northern white establishment's party line, the Board of Education President, who attended the Urban League dinner, rejected all responsibility for school segregation, and the school superintendent subsequently called segregation in Harlem "accidental" and even "natural."[312] Biondi concludes by suggesting that, even assuming that "de facto segregation" constitutes a sensible term, it has questionable applicability to New York City because governmental entities consistently engendered segregation in the education, employment, and residential realms.[313]

The complex attitudes among northern whites toward black equality can also be more fully ascertained by examining leisure activities during the *Brown* era. Although many barrels of ink have been spilled about the quest for racial integration in the educational context,[314] social historians have only recently begun to flesh out how racial interactions unfolded (and, more to the point, did not unfold) in other, nonschool arenas. Jeff Wiltse's historical exploration of the community swimming pool as a locus for disputes about public space highlights the notion that many northern whites, halfhearted approval of *Brown* notwithstanding, steadfastly avoided interactions with blacks.[315] Wiltse notes that racial lines began to harden at swimming pools in the North beginning in the 1920s, as the Great Migration witnessed significant numbers of blacks living outside of the South for the first time.[316] Although racial rhetoric among white northerners became more liberal following World War II, Wiltse observes, the "integration" of public swimming pools in the North during the 1940s and 1950s typically meant that municipal pools went from all white to all black.[317] White swimmers, in turn, generally fled to the all-white oases provided by private pools or ceased swimming altogether.[318]

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312. *Id.* at 246–47.

313. *Id.* at 285.

314. *See, e.g.*, DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM (2004); LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001); JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (2010).

315. WILTSE, *supra* note 295, at 157 (discussing how "[d]esegregation did not really integrate [Baltimore's] municipal pools").

316. *Id.* at 3–4.

317. *Id.* at 159 ("In large cities, desegregation transferred use of some pools from white swimmers to black but rarely led to meaningful interracial swimming.").

318. *Id.* at 205 ("Between 1950 and 1970, millions of Americans chose to stop swimming at municipal pools. This represented a mass abandonment of public space and was caused most directly by racial desegregation."); *id.* at 159 ("When one-pool communities kept their desegregated pools open, many whites retreated to private pools or simply stopped swimming.").

The racial dynamic of swimming pools in the North sheds considerable light upon the extraordinarily shallow commitment to black equality that many northern whites held at the time of *Brown*. At least as a theoretical matter, one could imagine swimming pools being considerably easier to integrate than public schools. It seems distinctly possible, for instance, that parents would be a good deal less emotionally invested in where their children swam compared to where their children learned.[319] Moreover, achieving integrated municipal swimming pools should have been comparatively less weighed down by residential segregation and bureaucracy (i.e., pupil assignment). Despite the comparatively lower barriers to racial integration in the context of swimming, however, neither public pools nor public schools witnessed much in the way of meaningful and sustained cross-racial interactions. In both venues, then, it seems that a commitment to integration among white northerners in the hypothetical vanished in the actual.

iii. A New Map.—Consensus constitutionalists often note that seventeen states enforced racially segregated educational facilities and that an additional four states permitted, but did not require, localities to adopt racial segregation.[320] These twenty-one racially retrograde states, it is understood, are trumped by the remaining twenty-seven states, which had not enacted state laws either requiring or permitting Jim Crow.[321] Thus, in its crudest articulation, the consensus constitutionalist account of *Brown* might be reduced to a mathematical formula: $27 > 21$ = school desegregation.

Although this view contains undeniable appeal at first blush, that era's racial realities contained greater complexity than is captured by the vulgar tallying of state racial policies. Consensus constitutionalism generally disregards the racial compositions of the various states that existed in 1950s America. As a result, it attributes a sense of racial injustice about black inequality to many northern whites who, to the extent they thought about race at all, likely viewed America's racial situation more as an abstraction than a reality. The twenty-seven states that consensus constitutionalists cite as embodying the nation's supposed racially egalitarian values at the time of *Brown* had—on the whole—dramatically lower percentages of black residents than the states that had legally segregated schools. Nineteen of the twenty-seven non-Jim Crow states, more than two-thirds, had fewer than 2.8

319. But fears of miscegenation, of course, pervaded both contexts. *See* WILTSE, *supra* note 295, *passim*; PATTERSON, *supra* note 314, at 6 ("For many whites, the very idea of desegregated schools prompted the ugliest imaginable images of racial mixing.").

320. *See, e.g.*, KLARMAN, *supra* note 10, at 311 (pointing out that "*Brown* was not inevitable in 1954, when seventeen states and the District of Columbia still segregated their schools and four more states permitted local communities to adopt segregation at their discretion").

321. Alaska and Hawaii, it must be remembered, did not gain admission to the United States until 1959. Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959); Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339 (1958).

percent black residents, according to the 1950 census.[322] Twelve of those nineteen states, moreover, had fewer than 1 percent black residents.[323] And six of those twelve states had fewer than 0.2 percent black residents.[324] Conversely, every state featuring what could be considered a substantial black percentage of the population required schoolchildren to be segregated by law. Thirteen states, in other words, had black populations greater than 10 percent in 1950,[325] and all thirteen of those states featured Jim Crow schools.[326] This more textured understanding of state reaction to *Brown* complicates the racially egalitarian views that consensus constitutionalism implicitly attributes to residents of states that had an infinitesimal percentage of black residents.

What, precisely, would it mean for a white person to express racially egalitarian views regarding school placement living in 1950s Idaho, Iowa, Maine, Minnesota, Montana, New Hampshire, North Dakota, Oregon, South Dakota, Utah, Vermont, or Wisconsin? Those states all had black populations of fewer than 1 percent.[327] Anti-black sentiment appears to have been most widespread where blacks composed a large percentage of the population.[328] The notion that white attitudes about school integration were driven in large part by the surrounding racial realities finds at least some support in polling data. In 1959, five years after *Brown*, Gallup asked white parents in the North whether they would object to, *inter alia*, having their children attend "a school where a few of the children are colored," and whether they would object if it were a school "where more than half of the children are colored."[329] Predictably, an overwhelming 92 percent of white northern parents expressed no objection to sending their children to school with a small number of black students, and just 7 percent objected.[330] In answering the question about the school where black students outnumbered white students, however, 58 percent of white northern parents expressed objection, and just 35 percent expressed no objection.[331] These responses

322. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, POPULATION, BY RACE, STATES: 1930–1950, at 30 tbl.27 (1960) [hereinafter STATISTICAL ABSTRACT BY RACE].

323. *Id.*

324. *Id.*

325. *See id.*

326. *See id.*

327. *Id.*

328. *See* V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 5 (1949) (contending that white antipathy toward blacks was strongest in areas with a large percentage of black residents).

329. *Mixed Schools: How Northern Parents Feel*, U.S. NEWS AND WORLD REPORT, Mar. 23, 1959, at 12.

330. *Id.*

331. *Id.* In response to a question of whether they would object to sending their child to a school "where one half of the children are colored," 34 percent of northern white parents objected, and 63 percent registered no objection. *Id.*

help to reveal the profound limitations of even an abstract commitment to racial egalitarianism among northern whites.

