Response

Public Consensus as Constitutional Authority

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Abstract

Barry Friedman's new book The Will of the People *attempts to dissolve constitutional law's countermajoritarian difficulty by showing that, in practice, the Supreme Court does only what the public will tolerate. His account succeeds if "the countermajoritarian difficulty" refers to the threat that courts will run the country in ways that contravene majority preference, but not if the "the countermajoritarian difficulty" refers to the need to explain the legitimate sources of judicial authority in cases where decisions do contravene majority preference. Friedman's book does not pursue the second possibility, and may suggest that doing so is unimportant, in part because of the limited latitude that public opinion gives the Court and in part because of skepticism about the enterprise of constitutional interpretation. This Essay argues that Supreme Court decisionmaking is important despite being constrained by public opinion and that the constraint of public opinion should sometimes be understood as an aspect of constitutional interpretation rather than as an alternative to it. Public opinion that approaches consensus is better understood as a contributing factor in the calculus of arriving at correct constitutional outcomes than as a force demonstrating the limits (or impossibility) of authentic constitutional interpretation.*

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Introduction

The idea of the countermajoritarian difficulty arises from the potential clash between the rule of law and the preferences of the public—or, to use a different shorthand, between constitutionalism and democracy.[1] Most attempts to solve the difficulty have marched under the banner of constitutionalism. They point out that the Supreme Court's claim to legitimacy lies in interpreting the Constitution correctly, whether or not that yields decisions that people like. Barry Friedman's new book *The Will of the People* comes from the other side, proposing to dissolve the countermajoritarian difficulty under the banner of democracy.[2] According to Friedman, there is no point in worrying about the countermajoritarian difficulty if in practice the Court's decisions align with popular preferences—which, he says, they pretty much do.[3]

The Will of the People is a remarkable achievement. It may be the best one-volume narrative of the Supreme Court's role in constitutional law, or in American politics, that I have ever read. But its dissolution of the countermajoritarian difficulty comes at a price. In arguing that Supreme Court decisionmaking is legitimate because it stays within the limits of public tolerance, the book leaves little room for anything that we would recognize as constitutional interpretation.

In Friedman's telling, Justices throughout history have decided cases by tempering their first-order preferences with their knowledge,

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1 *See generally* Alexander Bickel, The Least Dangerous Branch 16–23 (1962) (discussing the countermajoritarian difficulty and how judicial review is arguably undemocratic).

2 Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009).

3 *Id.* at 369–71.

or at least their best guesses, as to what the public will bear.[4] There is an important story here, and Friedman conveys it wonderfully. But something important is left out. The Court that is described in *The Will of the People* responds to public opinion, but its members do not grapple with constitutional text, judicial precedent, historical materials, or the other sources of authority that are standardly regarded as appropriately shaping constitutional analysis. Judicial will and public will seem to be all that matter. Moreover, the fact that the Justices are cabined by—and only by—the will of the people is presented entirely as a solution to the problem of the Supreme Court's legitimacy, rather than as something that would raise problems of its own. So long as the public wins in the end, Friedman says—and it does—the Court's decisionmaking is legitimate.

This framework makes it hard to think about how decisionmaking should proceed in most constitutional cases that reach the Supreme Court, because in most such cases there is no such thing as a well-formed public view. But there is also a deeper problem. Even when the public does have a view, the idea that that view properly prevails in constitutional law only makes sense if we jettison one of the two values that underwrote the countermajoritarian difficulty in the first place—that is, rule-of-law constitutionalism. A full account of the American constitutional system should dismiss neither the impulse toward democracy nor the aspiration for a legal constitutionalism that limits democratic power. But in focusing on popular will as the source of constitutional meaning, Friedman drives the legal aspect of constitutionalism almost entirely out of the picture.

My contribution in this Essay is to suggest a third way, one that mediates the tension between constitutionalism and democracy rather than awarding outright victory to one side or the other. Specifically, I suggest that authentic constitutional reasoning can include consideration of strongly held public opinion as one of its constituent parts, so long as "strongly held public opinion" means something approaching consensus rather than simply the views of a majority.[5] Just as the text

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4 *See, e.g.*, *id.* at 4.

5 Throughout this Essay, I use the term "public opinion" to mean the raw views of the populace, whether or not those views have been enacted into law by any formal decisionmaking process. By "public consensus," I mean very broadly shared public opinion. I can offer no precise formula to specify how broadly an opinion must be shared for it to qualify as a consensus opinion, but I have in mind a standard considerably more demanding than the one the plurality of the Supreme Court seems to have recently entertained in *McDonald v. City of Chicago*, where four Justices adduced an amicus brief submitted on behalf of 58 members of the United States Senate and 251 members of the House of Representatives as evidence of a consensus that the

of a constitutional clause or the requirements of a precedential doctrine can guide good-faith constitutional adjudication, so can the fact that public consensus supports a particular view.[6] To be clear, the role I imagine for public consensus in constitutional interpretation is limited. Consensus is rare, and even where it exists, it is only one factor in an overall calculus. In the end, the force of public consensus should alter few Supreme Court outcomes—fewer, I suspect, than Friedman suggests that public opinion has changed in practice. But few is not none. And if we understand public consensus to be one potential source of authority within a larger process of constitutional decisionmaking, we may find a better way of understanding the relationship between constitutionalism and democracy. The task of this Essay, then, is to move beyond Friedman's reversal of the traditional solution to the countermajoritarian difficulty by explaining when and why public consensus can be a source of authority in constitutional interpretation, rather than an external force with which authentic constitutional interpretation must do battle.