Had there been larger concentrations of blacks spread throughout the country during the *Brown* era, it is certainly possible that the Court's decision would have been greeted with even less enthusiasm. Shortly after the Court issued *Brown*, a white southerner who supported racial integration memorably pressed precisely this point in an interview with Robert Penn Warren. "It's not a question of being Southern," he explained.[332] "You put the same number of Yankee liberals in [a predominantly black] county and in a week they'd be behaving the same way [as Southern racists]. Living with something and talking about it are two very different things, and living with something is always the slow way."[333]

b. White Southerners.—In today's popular imagination, white southerners during the age of the civil rights movement are widely understood to have been virtually uniform in their intense opposition to racial equality in general and to *Brown* in particular.[334] Professor Klarman's work—most significantly, the backlash thesis[335]—should be commended for helping to complicate this misleading narrative. By emphasizing that *Brown* eliminated the political space available to southern racial moderates and, thus, incentivized politicians in the South to adopt unyielding pro-segregation poses, Klarman acknowledges that not all white southerners held identical racial attitudes.[336] In a similar vein, Klarman often admirably recognizes that the various states in the South had varying racial climates, instead of treating the region as an undifferentiated mass.[337]

For all its considerable strengths, though, two matters blemish Klarman's depiction of racial attitudes among white southerners. First, Klarman principally focuses his attention on the views of white southern politicians rather than on the views of ordinary white southerners.[338] There

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332. ROBERT PENN WARREN, SEGREGATION: THE INNER CONFLICT IN THE SOUTH 26–27 (1956).

333. *Id.* at 27.

334. This notion enjoys a lengthy history. Melvin M. Tumin, *Readiness and Resistance to Desegregation: A Social Portrait of the Hard Core*, 36 SOC. FORCES 256, 256 (1958) ("It is a popular notion that the South is a homogenous unit so far as its attitudes toward desegregation are concerned.").

335. *See supra* note 226.

336. *See id.*

337. *See, e.g.*, KLARMAN, *supra* note 10, at 348 ("The eleven states of the former Confederacy responded to *Brown* very differently from the border states."); *id.* at 400 ("Florida, Texas, and Tennessee, states that had never fully embraced massive resistance, further distanced themselves from it in 1958–1959.").

338. This shortcoming is most pronounced in Klarman's two articles from 1994 laying out the backlash thesis. *See supra* note 226. Though the treatment in *From Jim Crow to Civil Rights* makes strides along this dimension, it, too, concentrates too heavily upon the actions of politicians.

is, of course, some relationship (almost certainly a strong one) between those two sets of views. But by concentrating his attention inordinately upon the racial radicalization of white southern politicians, Klarman accords pride of place to the massive resistance coalition and, consequently, underplays those who dissented. Second, even when he looks beyond politicians and characterizes the racial attitudes of white southerners themselves, Klarman would do well to avoid phrasing that diminishes the avowed willingness of some white southerners to follow *Brown*. In noting that one of the features that made the Court's progressive race-based decisions difficult to implement was that many people who rejected the decisions were geographically concentrated, Klarman writes, "Virtually all white southerners disagreed with *Brown*, and opponents of other race decisions . . . were likewise concentrated in the South."[339] Similarly, when Klarman assesses the causes of white southern opposition to *Brown*, he writes: "Perhaps most important, the desire of nearly all whites to preserve segregation if possible virtually ensured an attempt at massive resistance."[340]

Although it is certainly true that white southerners during the 1950s and 1960s expressed more widespread hostility to *Brown* than their northern counterparts, accounts of this era should more consistently highlight the multiplicity of southern white racial attitudes. It is important to note that a nontrivial number of white southerners during the *Brown* era evinced—at least as measured by the standards of the time—relatively egalitarian racial thoughts. In the mid-1950s, for instance, Lewis Killian and John Haer conducted a sociological examination of the attitudes of white adults in Tallahassee, Florida, toward school desegregation.[341] Although Killian and Haer conceded that "[i]t would be extremely unrealistic to contend that . . . any large portion of the southern white population has been in favor of public school desegregation," they also steadfastly insisted, "[i]t would be equally unrealistic to assert that those spokesmen who declare, 'The South will never stand for desegregation,' accurately reflect the sentiments of the great majority of white southerners, even though the voices raised to contradict them seem weak and few."[342]

Killian and Haer proceeded to enumerate a taxonomy of four general approaches to *Brown* among white southerners: (1) accepters, who agreed

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See KLARMAN, *supra* note 10, at 385 ("My claim is that *Brown* radicalized southern politics, as voters elected candidates who espoused extreme segregationist positions.").

339. KLARMAN, *supra* note 10, at 461.

340. *Id.* at 409. Klarman's book seems to reveal some internal tension regarding even the approximate percentages of white southerners who wished to follow *Brown*. Two sentences after declaring that "the desire of nearly all whites [was] to preserve segregation," he allows that "many white southerners were prepared to comply with *Brown*, and a few actually agreed with it . . . ." *Id.* Reconciling those two assertions is not easy.

341. Lewis M. Killian & John L. Haer, *Variables Related to Attitudes Regarding School Desegregation Among White Southerners*, 21 SOCIOMETRY 159, 159–64 (1958).

342. *Id.*

with *Brown* and thought that the decision should be followed; (2) compliers, who disagreed with *Brown*, but thought that it should nevertheless be followed; (3) delayers, who disagreed with *Brown* and thought that all legal means should be attempted to evade the decision; and (4) resisters, who disagreed with *Brown* and thought that the decision should never be enforced, even if such an approach clashed with the law.[343] The poll yielded 13 percent accepters, 12 percent compliers, 57 percent delayers, and 17 percent resisters.[344] The most striking differences in background characteristics among the four groups could, predictably, be found between accepters and resisters. "College graduates are over-represented among [a]ccepters, while people with less than 12 years of schooling (high school) are over-represented among [r]esisters," Killian and Haer wrote.[345] "These types differ significantly in occupation and in age, with [a]ccepters tending to be professional or managerial persons, concentrated in the age group 20–29, and [r]esisters tending to be manual and service workers, concentrated in the age bracket above 50 years."[346]

A nationwide poll conducted in 1956 supports the idea that a range of reaction among white southerners to the notion of school desegregation could be detected well beyond the Florida panhandle.[347] Southern supporters of school desegregation possessed, moreover, similar demographic characteristics to the Tallahassee accepters.[348] Although the 1956 poll indicated that only 14 percent of white southerners approved of school desegregation, education and youth were positively correlated with an increased willingness to approve of the decision.[349] College-educated white southerners, 28 percent of whom thought that whites and blacks should attend the same schools, were twice as likely to accept school desegregation as compared to the general population of southern whites.[350] Although the effect of youth on views regarding desegregation was not as pronounced as the effect of education, 19 percent of white southerners between twenty-one and twenty-four years old approved of school desegregation.[351]

Social historians have recently begun to confound the overly uniform depiction of southern white racial attitudes during the post-World War II era. Jason Sokol's *There Goes My Everything* captures the deep ambivalence and

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343. *Id.* at 160.

344. *Id.* at 161.

345. *Id.*

346. *Id.*

347. Hyman & Sheatsley, *supra* note 277, at 36.

348. *Id.* at 36, 38.

349. *Id.*

350. *Id.* at 36. Just 5 percent of white southerners who attained only a grammar-school education supported interracial education, according to the poll. *Id.*

351. *Id.* at 38. Just 10 percent of white southerners older than sixty-four approved of *Brown*. *Id.*

sense of bewilderment that beset many southern whites during the civil rights movement. "Most white southerners identified neither with the civil rights movement nor with its violent resisters," Sokol explains. "They were fearful, silent, and often inert."[352] Sokol highlights how ordinary southern whites were—as a result of *Brown*, the civil rights movement, and the accompanying racial upheaval—forced to contemplate the subordination of blacks, a phenomenon that had not previously demanded much sustained thought.[353] Sokol understands, of course, that the overwhelming majority of white southerners opposed racially integrated education during the post-*Brown* era, and that some expressed that opposition with considerable intensity.[354] Nevertheless, Sokol insists that we remember that at least some white southerners immediately accepted *Brown*'s legitimacy, and that many more harbored deeply conflicting feelings about the decision.[355] Simply because every member of the mob who gathered to oppose the desegregation of Little Rock Central High School in 1957 was white does not mean that all white people were hardliners on the question of racial integration. Legal history would do well to consistently highlight the wide array of southern white attitudes regarding race.

c. African-Americans.—A contested-constitutionalist approach to understanding the rich set of reactions to *Brown* also requires emphasizing that black people did not, contrary to popular perception, universally embrace the decision calling for school desegregation.[356] A poll conducted by the American Institute of Public Opinion in February 1956, for instance, revealed that a mere 53 percent of black southerners approved of *Brown*.[357]

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352. JASON SOKOL, THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975, at 4 (2006).