I. The Will of the People

The Will of the People is an impressive book. It has large ambitions: Friedman has done nothing less than tell the whole history of judicial review by the Supreme Court. That might have been a recipe for trouble. At some point in their careers, too many law professors cannot resist writing a book that might be called *All of American Constitutional History According to Me*. The historiography in these books is often poor, because the scope of the project exceeds the ex-

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right to keep and bear arms is, as a constitutional matter, sufficiently fundamental so as to apply against the states as well as against the federal government. *See* McDonald v. City of Chicago, No. 08-1531 (U.S. June 28, 2010) (plurality opinion). Under the conditions prevailing at the time *McDonald* was decided, 58 Senators and 251 Representatives would not even have been a majority great enough to pass ordinary legislation. One would think that a supermajority large enough to qualify as a constitutional consensus must be considerably greater than that necessary to enact a statute.

6 The sort of public view that I have in mind is not a view about the interpretation of a particular constitutional authority (e.g., that the Due Process Clause of the Fifth Amendment is properly understood to contain an equal protection component). It is a view about the ultimate constitutionality or unconstitutionality of a specific practice (e.g., that the federal government may not operate racially segregated schools). Anything like mass public consensus about interpretive questions of the first kind is probably elusive in the extreme. Indeed, and as I will say throughout this Essay, it is frequently the case that the public has no widely shared view even about questions of the ultimate constitutionality of a practice. But it probably does make sense to speak of consensus public convictions about the ultimate constitutionality of at least a few known practices, even if there is no public consensus about the doctrinal mechanics that establish those conclusions.

pertise of the authors. To Friedman's great credit, however, *The Will of the People* escapes the customary embarrassments of this genre. Friedman has done an enormous amount of work, and he writes skillfully about each period of history he analyzes. Even well-informed readers will learn something new and worth knowing in every single chapter. All in all, the book tells a very good story about a very important topic.

Let me be specific, though not comprehensive. The narratives of *Marbury*[7] and of the Chase impeachment[8] are excellent, as good as any others I can think of, and both stories have been told many times. The treatments of the nullification controversy[9] and the late nineteenth-century Court[10] are lively, sharp, and useful. Even the chapter on the crisis of the New Deal,[11] which is possibly the most overwritten subject in modern constitutional history, manages to turn up new material. Situating Learned Hand's skepticism about judicial review squarely in the context of the 1950s Red Scare[12] is an important corrective to the now-dominant framing, which is mostly about *Brown*. And the final chapters, which narrate events almost too recent to be called history,[13] demonstrate that Friedman is no less skilled at telling new stories than he is at retelling older ones. In sum, the book's large ambition and elegant execution make it a first-rank achievement in the literature of constitutional law. I have never read a better one-volume history of judicial review.

That said, no scholarly endeavor is free of problems, and one important problem with *The Will of the People* concerns the moral of its story. For the book is not just a narrative: it comes to make a point. From start to finish, Friedman presents *The Will of the People* as a rejoinder to constitutional law's preoccupation with the countermajoritarian difficulty. People who have feared judicial review, he says, have assumed that the Court can and does countermand the preferences of the majority.[14] People who place their hopes in judicial review have depended on the Court to do the same thing.[15] But in practice, Friedman says, the Court does not do that, and probably can-

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7 FRIEDMAN, *supra* note 2, at 58–64.

8 *Id.* at 64–71.

9 *Id.* at 95–104.

10 *Id.* at 150–66.

11 *Id.* at 195–236.

12 *Id.* at 254–58.

13 *Id.* at 280–365.

14 *Id.* at 369–70.

15 *Id.*

not.[16] The Court can only act within the space where public opinion allows it to act. If the Court departs from what the people want, it will suffer retaliation, and the Justices know this, or at least behave as if they know it.[17] The Court cannot withstand popular opposition and does not try to.[18] Therefore, Friedman concludes, the countermajoritarian difficulty is not a problem worth worrying about.

Friedman is surely right that the Court generally stays within bounds that the American people will tolerate. His prior work,[19] along with that of Michael Klarman[20] and others building on a basic insight associated with Robert Dahl,[21] has helped to make this point a staple of what well-informed people understand about the American constitutional system. It is an enormously important point. And it may well mean, as Friedman contends, that we should not spend much time worrying that the Court will systematically impose highly unpopular decisions upon an unwilling public.

But the conclusion that we should banish all contemplation of the countermajoritarian difficulty only follows if the crux of the difficulty is that courts might repeatedly decide important issues in ways hostile to the strongly held views of the majority of Americans—indeed, so much so as to undermine the basic idea that popular majorities should set the direction of governance. That version of the countermajoritarian difficulty—which we might call the wholesale version—is only one way to understand the idea. There are also two other ways, which we might call the retail version and the heuristic version. To those understandings of the countermajoritarian difficulty, *The Will of the People* has little to say.

In its retail version, the countermajoritarian difficulty is a normative problem that attaches to those decisions in which courts do contravene the majority's preference. As Friedman amply demonstrates, such decisions are uncommon. But they exist. From time to time, courts make constitutional decisions with which most Americans disa-

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16 *Id.* at 370.

17 *Id.*

18 *Id.* at 371.

19 *See, e.g.*, Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586 (1993); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606–08 (2003).

20 *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 443 (2004); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 17–18 (1996).

21 *See* Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). My own small contribution to this literature is Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 1023 (2004).

gree. What makes those decisions legitimate in a democratic society? To be sure, the fact that such cases are rare makes the question less pressing than it would be if courts overrode majority will more regularly. But pointing out that the countermajoritarian difficulty only arises in retail form does not address the difficulty in the cases where it does arise. Similarly, the fact that countermajoritarian decisions are rare may help explain why courts can get away with them, but it does not answer the question of whether or how such decisions can be normatively defensible.

The countermajoritarian difficulty can also be understood as a heuristic. We can use the scenario in which the Court decides a constitutional question in a way that contravenes majority preferences—exceptional though it might be—to provoke a general inquiry into the appropriate sources of authority for judicial decisionmaking. As a heuristic, the countermajoritarian difficulty can be to constitutional theory what the trolley problem is to moral philosophy.[22] It is a way to introduce a fundamental set of questions, especially to people not already well versed in the subject. Moral philosophers know that neither they nor their students will regularly be called upon to decide whether to kill one innocent person or many innocent people by steering a trolley to the left or the right. But posing a stylized question can be a good first step toward inquiry into serious and important matters.

Similarly, the idea of the countermajoritarian difficulty is useful because it provokes discussion of a centrally important question of constitutional law: what are the appropriate sources of authority for constitutional decisionmaking by courts? The countermajoritarian difficulty approaches that question by pointing out that the legitimacy claim of judicial decisionmaking under the Constitution does not reside in vindicating the present preference of a majority of voters. Some decisions are correct even though they do not conform to the majority's preference. So what are the criteria for valid decisionmaking? Obviously, the countermajoritarian difficulty is not the only way of approaching this question, just as the trolley problem is not the only way to enter moral philosophy. But it is not a bad way, either.

In seeking to dispatch the countermajoritarian difficulty, *The Will of the People* seems to dispense not just with the fear that courts might run the country, but also with the important normative question that the idea of the countermajoritarian difficulty ought to provoke. The

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22 *See* PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of Double Effect*, *in* VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 23–24 (2002); Judith Jarvis Thompson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

book's narrative is a sufficient rejoinder to the countermajoritarian difficulty's wholesale version: if the Court generally stays within the space that the public permits, then popular democracy faces no systematic threat. But the need to answer the normative question about the sources of judicial authority remains, both for those unusual cases where the courts are out of step with majority preferences and for the more numerous cases where they are not. Without an answer to that question, we cannot know whether courts are deciding cases appropriately, and knowing that courts usually stay within the range of public tolerance is not a sufficient substitute because there are inappropriate as well as appropriate decisions to be found within that range. Courts exercise agency within that range even when they do not challenge its boundaries. As Friedman knows, there is slack in public opinion.[23] There are constitutional issues that are important as matters of policy but that are not salient to the mass public. There are other issues that are more salient to the public but on which each side has more than forty percent support. No decision on such issues is likely to provoke popular discipline of the Court, which is to say that the Court could go either way in the ordinary course of business. Yet frequently it matters which way the Court goes. So it matters also that the Court decide appropriately.

Friedman's book is uninterested in the question of how the Court should decide cases within the space permitted by public opinion. Nor is it interested in the question of when the Court should push beyond that space. To be sure, there is nothing necessarily wrong with these limits on the book's ambitions. There is a place for good histories of law written from the external, rather than the internal, point of view. But *The Will of the People* could easily be read to mean that *nobody* should be interested in the question of how the Court should decide cases, and for two reasons. First, the book could be read to mean that it does not much matter what the Court does.[24] Its latitude is narrow, and its decisions are not final: in the rare cases where the Court gets out of line, the People will eventually bring the law back to where they want it.[25] Second, the book seems skeptical that the Court decides cases through any process of legal reasoning that is not in the

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23 *See* FRIEDMAN, *supra* note 2, at 375.

24 Friedman recently published a short statement of his argument in *The New Republic* under the title "Benched: Why the Supreme Court Is Irrelevant." *See* Barry Friedman, *Benched: Why the Supreme Court Is Irrelevant*, NEW REPUBLIC, Sept. 23, 2009, at 7. Journalism being what it is, Friedman may not have chosen that title, and I do not know whether he liked it. But it captures a fair implication of his argument, even if in slightly exaggerated form.

25 *See* FRIEDMAN, *supra* note 2, at 369.

end a complex form of preference summation. The very idea of constitutional interpretation is presented as an unnecessary concern of legal intellectuals and an epiphenomenon of post–Warren Court constitutional politics, rather than as a perennial and inherent activity of constitutional decisionmaking by public officials.[26] Friedman wants to liberate us from such concerns. Decisions will fall within a publicly acceptable range, he says, and that should be enough to establish that everything is basically fine. There is no need to worry about the Court because the Court will only do what We the People permit.

In the mouth of Anthony Kennedy, Friedman's argument would be sinister. "Don't mind me," says the swing Justice. "I'm not an independent actor or a causal force in American law, let alone American politics. I'm just the faithful mirror of public opinion." But nobody is the faithful mirror of the preferences of any group of 300 million people, and saying "The public is in control" is an excellent way to claim cover for discretionary decisionmaking within the broad band of public acceptability.

Friedman's perspective thus gives judges a great deal of license in the guise of declaring them to be narrowly constrained. As often as not, Supreme Court cases present issues where a decision for either side can be within the mainstream. Public opinion will tolerate a range of different regimes for abortion, affirmative action, capital punishment, terrorist detention, and criminal procedure. And those are just the issues that the public cares about. Now think about dormant commerce, federal jurisdiction, and the delegation of lawmaking power to administrative agencies—hugely consequential issues about which most college-educated Americans have no views. Whatever boundaries public opinion imposes on judicial decisionmaking in these areas will leave a great deal of room for courts to make choices, and it will often matter what choices the courts make.

To get a sense of how much agency the constraints of public opinion still leave to the Court, consider how broadly Friedman's thesis applies to social actors. About whom else could one say, "Well, they might seem important, but in the end they can only do what the public will tolerate"? Here is a partial list: Hollywood producers. Automobile manufacturers. Novelists. Advertisers. And so on. But the fact that these people can in the end only do what the public will tolerate does not mean that they are passive reflectors of public opinion. They are important causal actors in shaping the public and the world.

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[26] *Id.* at 280–322.

The Court, too, is a shaper of the public and an important shaper of constitutional meaning. To be sure, its interventions are not the *only* thing that matters in constitutional law. Nor are they even the final thing. As *The Will of the People* convincingly illustrates, Supreme Court decisions are subject to revision, if and when some other institution or constituency mobilizes against the Court.[27] But the Court's decisions matter a great deal even without being final in the sense of fixing constitutional meaning forever. We all live in the short run, and our lives are governed by what happens in the meantime. Consider, for example, the Court's invalidation of child-labor laws in *Hammer v. Dagenhart*.[28] Eventually, the force of public opinion opposed to child labor won out, and the Court overruled *Dagenhart* in *United States v. Darby*.[29] But many children worked in factories in the decades between *Dagenhart* and *Darby*. In their lives, the Court's ruling in *Dagenhart* mattered a great deal.