353. *Id.*; *see also* Walter Dellinger, *A Southern White Recalls a Moral Revolution*, WASH. POST, May 15, 1994, at C1 ("Segregation was a fact about my universe; it seemed no more 'right' or 'wrong' than the placement of the planets in the solar system. It simply was.").

354. SOKOL, *supra* note 352, at 149 (describing white riots and hangings in effigy in response to judicially enforced integration of the University of Georgia as late as 1961).

355. *Id.* at 115.

356. Though Klarman's book cites a Gallup poll conducted in 1955 that revealed modest levels of black support for *Brown*, *see* KLARMAN, *supra* note 10, at 352, the book dedicates surprisingly little attention to misgivings among blacks regarding the wisdom of pursuing school desegregation.

357. Erskine, *supra* note 276, at 140. More than one-third (36 percent) of black southerners disapproved of the decision, and 11 percent expressed no opinion. *Id.*

Notably, another AIPO poll conducted in November 1957—approximately twenty-one months later—found that a higher percentage of black southerners (69 percent) registered approval of *Brown* and a much lower percentage of black southerners (13 percent) expressed disapproval. *Id.* The percentage of black southerners expressing no opinion of the decision increased to 18 percent. *Id.* Do these strikingly different results mean that the February 1956 poll somehow failed to gauge the accurate level of pro-*Brown* sentiment among blacks in the South? It seems improbable. Rather, the volatile poll results likely stem from the cataclysmic events that surrounded the integration of Little Rock Central High School in September 1957. Those events, which dominated

Although it is tempting to think that many black respondents may have publicly dissembled to poll takers when they were in fact privately exultant, that thought is compromised by the fact that black respondents expressed a good deal more enthusiasm for other racially egalitarian policies. Indeed, another poll also taken in 1956 revealed that more than 80 percent of southern blacks approved of an Interstate Commerce Commission decision invalidating Jim Crow transportation laws.[358]

The precise reasons leading black southerners to disapprove of *Brown* are surely complex. Despite that complexity, however, it remains well worth contemplating at some length what may have motivated so many black southerners—the very people who were believed to be the most immediate beneficiaries of *Brown*—to express disapproval of that decision. Historian James T. Patterson has noted the decidedly mixed reaction to *Brown* among blacks and offered potential reasons why some blacks may have expressed wariness. "Some of those who said that they disapproved of *Brown* had no great wish to have their children mix with white people," Patterson wrote. "Others suspected that desegregation would force them to assimilate into white culture. Still others, proud of their schools, worried about the impact of the decision on black educators."[359] More recently, Stuart Buck has noted that the all-black school—whatever its considerable shortcomings—"was the most important institution in the black community, next to the church."[360] Some black citizens during the mid-1950s doubtlessly understood that the destruction of Jim Crow also augured the destruction of that institution.[361] An additional reason for blacks' circumspection regarding *Brown* may have stemmed from anticipating that merely because blacks and whites would—eventually—attend the same schools did not necessarily mean that they would attend the same classes.[362] In 1955, Zora Neale Hurston articulated the southern black resistance to *Brown* that stemmed from racial pride. "The whole matter revolves around the self-respect of my people," Hurston wrote.

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the national news, had the effect of making *Brown* tangible and may have (in the minds of more black southerners) equated expressing disapproval of the decision with a belief in white supremacy.

358. *Id.* at 144. Professor Gerald Rosenberg has noted the discrepancies among black southerners' attitudes toward desegregating schools and railcars. *See* ROSENBERG, *supra* note 124, at 132.

359. PATTERSON, *supra* note 314, at xxvi.

360. STUART BUCK, ACTING WHITE: THE IRONIC LEGACY OF DESEGREGATION 58 (2010).

361. *See id.* at 73 (quoting William Mansel Long of Tuscumbia, Alabama as saying: "The Supreme Court decision of 1954 didn't give us school integration in Tuscumbia, it gave us school elimination. It eliminated the black schools and forced the black children to go to the white school.").

362. *See id.* at 116–24 (analyzing the racial dimensions of "tracking," i.e., sorting students by perceived academic ability).

"How much satisfaction can I get from a court order for somebody to associate with me who does not wish me near them?"[363]

Prominent black citizens, both before and after *Brown*, repeatedly warned of the dangers of prioritizing school integration in the quest for racial equality. In 1935, nearly two decades before the Court decided *Brown*, W.E.B. Du Bois contended that "the Negro needs neither segregated schools nor mixed schools. What he needs is Education."[364] Du Bois further cautioned that "[a] mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad."[365] Even Martin Luther King, Jr.—for many, the very embodiment of the hope for an integrated society[366]—is reported to have privately expressed much the same sentiment in a 1959 conversation with a teacher from an all-black high school in Montgomery, Alabama.[367] "I favor integration on buses and in all areas of public accommodation and travel. I am for equality. However, I think integration in our public schools is different," said King, who had studied in both segregated and integrated school environments.[368] "In that setting, you are dealing with one of the most important assets of an individual—the mind," King contended. "White people view black people as inferior. A large percentage of them have a very low opinion of our race. People with such a low view of the black race cannot be given free rein and put in charge of the intellectual care and development of our boys and girls."[369]

As the dispute about implementing *Brown* turned from combating segregation to achieving integration, black citizens retained deep divisions. In 1976, Derrick Bell contended that the black community divided sharply regarding the wisdom of civil rights attorneys' identifying racial integration, rather than excellence in education, as the ultimate goal.[370] Bell suggested that blacks were principally divided by economic class regarding the value of integration, with some blacks favoring excellent schools (whatever their

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363. Zora Neale Hurston, *Court Order Can't Make Races Mix*, ORLANDO SENTINEL, Aug. 11, 1955, *reprinted in* FOLKLORE, MEMOIRS, AND OTHER WRITING 956 (Cheryl A. Wall ed., 1995).

364. W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

365. *Id.*

366. *See* Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 601 (2008) (noting that King "offered the most stirring and ambitious vision of integration for this nation, beyond anything that the nation achieved even at the height of judicially-monitored school desegregation").

367. Samuel G. Freedman, *Still Separate, Still Unequal*, N.Y. TIMES, May 16, 2004, § 7, at 8 (book review).

368. *Id.* For an account of King's educational background, see DAVID L. LEWIS, KING: A BIOGRAPHY (1978).

369. Freedman, *supra* note 367.

370. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

racial composition), and more affluent blacks valorizing racial integration.[371] In a detailed exploration of the quest for integration in Atlanta, Georgia during the early 1970s, however, Tomiko Brown-Nagin usefully interrogated Bell's narrative.[372] Brown-Nagin found that black Atlantans' divisions regarding integration also occurred within economic classes: "Working-class clients did not uniformly oppose racial-balance orders, and school integration was not advocated and imposed by a unified group of middle-class decision makers from outside of the city."[373] To the contrary, Brown-Nagin contended that middle-class blacks in fact opposed school desegregation in order "to protect black middle-class employment interests and to preserve a select group of segregated, but highly regarded, schools that catered to the children of Atlanta's African American elite."[374] Whatever the precise explanation for anti-*Brown* sentiment among black southerners, historical accounts attendant to contested constitutional values should explore the varied responses to the decision and its aftermath in their full complexity.