Even in the longer run, public or political mobilizations that cut back on the Court's work often stop short of completely negating the Court's impact as a constitutional actor. Consider the big trends in criminal procedure doctrine between 1960 and 2000. Decisions like *Miranda v. Arizona*[30] announced major invigorations of the rights of suspects, and then, after political reaction set in, other decisions took back much of what the earlier decisions had given.[31] But the resulting equilibrium is not exactly where we would be if the Court had not acted in the first place. Police officers today generally must issue *Miranda* warnings upon making arrests, and that requirement has certain effects, even if those effects are smaller than they would be without the decisions that qualified *Miranda*. To put the point schematically, if the Court moves the law three steps to the left and the political reaction leads the Court to move the law two steps back to the right, the world is not quite as it was before the Court first intervened. The initial judicial decisions do not move the law as far in the long term as they did in the short term, nor is the net distance traveled as great as it might have been in a world where the Court were the only actor. But

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27 *See, e.g.*, *id.* at 380–81.

28 Hammer v. Dagenhart, 247 U.S. 251 (1918).

29 United States v. Darby, 312 U.S. 100 (1941).

30 Miranda v. Arizona, 384 U.S. 436 (1966).

31 *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (*Miranda* warnings not required before asking questions required by concern for public safety); Michigan v. Tucker, 417 U.S. 433 (1974) (fruits of non-Mirandized confession are admissible, though the confession itself is not); Harris v. New York, 401 U.S. 222 (1971) (non-Mirandized confession can be admitted for impeachment purposes).

neither is the world quite the same as it would have been without the Court's intervention.[32]

II. Beyond the Opposition: Double-Consciousness

From its external point of view, Friedman's book powerfully illustrates a relationship between public opinion and Supreme Court decisionmaking. But judges generally decide cases from the internal point of view, even if the large patterns of their decisions are also helpfully illuminated from the external one. It remains to ask, therefore, whether the relationship between public opinion and Supreme Court decisionmaking (and the relationship between public opinion and constitutional meaning) can be understood from the internal point of view in a way consistent with the idea that judges should decide cases through a process of legal reasoning, rather than simply by following the election returns—or, in a more complex version, by reaching compromises between the election returns and what the judges themselves would most like to do. The answer, I think, is yes. But it requires us to question the opposition that drives the countermajoritarian difficulty, rather than to reverse the customary solution.

Think again about the premises of the countermajoritarian difficulty. As noted above, it arises from the potential clash between the rule of law and popular will, or between—and again, these are shorthands—constitutionalism and democracy. Most attempts to solve the countermajoritarian difficulty have chosen rule-of-law constitutionalism. So long as the Court adheres faithfully to the Constitution, these accounts run, its decisionmaking is legitimate regardless of popular approval. But the reader of Friedman's book is primed to be skeptical of claims about judges adhering faithfully to the meaning of the Constitution, at least if we understand such faithful adherence to be adherence to something fixed. Friedman's whole narrative vividly illustrates the Court's endorsing different constitutional views over time. Indeed, the concept that really takes it on the chin in this book, even more than the countermajoritarian difficulty, is the autonomy of law. Seen historically, Friedman teaches, the Court has not held fast to unchanging constitutional meaning, which means that the countermajoritarian difficulty cannot be solved under the banner of fidelity to the fixed Constitution.[33] So *The Will of the People* comes from the other side, telling us that there is nothing to worry about because the

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32 *See* Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. (forthcoming 2010).

33 *See* FRIEDMAN, *supra* note 2, at 322.

Supreme Court's work product is justified by its consistency with popular preferences. But for the reasons discussed above, that is not a satisfying resolution either. It leaves the Court too free to make decisions according to its whim, so long as it stays within the limits of popular tolerance. And it suggests no justification for those decisions that do go against what popular majorities want, offering as solace just the prediction that the Court can only get away with such decisions so long as the bulk of the Court's decisions keep the people happy.

I want to suggest a third way, one that mediates the tension between democracy and constitutionalism. Note that Friedman's argument continues to present the binary opposition that the countermajoritarian difficulty presupposes: either the Court does what the public wants or we have constitutionalism in a traditional rule-of-law sense, of which authentic constitutional interpretation can be a part. But not both. My suggestion, in contrast, is that authentic constitutional reasoning may include consideration of strongly held public opinion as one of its constituent parts. Just as the text of a constitutional clause or the requirements of a precedential doctrine can guide the process of good-faith constitutional adjudication, so can the fact that the American public strongly holds a particular view. On this view, strongly held public opinion is not a factor with which correct constitutional interpretation must compromise in order to prevent the Court from suffering retaliation. Instead, the strongly held view of the public—by which I mean something closer to consensus than to simple majority preference—can be an ingredient in the right answer to a constitutional question.[34]

Elsewhere, I have described this idea by saying that officials deciding constitutional questions must sometimes practice a kind of double-consciousness.[35] They must ask what the legal sources say, but they must also ask what the public believes the Constitution requires. The second question will often yield no sensible answer, and in such cases it can be ignored. But where a strongly held public view approaches the level of consensus, that consensus can be one of the inputs that shape the correct answer to relevant constitutional questions.

A complete exposition of this perspective would exceed the appropriate limits of a paper written for this symposium. So in what

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34 *See* Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 18–20 (2007).

35 *Id.*

follows, I outline the idea briefly, leaving more complete treatments of the matter to other forums.

A. How to Think About Sources of Constitutional Authority

According to an important conventional view, constitutional law exists precisely to block the force of public opinion.[36] That proposition might imply that constitutional authority and public opinion have a zero-sum relationship. It would then be incoherent to suggest that public consensus—which is the limiting case of public opinion—could itself be a source of constitutional authority. Although this conventional view makes a considerable amount of sense, it is not quite the whole story. To begin to see why not, we should ask what justifies the authority of those sources that *are* regarded as authoritative in constitutional law, such as constitutional text and judicial precedent. On the best account of the authority of those sources, public opinion cannot be completely excluded from the set of potential authorities.

As I have argued elsewhere, the best justification for regarding any potential source of authority as authoritative in a constitutional case is that doing so conduces to decisionmaking that respects the basic values of the constitutional system.[37] Why, for example, should the text of the Constitution be a source of authority? The answer is that in appropriate circumstances, treating the text as authoritative can vindicate the democratic process, uphold the rule of law, or, in a society that understands itself as governed by a written Constitution, promote the public's identification with the governing regime. Democracy, the rule of law, and subjective public identification with the regime are all important constitutional values in the American system.

To be sure, this is an untidy way of thinking about constitutional authorities. It requires reference to the substance of the constitutional system's values, and those values are fiercely contested. Indeed, they are contested at two levels. First, people disagree about what should be on the list of constitutional values. Second, even when people agree that something is a constitutional value, they may disagree as to

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36 *See, e.g.*, FRIEDMAN, *supra* note 2, at 370 (collecting examples of expressions of this view); Klarman, *supra* note 20, at 1–3 (same); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (Amy Gutmann ed., 1997).

37 *See* Richard A. Primus, *When Should Original Meanings Matter?,* 107 MICH. L. REV. 165, 186 (2008).

its content. We all agree that democracy is a constitutional value, but we have different views about what democracy requires. Such disagreements can make it hard to decide whether a particular decisionmaking technique actually promotes an important constitutional value. One perennial issue in the wars over originalism, for example, is whether deciding cases by reference to original meanings serves or disserves democracy, and part of that disagreement reflects a deeper disagreement about the best understanding of democracy.[38] That said, there are areas of broad agreement as well as of disagreement. Virtually all participants in the American constitutional system would agree that awarding offices on the basis of elections respects democracy but that awarding offices to the candidates who can swim the fastest does not.[39] And the standard method of arguing for a particular method of constitutional interpretation is to show that that method, properly applied, is justified in terms of an underlying constitutional value like democracy or the rule of law.

B. Public Consensus

If the reason to treat something as a source of authority in constitutional decisionmaking is that doing so conduces to decisions that respect or vindicate constitutional values, and if the set of relevant (if contested) values includes democracy, the rule of law, and public identification with the regime, then the door is open to considering public consensus as a source of constitutional authority. It is easy to show that in at least some circumstances attention to public consensus in constitutional decisionmaking would show respect for democracy, promote the rule of law, and enhance public identification with the regime. First, treating the public's view as a source of authority straightforwardly shows respect for democracy, if not for formal democratic decisionmaking. Second—and here *The Will of the People* is full of testimony—avoiding the crises that might arise if the public felt that the Court were construing the Constitution intolerably can help preserve public respect for governmental institutions, including courts, and therefore for the rule of law. To the considerable extent that attention to public consensus acts as a brake on judicially ordered social

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38 *Compare, e.g.*, JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 163–77 (2001) (arguing that "written constitutionalism . . . is *required* by democracy"), *with* Michael Klarman, *Antifidelity*, 70 S. CAL. L. REV. 387 (1997) (arguing that, from a positivist perspective, anticonstitutionalism or antioriginalism is not radical and that originalism disserves democracy).

39 Absent, of course, a prior democratic decision to award an office on the basis of a swimming race.

change, treating popular consensus as a source of constitutional authority may also enhance the rule of law by promoting the stability of legal norms. (This last situation is complicated because it might pit some kinds of rule-of-law values against others, as I will explain below.) Third, and perhaps most obviously, the substantive alignment of constitutional doctrine with the public's strongly held views helps maintain the public's identification with the constitutional regime. For all these reasons, public consensus has a claim to being a factor in the shaping of authentic constitutional meaning.

To be sure, paying attention to public opinion could undermine constitutional values as well as respect them. Constitutional decisionmaking driven by popular whim could eviscerate the rule of law. That threat is less dangerous if public opinion must approach consensus to become an input in constitutional decisionmaking than if any majority preference could qualify, but this proviso does not eliminate the concern. Even large supermajorities can go terribly wrong. But the reality that treating public consensus as a source of constitutional authority would sometimes disserve constitutional values falls well short of proving that public consensus cannot be constitutionally authoritative because the same is true of every source of constitutional authority. Precedent sometimes directs nondemocratic decisions, as judges who must apply the Court's school prayer decisions in culturally conservative jurisdictions are keenly aware. Text sometimes directs decisions that are both nondemocratic and destabilizing, as it did when the Court struck down the congressionally sanctioned practice of legislative veto.[40] Clearly, though, precedent and text are valid sources of constitutional authority. They are not sources of authority that decisionmakers follow blindly in every case, nor should they be, because following them blindly would often disserve the values of the constitutional system. The responsibility of a good constitutional decisionmaker is to know when giving force to each potential source of authority will best respect the whole set of constitutional values. On that understanding, public consensus can be a source of authority on the same terms as text and precedent.

Two important questions may now be on readers' minds. First, does the public really have views on constitutional questions? Second, why would we think that judges are any good at discerning public opinion? These are important questions for Friedman as well as for me, of course. For his part, Friedman is (and must be) relatively san-

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[40] *See* INS v. Chadha, 462 U.S. 919 (1983).

guine about the answers. Central to *The Will of the People* is a People with a Will and a set of Justices who know, or at least guess, what the content of that will is.[41] My approach permits me to be more skeptical. On the question of whether the public has views on constitutional questions—which for my purposes is best understood to ask whether the public has views approaching consensus—my answer is "rarely, but sometimes." To the question of whether judges are good at assessing public opinion, my answer is "not especially." But neither of those answers indicates that public opinion cannot function as a source of constitutional authority. The fact that public consensus is rare means that the authority of public consensus is rarely an operative factor in constitutional law, but it does not preclude the possibility of such authority where the public does hold a consensus view. And if public opinion must approach consensus before becoming authoritative, then even people lacking special skills in assessing public opinion might be able to give it force—intentionally or otherwise.[42] To be sure, judges might still err on this score. But such error would not differentiate public consensus from other sources of authority that judges deploy all the time. Judges are notoriously bad at interpreting eighteenth-century history, but few people think that limitation of judicial competence means that eighteenth-century historical sources are categorically excluded from the universe of constitutional authorities.