2. Against Inevitability.—The notion that the Court in *Brown* "conver[ted] . . . an emerging national consensus into a constitutional command" betrays a vivid instance of the backward-looking historical inevitability that mars much of consensus constitutionalism.[375] Indeed, despite the analytical shortcomings of historical approaches predicated on inevitability, Klarman has nevertheless characterized progress on the racial front as "inevitable," contending that racial reform in America after 1945 would have certainly occurred even had the judiciary abstained from resolving the race question.[376] "[A] variety of deep-seated social, political, and economic forces . . . would have undermined Jim Crow regardless of Supreme Court intervention," Klarman wrote.[377] These forces, Klarman suggested, "were propelling the nation ineluctably toward greater racial equality."[378] Although he has softened some of his initial counterintuitive claims regarding *Brown* since they appeared in print,[379] Klarman continues to hold fast to the

371. *See id.* at 489–92.

372. *See* Brown-Nagin, *supra* note 262, at 1925 ("[T]he historical record supports a correlation between remedial preferences and class that is significantly different from, and indeed in some ways the opposite of, that supposed by Bell.").

373. *Id.* at 1925–26.

374. *Id.* at 1926.

375. KLARMAN, *supra* note 10, at 310.

376. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, *supra* note 226, at 10 ("[R]acial change in America was inevitable owing to a variety of deep-seated social, political, and economic forces.").

377. *Id.*

378. Klarman, *supra* note 1, at 20.

379. *See* David J. Garrow, *"Happy" Birthday,* Brown v. Board of Education*?:* Brown*'s Fiftieth Anniversary and the New Critics of Supreme Court Muscularity*, 90 VA. L. REV. 693, 716 (2004)

inevitability thesis. As he writes in the concluding paragraph of *From Jim Crow to Civil Rights*, "[W]hile *Brown* did play a role in shaping both the civil rights movement and the violent response it received from southern whites, deep background forces ensured that the United States would experience a racial reform movement regardless of what the Supreme Court did or did not do."[380]

Contested constitutionalism, unlike its consensus-based counterpart, generally attempts to steer clear of deeming historical developments "inevitable" or "ineluctable." Such terminology fails to convey the way in which events involving human beings often defy prediction. Instead of inevitability, constitutional history grounded in contest and conflict emphasizes the contingency of historical developments. The emphasis on contingency has the virtue of not only making for richer historical understanding but also of more accurately recreating the world that judges contemplate when they decide cases. As discussed above, judges cannot know with certainty whether something that seems to be a growing trend will harden into a broadly held norm or whether a budding notion will prove to be of merely passing fancy.

Given that consensus constitutionalists vigilantly criticize scholars who deride Court decisions by viewing them with modern eyes,[381] it is genuinely confounding that they fall into the inevitability trap. When the subject matter principally involves black citizens, moreover, historians should be particularly reluctant to invoke ideas of "inevitability." After all, the story of blacks within the United States is not one of steady progress, with each decade's racial climate representing an improvement upon the preceding one. Following World War II, as consensus constitutionalists note, the times certainly appeared ripe for a sustained period of strides toward racial equality.[382] Yet the times also appeared ripe for such a sustained period immediately following the Civil War.[383] That moment, alas, proved ephemeral.[384]

Without the Court's invalidation of Jim Crow, of course, it is impossible to know for certain whether demands for formal racial equality would have been heeded. Rather than depicting judicial intervention as either irrelevant or "almost perverse" in its effect on the nation's inevitable embrace of racial

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(book review) (describing how Klarman's book, unlike an earlier article, allowed that *Brown* did in fact meaningfully inspire blacks to challenge Jim Crow).

380. KLARMAN, *supra* note 10, at 468.

381. *See supra* text accompanying notes 170–73.

382. *See* FRIEDMAN, *supra* note 11, at 243 ("Racial attitudes in the nation were undergoing a substantial transformation by the 1940s. Much of this had to do with the Second World War."); KLARMAN, *supra* note 10, at 173–74 ("By the 1940s, long-term forces for racial change that had antedated World War II—urbanization, industrialization, the Great Migration, and educational advancement—were producing significant results. The war magnified these forces.").

383. *See* JAMES MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988).

384. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 28–29 (2d rev. ed. 1966).

egalitarianism,[385] it comes closer to the mark to acknowledge that the Court provided advocates of racial equality with a powerful rhetorical and moral weapon.[386] Without Court intervention, in other words, it would have been impossible in 1955 for a twenty-six-year-old Martin Luther King, Jr. to claim as the freshly anointed head of the Montgomery Improvement Association, "If we are wrong, then the Supreme Court of this Nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong."[387] Without Court intervention, it would have been impossible in 1963 for President John F. Kennedy to claim that, with respect to civil rights, "[w]e are confronted primarily with a moral issue. It is as old as the Scriptures and is as clear as the American Constitution."[388] It seems dubious, then, that in the sphere of racial inequality the Court's intervention did not meaningfully alter and shape the historical developments that followed in its wake.[389]

B. Countermajoritarian Capabilities, Past and Future

1. Interracial Marriage.—In exploring the Court's involvement with race cases during the period immediately following *Brown*, consensus constitutionalists often note that the Court encountered an (unwanted) opportunity to eliminate prohibitions on interracial marriage in 1955. In *Naim v. Naim*, the Virginia Supreme Court upheld a state statute forbidding white citizens from marrying a person of another race.[390] The Court sought to rid itself of *Naim* (which came to the court as an appeal rather than as a petition for certiorari) as quietly as possible. The Justices dodged *Naim* not because they thought that Jim Crow marriage laws were legally or logically

385. Klarman, Brown, *Racial Change and the Civil Rights Movement*, *supra* note 226, at 76.

386. Klarman has not advocated a consistent line on whether *Brown* made a direct, positive difference in the fight for racial equality. Initially, he cast grave doubt regarding *Brown*'s inspirational importance for the civil rights movement. *See id.* at 84. Toward the end of *From Jim Crow to Civil Rights*, however, Klarman reversed course and allowed that the decision "plainly inspired blacks," as it "furthered the hope and the conviction that fundamental racial change was possible." KLARMAN, *supra* note 10, at 463. Professor Garrow took early notice of Klarman's evolution on this point. *See* Garrow, *supra* note 379, at 716.

387. Martin Luther King, Jr., Speech at Holt Street Baptist Church, Montgomery, Alabama (Dec. 5, 1955), *reprinted in* EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS—A READER AND GUIDE 44, 45 (C. Carson et al. eds., 1987). For an examination of King's significance for constitutional thought more broadly, see Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

388. Robert E. Gilbert, *John F. Kennedy and Civil Rights for Black Americans*, 12 PRESIDENTIAL STUD. Q. 386, 396 (1982).

389. For analysis of *Brown*'s tangible impact on the bus boycott in Montgomery, Alabama, see Garrow, *supra* note 379, at 717.