1. Do the People Have a Will?

Most Americans have no view about most of the constitutional issues that present themselves in court. This is especially true of the species of issue that involves parsing and implementing constitutional clauses or precedential doctrines. Very few people have views, much less developed and stable views, about whether prophylactic legislation under Section Five of the Fourteenth Amendment can include the

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41 They get it wrong sometimes, Friedman says, but more often they get it right, and they get it right more and more often as time goes on. *See, e.g.*, FRIEDMAN, *supra* note 2, at 376.

42 That is, decisionmakers who act on the authority of public consensus do not always recognize that consensus is an important ground of their decision. By definition, a real consensus on a constitutional issue would include the vast preponderance of American officials. And when a consensus view is also an official's own view, he may give it force not because he is trying to channel a consensus but because, as his own view, it shapes his understanding of otherwise indeterminate authorities like text and precedent. To be sure, the tendency of interpreters to read indeterminate sources in light of their own views exists whether or not those views are broadly shared. But the tendency is probably at its height when the views in question are a matter of consensus, because the absence of controversy may permit interpreters to forget that the authorities being interpreted could be understood in any other ways. *See generally* Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. (forthcoming 2010).

regulation of nonstate actors, or about whether rational basis review means the same thing in due process cases that it means in cases concerned with the limits of Congress's enumerated powers. The idea that public consensus can supply authority in constitutional decisionmaking does not mean, though, that public consensus can be brought to bear on interpretive issues of that sort. It means that public consensus might have something to say about the ultimate constitutionality of a practice, and many Americans do have views about the ultimate constitutionality or unconstitutionality of particular practices. Many Americans are confident that it is constitutional (or unconstitutional) to torture detainees to extract information, or for the federal government to require individuals to procure health insurance, or for a state to require law enforcement officers to check the immigration status of persons suspected of being in the country illegally. These views may not always be backed up by the sorts of doctrinal or interpretive justifications that make for success on law school exams, but they may be held with conviction nonetheless.

To be sure, the fact that many Americans have this sort of convictions about some constitutional issues does not mean that the American people as a whole enjoy a consensus view on those issues. On the contrary, on the constitutional questions about which many people do have views, the polity is often marked by a cacophony of disagreement. That is certainly the case with respect to each of the three examples—torture, health insurance, immigration—that are given just above. So unless we regard majority or plurality opinion as tantamount to the will of the people, there may normally be nothing that can helpfully be called strongly held public opinion, much less consensus, on even that subset of constitutional issues about which Americans do have views. It follows that relatively few litigated cases could be decided on the basis of popular consensus even if everyone agreed that popular consensus should help decide cases. But it does not follow that public consensus is not a source of constitutional authority. The text of the Constitution does not decide many litigated cases either, but it is clearly a source of authority in constitutional law.

On some constitutional questions, the public does approach having a consensus view. It seems sensible to say that the American public believes that the President may not censor Fox News just because he disagrees with its political opinions. If asked why not, most educated Americans would probably say something about the First Amendment. But the text of the First Amendment does not reach

this issue, because that text is addressed only to Congress.[43] That said, the prevailing public view on the merits of the issue is not wrong. Presidential censorship of Fox News would be unconstitutional, despite the absence of an applicable textual prohibition. If pressed to explain why, one could make recourse to judicial precedent applying the First Amendment to executive officials[44] or to structural reasoning in constitutional law, and such explanations would have some validity. But the public's consensus view about the impermissibility of political censorship may also play a role in constituting the correct answer to this constitutional question. As a matter of commonsense political morality in the contemporary United States, freedom from censorship is not dependent on which arm of government does the censoring. But in a counterfactual world where large public majorities fervently believed only Congress should be required to respect free speech, it might be difficult for courts to argue—let alone assume—that the First Amendment reaches other government actors as well.

Similarly, change in popular consensus over time can change the correct answer to a constitutional question. Consider the development of sex equality doctrine under the Fourteenth Amendment. In the nineteenth century, legally competent courts were solidly of the view that the Equal Protection Clause did not require equality between men and women.[45] Today, the opposite view is firmly established.[46] One might insist that this difference between judicial behavior in 1890 and in 2010 indicates either that the courts were all wrong then or that the courts are all wrong now. It makes more sense, however, to say that the content of "equal protection" has changed. But what is the source of that change? Or, to sharpen the point, what input into constitutional meaning has changed so as to produce this changed result? The text of the Fourteenth Amendment is still what it was in 1868, and so is the original meaning of that text.[47] But the

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43 *See* U.S. CONST. amend. I ("*Congress* shall make no law . . . abridging the freedom of speech . . . .") (emphasis added).

44 *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (rejecting the executive branch's demand for censorship said to be necessary for national security).

45 *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (invalidating race-based classification of jurors but arguing that other forms of classification, including sex-based discrimination, were not prohibited by the Fourteenth Amendment).

46 *See* United States v. Virginia, 518 U.S. 515, 532 (1996) ("[T]he [Supreme] Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.").

47 By definition, original meanings do not change. But perceptions of original meanings

dominant public view of sex equality has changed. Understanding that shift as changing an input into the constitutional analysis can help make sense of a change in constitutional meaning as something other than sheer judicial will.