390. 87 S.E.2d 749, 756 (Va. 1955).

distinct from Jim Crow education laws.[391] Instead, the Court feared that invalidating anti-miscegenation laws so closely on the heels of *Brown* would compromise the validity of the school desegregation decisions because opposition to interracial marriage was so widespread.[392] As Klarman has noted, "[O]pinion polls in the 1950s revealed that over 90 percent of whites, even outside the South, opposed interracial marriage."[393]

Consensus constitutionalism suggests that the Court wisely decided to bide its time in resolving the anti-miscegenation issue rather than rushing headlong into a fight that it could not win. Legal scholars have debated for decades whether the Court's evasion of *Naim* can be justified on prudential grounds, even if it cannot be so justified on strictly jurisprudential grounds. Where Alexander Bickel defended judicial evasiveness (at least in certain circumstances), Gerald Gunther famously skewered Bickel for encouraging the Court to be one hundred percent principled, but only twenty percent of the time.[394] Although the contours of the Bickel–Gunther debate are familiar, what has remained severely underexplored is the often unstated assumption underlying consensus constitutionalism's support for the nondecision in *Naim*: the Court waited to strike down prohibitions on interracial marriage until national sentiment demanded such a decision. This assumption, as it turns out, demands revisiting.

Sunstein details the Bickel–Gunther dispute at length and makes clear that he believes that Bickel gets the better of the argument.[395] Sunstein also contends that the Court's strong suspicion that an anti-miscegenation decision would generate outrage "helps to explain the view that the Court was right not to invalidate the ban on racial intermarriage in the 1950s" when it evaded the issue in *Naim*.[396] Friedman's book comes closest to articulating what generally remains implied among consensus constitutionalists.[397] In his

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391. *See* KLARMAN, *supra* note 10, at 321–22 (identifying the Court's central concern as the practical problem of addressing the heated issue of anti-miscegenation laws so soon after *Brown*).

392. *Id.*

393. *Id.* at 321.

394. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

395. *See* SUNSTEIN, *supra* note 13, at 127–39 (concluding that, while Bickel's theory neglects some important considerations, Gunther's view is oversimplified).

396. *Id.* at 164.

397. Consensus constitutionalism often simply omits addressing *Loving* altogether. It is somewhat perplexing that Klarman's book, which begins chronicling Court decisions involving race toward the end of the nineteenth century, stops just shy of addressing the Court's decision in *Loving*, widely deemed one of the most significant decisions involving racial equality during the twentieth century. *See, e.g.*, Pamela S. Karlan, *Loving* Lawrence, 102 MICH. L. REV. 1447, 1447 (2004) ("*Loving* marked the crystallization . . . of the antisubordination principle . . . ."). When Klarman has mentioned *Loving* in law review writings, he has tended to do so only in passing—and in a way that is consistent with the consensus constitutionalist framework. *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 485–86 (2005) ("At some point, the Court is likely to constitutionalize a newly emerging consensus and invalidate bans on same-sex

discussion of race during the 1960s, Friedman writes, "Finally, the Court mustered the wherewithal to face the one racial issue it had feared to confront amid all the controversy . . . ."[398] Recounting the history of *Naim*, Friedman notes, "Mixed marriage was a sensitive issue throughout the country . . . . It was only in 1967, some thirteen years after *Brown* and well after passage of the Civil Rights Act, that the Court finally struck down such laws as unconstitutional, in the aptly named case *Loving v. Virginia*."[399] Friedman's narrative, consistent with the conventional understanding within legal circles more broadly,[400] suggests that by the time the Court decided *Loving* the "controvers[ial]" and "sensitive" feelings regarding interracial marriage had dwindled.[401] National values embraced racial egalitarianism in the mid-1960s (as demonstrated by adoption of the 1964 Civil Rights Act), Friedman intimates, and those values then included approval of (and certainly not widespread disapproval of) interracial marriage.

The racial environment in which the Court decided *Loving*, however, was far more disapproving of interracial marriage than the consensus constitutionalist narrative would suggest. Whites had, it concededly appears, become more accepting of such unions since the 1950s when, as Klarman notes, a Gallup poll indicated that more than 9 out of 10 expressed disapproval.[402] Yet white racial enlightenment on this score remained extremely limited, even in the late 1960s. A Gallup poll conducted in 1968—one year after *Loving*—revealed that 3 out of 4 whites continued to disapprove of interracial marriages.[403] The nationwide response (i.e., all races rather than only whites) was not much different, with 73 percent registering disapproval and just 20 percent indicating approval.[404] Not only was there an absence of consensus voicing approval of interracial marriage in 1968, national consensus—to the extent that one existed—affirmatively *disapproved* of the practice. It is certainly true that only sixteen states had laws on the books that *Loving* upended,[405] but that is not because citizens in

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marriage, much as the Justices struck down restrictions on interracial marriage in *Loving v. Virginia* (1967) after the civil rights movement had rendered anachronistic that last formal vestige of Jim Crow.").

398. FRIEDMAN, *supra* note 11, at 249.

399. *Id.* at 249–50.

400. *See, e.g.*, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in The Twentieth Century*, 100 MICH. L. REV. 2062, 2286 (2002) (claiming that "it took half a generation, and a sea change in our culture, for the Court to get from *Brown* to *Loving*").

401. FRIEDMAN, *supra* note 11, at 249–50.

402. *See* KLARMAN, *supra* note 10, at 321.

403. *See* Joseph Carroll, *Most Americans Approve of Interracial Marriages*, GALLUP (Aug. 16, 2007), http://www.gallup.com/poll/28417/Most-Americans-Approve-Interracial-Marriages.aspx (noting that—among whites respondents to interracial marriage in 1968—75 percent disapproved, and just 17 percent approved).

404. *Id.*

405. Loving v. Virginia, 388 U.S. 1, 6 (1967).

the remaining thirty-four states generally thought that race was irrelevant to marital considerations. A clear majority of Americans thought that race was exceedingly relevant to marital considerations, and had no compunction about expressing this notion to pollsters. It is important to note that as late as 1994, Gallup found that only 48 percent of Americans expressed approval of interracial marriage.[406] The first year that Gallup registered a majority approving of interracial marriage occurred in 1997.[407]

That the overwhelming majority of Americans disapproved of interracial marriage when the Court issued *Loving* in 1967 reveals a couple of different things. First, it undercuts the idea that the Court possesses virtually no power to extend protection to minorities who are not held in high esteem by a majority or a near majority of the populace. Approval of interracial marriage at the time of *Loving* was a decidedly minority phenomenon. Second, the decision helps to underscore the very real stakes that are raised by adhering to the slogan that *the courts should not get out too far in front of the people.*[408]

The American public's widespread disapproval of interracial marriage during the 1960s also offers a particularly stark caution against the way that consensus constitutionalism sometimes draws upon public opinion. It is important to emphasize that the public opinion polls that consensus constitutionalists cite do not always expressly ask respondents for a view regarding whether a program is legal or constitutional, but instead ask merely for a policy preference.[409] At least some evidence suggests that, in the minds of many Americans, the sphere of policy, on the one hand, and the sphere of legality, on the other, may not be coextensive.[410] In the context of interracial

406. *See* Carroll, *supra* note 403 (noting that 37 percent of respondents disapproved of interracial marriage and 15 percent expressed no opinion).

407. *Id.* In 1997, the approval percentage for interracial marriage increased to 64 percent. *Id.*

408. *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1081 (2004) ("*Lawrence* and *Romer* undid most of the pluralism damage of *Hardwick*—but without making the mistake of getting too far ahead of the country.").

409. For example, in analyzing the Court's decisions regarding affirmative action at the University of Michigan, Friedman cites a poll conducted in 2003 by the Pew Research Center to show a shift in public attitudes on the issue of affirmative action between 1995 and 2003. FRIEDMAN, *supra* note 11, at 361. The poll cited by Friedman, however, did not question the constitutionality of affirmative action, but instead asked, "In order to overcome past discrimination, do you favor or oppose affirmative action programs. . . ?" News Release, Pew Research Ctr. for the People & the Press, Conflicted Views of Affirmative Action 1 (May 14, 2003), *available at* http://peoplepress.org/reports/display.php3?ReportID=184.

410. A recent divergence of views regarding policy preference, on the one hand, and legality, on the other, arose during the controversy surrounding the plan to build a mosque and Islamic cultural center in Manhattan, close to the site of the terrorist attacks that occurred on September 11, 2001. Although a poll conducted in August 2010 revealed that only 30 percent of respondents indicated that the building's proposed location was "appropriate," more than 60 percent of respondents agreed that "the Muslim group has the right to build a mosque there." FOX News Poll 1 (Aug. 13, 2010), *available at* http://www.foxnews.com/projects/pdf/081310_MosquePoll.pdf.

marriage, for example, the percentage of people who expressed *disapproval* of interracial marriages has exceeded the percentage of people who suggested that interracial marriages should be *illegal* since at least the 1960s.[411] In 1968, when Gallup found that 75 percent of whites "disapprove[d]" of interracial marriage, the University of Chicago's National Opinion Research Center found that 56 percent of whites thought "there should be laws against" it.[412] It is far from astonishing, though, that consensus constitutionalists do not generally highlight the difference between polling questions inquiring about policy views and questions inquiring about legal views.[413] Much of their view of constitutional interpretation, after all, nearly insists upon eliding the distinction between what people (including judges) desire as a first-order preference and what they believe the law requires.

2. Same-Sex Marriage.—The Court's decision in *Loving* leads to the constitutional question of same-sex marriage. To state only the most obvious connection, both matters involve two people who wish to wed each other, but are prohibited from doing so because of tradition and the attendant deep ob-

411. Gallup's poll asked respondents whether they "approve[d] or disapprove[d]" of interracial marriage. Carroll, *supra* note 403. National Opinion Research Center's poll asked respondents whether "there should be laws against" interracial marriage. SCHUMAN ET AL., *supra* note 286, at 108 tbl.3.1B.

412. *See* Carroll, *supra*, note 403; SCHUMAN ET AL., *supra* note 286, at 106–08 tbl.3.1B. Intriguingly, another Gallup poll found on March 10, 1965 that a bare majority of the nation approved anti-miscegenation laws, 48 percent to 46 percent. *See* Hazel Erskine, *The Polls: Interracial Socializing*, 37 PUB. OPINION Q. 283, 292 (1973). It bears mentioning, however, that the polling question's phrasing may have overstated the opposition to anti-miscegenation laws. The question stated: "*Some states* have laws making it a crime for a white person and a Negro to marry. Do you approve or disapprove of such laws?" *Id.* (emphasis added). One need not have been an especially keen student of current affairs in 1965 to realize that "some states" effectively meant states in the South. And many nonsouthern respondents—and not a few southern respondents—would have wanted to be understood as rejecting that region's racial recalcitrance. Indeed, given that the poll was taken just days after Bloody Sunday occurred in Selma, Alabama, it is telling that more respondents nevertheless approved than disapproved of such laws. Rather than evincing racial egalitarianism, it seems plausible many respondents who disapproved of "some states'" laws were evincing anti-antiegalitarianism. *Cf.* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

In all events, as the above analysis of post-*Brown* northern racial attitudes suggested, it seems incorrect to understand this 1965 poll to indicate a widespread desire for equality regarding love across racial lines. In August 1967, shortly after the Court issued *Loving*, a Harris poll asked: "As far as your own personal feelings go, would you be personally concerned or not if your own teenage child dated a Negro?" Erskine, *supra*, at 289. Ninety percent of white respondents indicated that they would be concerned. It seems safe to believe, then, that when Chief Justice Earl Warren in *Loving* excoriated justifications for Virginia's anti-miscegenation laws as amounting to "White Supremacy," 388 U.S. at 7, he was not articulating the consensus views of American society.

413. Rosen notes the difficulty of using polling about policy preferences as a proxy for legal views. *See* ROSEN, *supra* note 12, at 9 ("Polls are hardly a reliable indicator, since polls seldom ask people what they think about constitutional issues, as opposed to policy issues . . . ."). Having duly noted the difficulty, however, his argument nevertheless often draws upon such polling.

jections of many individuals who wish to continue that tradition. Mildred Loving, the black woman who married a white man in the case bearing her name, observed this very connection when she announced her support of gay marriage in 2007.[414] Where tradition once held that a person may marry only a person of the same race, tradition today generally holds that a person must not marry a person of the same sex.[415]

Apart from the substantive issue of whether such analogies are doctrinally legitimate, *Loving* raises the question of when an oppressed group should seek to have the judiciary confer recognition upon a contested right. This very timing question was, of course, debated intensely in 2009 after a legal team, led by David Boies and Theodore Olson, the erstwhile antagonists from *Bush v. Gore*, filed a lawsuit in a federal district court in California.[416] Many advocates of gay equality contended that, while they shared the lawsuit's goal, it was simply "premature" to request judicial relief.[417] Evincing an unmistakable manifestation of consensus constitutionalism, Human Rights Campaign and Lambda Legal, along with other organizations supportive of same-sex marriage, issued a press release asserting, "The history is pretty clear: the U.S. Supreme Court typically does not get too far ahead of either public opinion or the law in the majority of states."[418] After all, voters in California had only months earlier effectively reversed a California Supreme Court decision that conferred the right to gay marriage.[419] But the individuals who claimed that it was simply too early to push for the federal recognition of same-sex marriage may prove unwisely and unnecessarily beholden to the consensus-constitutionalist mindset.

Recent statements about gay marriage from two of today's most distinguished legal thinkers acutely display the difficulty of gauging contemporaneous views regarding a hotly contested question. In the context of Court decisions vindicating gay rights, Sunstein suggests that such decisions have not "come as bolts from the blue."[420] Instead, Sunstein

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414. Mildred Loving, *Loving for All* (June 12, 2007), http://www.freedomtomarry.org/page/-/files/pdfs/mildred_loving-statement.pdf; *see also* Susan Dominus, *The Color of Love*, N.Y. TIMES, Dec. 28, 2008, (Magazine), at 21 (chronicling Mildred Loving's process of embracing gay marriage).

415. I use the word "generally" here because five states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) along with Washington, D.C., currently issue marriage licenses to same-sex couples. Ian Urbina, *Nation's Capital Joins 5 States in Legalizing Same-Sex Marriage*, N.Y. TIMES, Mar. 4, 2010, at A20.

416. Jesse McKinley, Bush v. Gore *Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1.

417. *See id.* at A15 (quoting one Lambda Legal official as saying, "We think it[']s risky and premature.").

418. Press Release, Am. Civil Liberties Union et al., Make Change, Not Lawsuits 3 (May 27, 2009), *available at* http://www.aclu.org/files/pdfs/lgbt/make_change_20090527.pdf.

419. *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008). The California Supreme Court upheld Proposition 8 in *Strauss v. Horton*, 207 P.3d 48, 63–64 (Cal. 2009).