One might say that the change in public opinion about sex equality altered equal protection doctrine because the text of the Fourteenth Amendment sets forth a principle—equal protection—that must be given content in terms of prevailing public views. On that understanding, public opinion changed the constitutional law of sex equality, but the authority of public opinion had only a second-order status. The first-order authority is the text, and the particular text of the Equal Protection Clause invites public opinion to explicate the principle that the text sets forth. But it is also possible to imagine public opinion as a first-order authority, standing on its own bottom.[48] Consider that the long-term change in public opinion about sex equality would probably have altered the content of constitutional law even if no particular text invited the change. After all, no constitutional clause invites the proposition that the President may not engage in censorship. The text of the First Amendment invites interpretation as to the content of the principle it calls the freedom of speech, but it does not invite decisionmakers to apply that principle to institutions other than Congress. Such applications are nontextual. But the rise of a powerful American consensus on free political speech in the twentieth century nonetheless extended the strictures of free speech doctrine to the executive branch, and nobody doubts the validity of that extension.

As a matter of convention, propositions of constitutional law tend to be associated with particular clauses even when the texts of those clauses do not contain the relevant propositions.[49] Within that convention, the Equal Protection Clause is a logical place to file the constitutional commitment to equality between men and women. But on

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change, and when they do, the change is partly a function of changes in popular opinion: a more egalitarian age is likely to read original meanings in a more egalitarian way, and a more property-protective age is likely to read original meanings in a more property-protective way, and so forth. *Cf.* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values[.]").

48 For more development of this distinction between public opinion as a first-order authority and public opinion as a second-order authority, see Primus, *supra* note 34, at 7–8.

49 For example, the immunity of states against being sued by their own citizens in federal court is called an Eleventh Amendment immunity, even though the Eleventh Amendment contains no words creating that immunity.

this understanding, the text of the Equal Protection Clause is not a necessary source of the authority of sex equality doctrine. Given the change in public opinion, the change in constitutional meaning may well have occurred without that text. Such a change would have been just as legitimate as the decision that the First Amendment reaches the President even though its textual terms plainly do not.

2. Judges and Public Opinion

One important operational question that follows from the foregoing analysis is how judges could evaluate the public's view of constitutional issues. Obvious dangers await here. Given the possibility of confirmation bias, judges acting in good faith might mistake their own strongly held views for those of the public at large. But this possibility does not defeat the suggestion that public consensus should be regarded as a source of constitutional authority, because American constitutional practice does not require that judges be expert in a given kind of analysis to admit that analysis as a legitimate form of constitutional reasoning. As noted earlier, judges may be less than expert in assessing public opinion, but they are also quite bad at interpreting eighteenth-century history, and yet historical sources from the 1780s (and other times) are among the core materials that judges consult in constitutional cases.[50] To be sure, judges should act prudently to prevent their disciplinary limitations from doing too much damage. Judges working with historical sources should strive to understand a little bit about critical historical thinking, and judges working with any materials in which they are less than expert should be careful and modest about their arguments. The same can be true for judicial consideration of public consensus. In that context, too, judges should be careful and modest in the conclusions they draw. But a requirement of modesty is different from a conceptual exclusion. If limited judicial competence in dealing with history is not a reason for excluding historical argument from constitutional reasoning, it is not clear why limited judicial competence in assessing public opinion should require the exclusion of public consensus from the universe of constitutional authorities.

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[50] Many scholars and judges have openly proclaimed the prevailing judicial incompetence in this arena. *See, e.g.*, Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003); *Jeffrey S. Sutton, The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1184–86 (2009). Nobody really contests the point. Nonetheless, almost nobody thinks that constitutional law should eschew history as a source of authority.

C. Public Consensus and the Rule of Law

The most powerful objections to thinking of public opinion as a source of authority in constitutional law do not really flow from worries about judicial competence. They flow from the sense that constitutionalism above all else requires the rule of law in the face of hostile popular majorities. What is the point of constitutional law, after all, if its demands can be overridden by popular preference? This idea contains an important truth. That said, the intuition might be too quick, or at least too totalizing, if the candidate source of authority is public consensus rather than simply majority will. The rule of law is a complex cluster of values and ideas, and giving weight to public consensus can either support or undermine particular values within the cluster, depending on the circumstances.

One aspect of the rule of law is a set of legal norms that are stable enough to enable planning and justify reliance.[51] If the public opinion that might qualify as constitutional authority were the will of the fickle mob, then treating public opinion as an input in constitutional reasoning would endanger this aspect of the rule of law. The public, or at least a majority or a plurality of those people who are paying attention, could want one thing this year and another thing next year. But the public opinion that can be an input in constitutional reasoning is stable public consensus, not shifting majority preference. It acts as a brake on change rather than an accelerant. As such it enhances, rather than threatens, the stability that the rule of law seeks to provide.

By way of example, imagine the fate of an equal protection challenge to same-sex marriage laws in the year 1980. The claim would go nowhere. Today, courts are divided on the issue. The Supreme Court of Iowa, not generally considered a hotbed of radicalism, recently credited such a challenge in an opinion that did no more than crank the handle on well-established equal protection doctrine.[52] But nothing about the conceptual issues of equal protection at stake in such a case has changed in the last thirty years. Once courts firmly established that equal protection is hostile to distinctions based on sex, the analysis required to decide the same-sex marriage issue as the Iowa court did was fully available. Yet courts did not reach that conclusion,

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51 *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW 213–15 (1979). The authority that the doctrine of stare decisis commands within constitutional adjudication partly reflects the importance of this rule-of-law concern within the overall set of American constitutional values.

52 *See* Varnum v. Brien, 763 N.W.2d 862, 876–906 (Iowa 2009) (applying the equal protection doctrine to the Iowa Constitution's provisions on marriage).

and indeed would not have dreamed of reaching that conclusion, until many more years had passed. One could say that all courts sitting before the 1990s were benighted, or one could say that the Supreme Court of Iowa and several other state supreme courts have recently taken leave of their senses. But there is a third alternative, which is that the content of equal protection shifted as public opinion moved away from a once-solid consensus dismissing the possibility of same-sex marriage.