420. SUNSTEIN, *supra* note 13, at 4.

contends that these cases, such as *Romer v. Evans*[421] and *Lawrence v. Texas*,[422]

> emerged from a social context in which such discrimination seems increasingly difficult to defend—in which We the People have been coming, in fits and starts, to think that gays and lesbians should not be put in jail for consensual relationship[s], and that discrimination against them, at least by government, is hard to defend.[423]

He also suggests that same-sex marriage is a modern analogue to *Naim* where "consequentialist considerations . . . justify a degree of judicial hesitation."[424] Regarding the next frontier for gay equality in the federal judiciary, Sunstein sounds a note of caution: "If the Court ever does conclude that states cannot ban same-sex marriage, it will only be after much of the public has already done so."[425] Last year, Judge Richard A. Posner similarly wrote, "Until homosexual marriage becomes as uncontroversial in most states as racial intermarriage had become by 1967, the Court will, in all likelihood, stay its hand."[426]

The statements of Sunstein and Posner possess an intuitive appeal, as few issues seem more hot-button and divisive in modern America than gay marriage. These statements, however, may betray serious misapprehensions. Polling data reveals that, Sunstein's intimation notwithstanding, "much of the public" had already concluded that states should—as a matter of law—no longer ban same-sex marriage by the time that he wrote that statement. Although the responses to different polls regarding gay marriage demonstrate volatility, a CNN poll taken in 2009 revealed that 45 percent of respondents thought that the Constitution conferred a right to gay marriage while 54 percent of respondents thought no such right existed.[427] These findings, moreover, are hardly aberrant. Indeed, a Gallup poll taken in 2007 revealed that 46 percent of respondents thought that the law should permit same-sex couples to marry and 53 percent thought that the law should not permit them to do so.[428] Most recently, a CNN poll taken in August 2010 found that 52

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421. 517 U.S. 620 (1996).

422. 539 U.S. 558 (2003).

423. SUNSTEIN, *supra* note 13, at 4–5.

424. *Id.* at 164.

425. *Id.* at 5. *See* Eskridge, *supra* note 408, at 1081 ("If most Americans believe that gay people are . . . not qualified for the elevated status of civil marriage, the judiciary not only cannot, but ought not, impose same-sex marriage on the hesitant body politic.").

426. Richard A. Posner, *The Race Against Race*, THE NEW REPUBLIC (Jan. 29, 2010), http://www.tnr.com/book/review/the-race-against-race.

427. CNN/Opinion Research Corp. Poll 3 (Aug. 11, 2011), *available at* http://i2.cdn.turner.com/cnn/2010/images/08/11/rel11a.pdf.

428. Lydia Saad, *Tolerance for Gay Rights at High-Water Mark*, GALLUP (May 29, 2007), http://www.gallup.com/poll/27694/Tolerance-Gay-Rights-HighWater-Mark.aspx (reporting data for the Gallup Poll for May 10–13, 2007). Since 2007, this poll has found that support for gay marriage has somewhat eroded. The poll taken in May 2009 revealed that 40 percent of respondents thought that such marriages should be so recognized and 57 percent thought that the law should not

percent of respondents indicated that gays and lesbians "should have a constitutional right to get married and have their marriage recognized by law as valid."[429]

Transitioning from law and toward approval—an issue Judge Posner gestured toward by addressing the "[]controversial" nature of same-sex marriage—precious little data exists on this question. Polling questions about gay marriage, for whatever reason, are almost invariably phrased in terms of legal views rather than policy preferences. The available polling reveals, though, that same-sex marriage (at least when considered on a national basis) has long garnered more approval and less disapproval than interracial marriage had when the Court decided *Loving* in 1967. A Quinnipiac University poll measured low support, finding that only 36 percent of respondents supported gay marriage and 55 percent opposed gay marriage.[430] But even these results reveal that gay marriage enjoys broader support and less opposition than interracial marriage enjoyed even post-*Loving*.[431] These surveys do not, of course, tell the whole story regarding the likelihood of public acceptance.[432] But neither can they be ignored in wrestling with the question of whether the moment is ripe to have the Court resolve the same-sex marriage question.

If the Lovings and their attorneys had been driven by polling data on interracial marriage when they initially filed their lawsuit in 1963,[433] it seems highly implausible that they would have decided to contest Virginia's anti-miscegenation provision. Indeed, approximately two weeks before they filed, *Newsweek* ran an article that featured polling results demonstrating that overwhelming disapproval of interracial relationships was a *national*

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recognize these unions. Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP (May 27, 2009), http://www.gallup.com/poll/118378/Majority-Americans-Continue-Oppose-Gay-Marriage.aspx. But, one year later, in May 2010, respondents indicating gay marriages should be recognized had increased to 44 percent; 53 percent said that such unions should not be recognized. *See* Jeff Jones & Lydia Saad, *Gallup Poll Social Series: Values and Beliefs*, GALLUP (May 24, 2010), *available at* http://www.gallup.com/poll/128297/Gay-Marriage-May-2010.aspx.

429. CNN/Opinion Research Corp. Poll, *supra* note 427, at 3.

430. Quinnipiac Univ. Poll (July 17, 2008), http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194.

431. Recall that in 1968 just 20 percent of Americans approved such unions and 73 percent disapproved. *See* Carroll, *supra* note 403.

432. Perhaps the most important consideration that is excluded from this data is the *intensity* of support and opposition. A 2009 NBC News/Wall Street Journal poll measured the intensity of respondent sentiments regarding the right to enter into same-sex marriage and found that among the categories—"strongly oppose," "somewhat oppose," "somewhat favor," and "strongly favor"—the largest group (40 percent) formed the "strongly oppose" camp. "Strongly favor" was the second largest group, but well behind at 26 percent. NBC News/Wall Street Journal Survey 23 (Oct. 2009), *available at* http://online.wsj.com/public/resources/documents/wsjnbc-10272009.pdf.

433. 388 U.S. at 3.

phenomenon.[434] "The closest that whites came to unanimity on any racial question was over the issue of interracial dating, which many view as the prelude to intermarriage," *Newsweek* observed. "Ninety per cent of all whites throughout the country said they would be concerned if their teen-ager dated a Negro. The percentage is 97 in the South. Elsewhere the figure falls no lower than 88 per cent."[435] In 1963, it seems clear, the Lovings did not have consensus on their side. But perhaps fueled by a "romantic" belief in both their love and—not incidentally—in the Court that would decide their fate, the Lovings decided to file a lawsuit anyway. Just because a view of the Court may be romantic, in other words, does not make it foolish.

Yet, even if one subscribes to the notion that the Court requires approval from approximately 50 percent of the public or greater to issue a particular outcome, it is extremely doubtful that an individual who wishes to have a legal claim vindicated would be well-advised to wait until after polls register the requisite level of support before simply *filing* suit. Lawsuits often take a number of years to make their way to the Court, and it is certainly possible that public opinion polling at the time of filing that reflects merely nascent support will have surpassed the majority level of public support by the time that the Court makes a decision.[436] Consensus, at least of the watered-down variety that consensus constitutionalists often cite, may sometimes materialize right before our very eyes.

Despite the widespread idea that it is vital for a consensus to emerge on the question of same-sex marriage before filing a federal lawsuit, ample reason exists to believe that those supporting expanded marital rights permitted a prudent length of time to elapse before raising the contested legal question. The period of time that is required to elapse between a potential legal victory that is thought initially by some to be unfathomable and the time that actual victory is secured can be shockingly short.[437] *Brown* and *Loving*, it is worth remembering, were decided only thirteen years apart. *Loving*, moreover, may actually stop the clock three years too late from the point when the Court first applied the racially egalitarian principle to matters of sexual intimacy. In *McLaughlin v. Florida*, decided in 1964, the Court invalidated a statute that criminalized cross-racial cohabitation with members

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434. *How Whites Feel About Negroes: A Painful American Dilemma*, NEWSWEEK, Oct. 21, 1963, at 44.

435. *Id.* at 49. The accompanying article featured a quotation from a San Diego, California resident stating: "Shaking hands is OK, but kissing—no thanks." *Id.* Similarly, the article quoted a Pennsylvania resident stating: "I don't like to touch [blacks]. It just makes me squeamish. I know I shouldn't be that way, but it still bothers me." *Id.* at 50.

436. There is never any guarantee, of course, that public approval will continue to expand rather than shrink. *See supra* text accompanying notes 150–51.

437. Intriguingly, Professor Sunstein has observed that "norm entrepreneurs" can, under the right circumstances, help to facilitate dramatic societal transformations in surprisingly short order. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929–30 (1996) (identifying the end of South African apartheid as such an instance).

of the opposite sex, a ruling that doctrinally made *Loving*'s result nearly axiomatic.[438] Adopting *McLaughlin* rather than *Loving* as the relevant endpoint, then, reduces the period of time between *Brown* and the Court's expressed willingness to extend racial egalitarianism to sexual intercourse—a ruling that would have supposedly been unimaginably incendiary had it been issued at the time of *Naim*—to a mere ten years.[439]

If contemporary suits seeking same-sex marriage are akin to *McLaughlin* and *Loving*, what judicial opinion serves as the *Brown* of the gay rights movement? In other words, what is the appropriate time from which to start the clock running? The conventional view, at least in this instance, seems to be the correct one, meaning *Lawrence v. Texas* serves as the equivalent of *Brown*.[440] *Lawrence*, like *Brown*, was widely understood as placing the fundamental issue of full formal equality squarely on the table—something that *Romer* did not achieve.[441] Thus, *Lawrence* elicited intense opposition among some people who derided the decision as illegitimate not so much because they thought that sodomy should be prosecuted, but because they feared that the decision would lead to same-sex marriage.[442] Although *Romer* surely received a hostile reception in certain quarters,[443] its reception paled in comparison to *Lawrence*'s.[444]

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438. 379 U.S. 184, 196 (1964). *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 272 (2003) (contending that *Loving* "was practically a foregone conclusion, especially since, in *McLaughlin v. Florida* (1964), the Court had already invalidated a Florida statute that criminalized interracial fornication").

439. *See* Posner, *supra* note 426, at 4 (noting the at least somewhat mysterious phenomenon by which *Loving*, rather than *McLaughlin*, is the celebrated breakthrough); *see also* Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1167 (2006) ("*McLaughlin v. Florida* gets short shrift in standard historical accounts of the legal regulation of race, sexuality, and interracial intimacy. These accounts usually crest not at *McLaughlin* but rather at *Loving v. Virginia*.").

440. *See, e.g.*, E.J. Graff, *The High Court Finally Gets It Right*, BOSTON GLOBE, June 29, 2003, at D11 (contending that "*Lawrence* is our *Brown v. Board of Education*").

441. In *Romer v. Evans*, the Court invalidated Colorado's effort to prohibit state entities from deeming gays a protected class. 517 U.S. 620, 635–36 (1996). Viewing *Romer* as the *Brown* of gay rights is intriguing not least because doing so would mean that it has already been fifteen years since the nation has contemplated full gay equality, two years longer than the gap between *Brown* and *Loving*. But *Romer* bears a closer resemblance to some of the cases that chipped away at the edifice of Jim Crow that preceded *Brown*. *See, e.g.*, McLaurin v. Okla. State Regents for Higher Ed., 339 U.S. 637, 640–42 (1950); Sweatt v. Painter, 339 U.S. 629, 635–36 (1950).

442. Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, at N8.

443. *See* 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.").

444. *See* Linda Greenhouse, *Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, June 27, 2003, at A1 ("Groups representing the socially conservative side of the Republican Party reacted to the decision with alarm and fury."); Kershaw, *supra* note 442 (quoting Professor William Rubenstein as stating "'The right wing is really galvanized by this [decision], throwing down the barricades.'").

Nearly eight years have now elapsed since the Court decided *Lawrence*. On August 4, 2010, Judge Vaughn Walker issued a decision validating the right to gay marriage in *Perry v. Schwarzenegger*, the first federal case raising the issue.[445] Given the lengthy period of appeals and deliberation that accompany most decisions that end up in the Court, and *Perry*'s unusual procedural quirks, it seems plausible that the Court will not decide any same-sex marriage case before approximately 2013.[446] If the Court decided that case or a similar case at that time, the period between *Lawrence* and a decision from the Court would match the period between *Brown* and *McLaughlin*. Two years from now may be too soon for anything resembling consensus to emerge on a divisive question like same-sex marriage. History reveals, however, that it will not be too soon for the Court to recognize that right without unduly imperiling either its own legitimacy or the quest for gay equality.

The point here is not to suggest that, on the tenth anniversary of a Court decision that confers a measure of legitimacy upon a widely-reviled group, magical dust sweeps the nation making it safe for further legal advancement. It is merely to contend that the Court possesses considerably more leeway than the consensus rubric often seems to permit—at least from a forward-looking vantage point. In the event that the Supreme Court should use *Perry* as a vehicle to validate a right to same-sex marriage, it seems plausible that consensus constitutionalists would incorporate the decision into their worldview by attributing it to "an emerging national consensus" regarding marital equality. In reality, though, the decision would more accurately be understood as arising from a deeply contested constitutional landscape. In other words, the decision would constitute judicial business as usual.

Conclusion

In 1968, toward the end of the last book that he would write, Richard Hofstadter offered an incisive (and, almost certainly, self-critical) appraisal of recent developments in his field. Hofstadter wrote:

> If there is a single way of characterizing what has happened in our historical writing since the 1950's, it must be, I believe, the rediscovery of complexity in American history: an engaging and moving simplicity, accessible to the casual reader of history, has given way to a new awareness of the multiplicity of forces. To those who

445. *See* 704 F. Supp. 2d 921 (N.D. Cal. 2010).

446. The federal cases decided by Judge Tauro in July 2010 involving challenges to the Defense of Marriage Act (DOMA) raise—at least potentially—a narrower set of issues than those raised by lawsuits directly challenging state prohibitions on same-sex marriage. *See generally* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (holding that DOMA violated the equal protection principles embodied in the Fifth Amendment); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010) (holding that DOMA exceeded Congress's power under the Spending Clause and violated the Tenth Amendment).

> find things most interesting when they are simple, American history must have come to seem less interesting in our time; but to those who relish complexity, it has taken on a new fascination.[447]

More than four decades after Hofstadter wrote those words, historians continue to embrace the complex rather than the simple.

Legal academia's external examination of Supreme Court history, in contrast, remains enthralled with simplicity. Law professors should disavow the casual manner in which they invoke consensus and the notion of an emerging national consensus to explain constitutional legal history. Consensus constitutionalism too often obscures the ideological disagreements and even the ideological uncertainty that undergird lawsuits resolved by the Court. Rather than altogether abandoning external inquiries into Court decisions, however, law professors might instead reexamine twentieth-century constitutional history with an alternate external prism, one that places conflict, not consensus, at the analytical center. This Article has employed contested constitutionalism to revise our understanding of *Brown* and *Loving*, two of the most closely examined constitutional decisions throughout the Court's entire existence. Going forward, more legal scholars might contemplate applying contested constitutionalism to provide a richer historical account of many significant events in American legal history.

Yet, important as enriching our historical understanding of Supreme Court decisionmaking is, contested constitutionalism involves considerably more than improving history books. Despite concerns about the supposedly growing chasm between the work of judges and the work of scholars,[448] the manner in which prominent law professors understand and explain the Court's history and its ability to protect minority rights has a way of seeping into the broader intellectual culture. Ultimately, those understandings and explanations exert influence upon how judges perform their jobs. Contested constitutionalism, with its insistence that the Court has in fact often issued decisions that challenge prevailing sentiments, seeks to preserve the Court's countermajoritarian capabilities.

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447. HOFSTADTER, *supra* note 65, at 442.

448. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).