Note that nothing here requires the view that public opinion today favors permitting same-sex marriage. Public opinion today is divided on the question,[53] and in the absence of consensus, public opinion does not furnish constitutional authority. But in the absence of a consensus *against* same-sex marriage, courts are often reaching conclusions that differ dramatically from what their predecessors concluded when public consensus solidly maintained that marriage made sense only with partners of opposite sexes. The courts are reaching those conclusions on the basis of constitutional authorities like the text of the Fourteenth Amendment and, perhaps more importantly, the precedential doctrines developed in equal protection cases.[54] But the newer conclusions are possible only given the absence of another factor, namely a public consensus favoring the older view.

In this story, what opened the door to change is not a judicial propensity to follow the preferences of a popular majority. It is the disappearance of a public consensus strong enough to carry authoritative weight. In contrast to the idea that treating public opinion as a source of constitutional authority would make the law unstable, therefore, this example shows that public consensus is sometimes the most important force holding the law in place. To be sure, there are formalist virtues to insisting on deciding cases by following textual or precedential authority wherever it may lead, no matter what settled public consensus might expect. But such a course of action can often undermine the stability of legal norms[55]—and that stability is one strand of the rule of law.

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53 *See, e.g.*, Adam Liptak, *Gay Vows, Repeated from State to State*, N.Y. TIMES, Apr. 11, 2009, at WK1 (discussing the Iowa case and public opinion regarding same-sex marriage).

54 *See Varnum*, 763 N.W.2d at 876–906.

55 Consider, for example, what would happen if the Supreme Court took seriously the textual command of Article I, Section 7, that

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the

Whether paying attention to public consensus would enhance or erode the rule of law overall is a question that cannot be answered wholesale. It might do either, depending on the circumstances of each case and depending on how one weighs the relative values of the subcomponents of the rule of law. What is clear, though, is that paying attention to public consensus can sometimes serve some elements of the rule of law, including not just stability, but also the public's willingness to obey the decisions of officials. The intuition on the latter count is, of course, that the public is more willing to obey rules that it regards as sensible than rules it regards as crazy. Again, this does not mean that concerns about the public's willingness to obey should trump other considerations, only that it is one factor in the mix. The complete calculus can be complicated. But once those complications are in view, it should be clear that treating public consensus as a source of constitutional authority need not be systemically hostile to the rule of law.

Attention to public consensus can show respect for democracy; attention to public consensus is not always hostile to the rule of law and indeed sometimes enhances it. On balance, then, and in some cases, treating public consensus as a source of constitutional authority—that is, as one of the inputs into legitimate constitutional decisionmaking—can serve the overall set of American constitutional values. In such cases, the force of public opinion is not a consideration that forces judges to compromise the correct constitutional answers to the cases before them. It is an ingredient of those correct answers and an appropriate factor within the process of constitutional interpretation.

Conclusion

Friedman's *The Will of the People* wonderfully illustrates episodes in which popular opinion has pushed constitutional meaning one way

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> Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives . . . .

U.S. CONST. art. I, § 7, cl. 3. The process for amending the Constitution under Article V requires the concurrence of the Senate and the House of Representatives. So, in the absence of some reason to deny that the vote by which the two houses of Congress approve a proposed constitutional amendment is a "vote," the text of Article I, Section 7 plainly directs that proposed constitutional amendments must be presented to the President. No proposed amendment has ever been so presented, and a strict textualist might therefore infer that all of the amendments we now think of as part of the Constitution are in fact invalid. Obviously, such a conclusion would radically destabilize American law, and nobody holds the view that courts should be good formalists and insist upon the textually prescribed rule in this case.

or the other. Probably no praise that I could offer here would convey just how well Friedman presents the material, let alone how enjoyable it is to read his book. And yet, a book with the ambitions of this one could—and should—grapple differently with the appropriate relationship between public opinion and constitutional reasoning. As I have tried to show, the force of popular opinion need not always be in competition with good-faith constitutional interpretation or even good-faith constitutional interpretation as conducted by courts. This suggestion is not, I think, hostile to the best understanding of Friedman's scholarship, even if it is at variance with the conclusions that Friedman draws; a project that aims to move beyond the countermajoritarian difficulty ought to welcome the idea that public consensus can be an ingredient in constitutional decisionmaking rather than an alternative to it.

The choice to regard public consensus as a source of constitutional authority might change a relatively small number of adjudicated outcomes. But if the perspective I propose in this Essay is right, two important conclusions follow. First, the fact that the Court's views of constitutional meaning have changed over time in ways that track changes in public opinion does not disprove the possibility that the Court has been engaged in good-faith constitutional decisionmaking. Some changes in judicial decisionmaking might shallowly follow the election returns, and some of those might properly be objects of criticism. But other doctrinal changes might be appropriate exercises in constitutional interpretation, justifiably reflecting changes in one of the important sources of constitutional authority—that is, the development or disintegration of a public consensus.

Second, and relatedly, judicial work product cannot be justified simply by reference to the fact that the public tolerates, or even approves of, the outcomes of most cases that the Court decides. Judges have an obligation to reason about legal sources, and other people should be able to criticize (and approve) judicial decisions by reference to a standard of decisionmaking intelligible from an internal point of view. When assessing whether judges have properly executed their obligation, however, we should be aware that the constitutional reasoning in which judges are supposed to engage is not wholly independent of strongly held public views, especially when those views approach consensus. Hence, the requirement that constitutional decisionmakers practice a kind of double-consciousness, attentive both to their own best readings of constitutional authorities and to

what public consensus might expect the Constitution to require.[56] After all, our constitutional system seeks to honor both democracy and the rule of law at the same time. It is a mistake to think that we can avoid compromising each of those values for the sake of the other. But it is also a mistake to see them as zero-sum antagonists. The challenge is to respect them both.

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56 *See* Primus, *supra* note 34, at 18–20.