1993

The Role of Public Opinion in Constitutional Interpretation

James G. Wilson
Cleveland State University, j.wilson@csuohio.edu

Original Citation
James G. Wilson, The Role of Public Opinion in Constitutional Interpretation, 1993 Brigham Young University Law Review 1037 (1985)

The Role of Public Opinion in Constitutional Interpretation

*James G. Wilson**

Table of Contents

* Professor of Law, Cleveland State University. B.A., Princeton University; J.D., University of Chicago. I wish to thank Marjorie Kornhauser, Sheldon Gelman, Gregory Mark, Patricia McCoy, Tayyab Mahmud, Susan Becker, and Mimi Lord for their invaluable assistance. The Cleveland-Marshall Fund also provided assistance.

[American] lawyers are obliged, however, to yield to the current of public opinion, which is too strong for them to resist . . . .[**]

I. INTRODUCTION

This Article seeks to answer two questions. First, to what degree has public opinion influenced American constitutional interpretation, both on and off the Supreme Court, over the past two centuries? Second, how much weight, if any, should constitutional decision-makers give to public opinion, however that protean concept is defined? The Article initially places these queries in a contemporary context by considering the extended discussion of public opinion in the *Planned Parenthood v. Casey*[1] opinions of Justice Souter,[2] Chief Justice Rehnquist, and Justice Scalia. Justice Souter partially relied on public opinion to not overrule the constitutional right to an abortion created in *Roe v. Wade*,[3] while Chief Justice Rehnquist and Justice Scalia claimed in their *Casey* dissents that public opinion was constitutionally irrelevant.[4]

** 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 279 (Phillips Bradley ed., Alfred A. Knopf 1972) (1835); *see* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 17 (1988) (illustrating the influence of public opinion on the Supreme Court); *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that Courts cannot make "significant" changes without support from the electoral branches); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (arguing that Justices follow election returns). *But see* LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992) (asserting that judicial doctrine has a major effect on outcomes and that the Justices are relatively insulated from policy and political considerations). Law and public opinion have a symbiotic relationship: "The history of the Anglo-Saxon race shows that, for ages past, the members of the legal profession have been powerful for good or evil to the government. They are, by the nature of their duties, the moulders of public sentiment on questions of government . . . ." *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 385-86 (1866) (Miller, J., dissenting) (holding that Congress cannot condition pardon to keep attorney out of federal courts by requiring loyalty oath).

1. 112 S. Ct. 2791 (1992).

2. The *New York Times* reported that Justice Souter was primarily responsible for the joint opinion. Linda Greenhouse, *The Supreme Court: A Telling Court Opinion*, N.Y. TIMES, July 1, 1992, at A1.

3. 410 U.S. 113 (1973).

4. 112 S. Ct. 2791, 2814-15. *Contra id.* at 2862-63, 2884.

The second part of the Article demonstrates that all three Justices' arguments in *Casey* have a viable intellectual tradition. This section presents a history of public opinion from before the American Revolution to the present. It considers the views of David Hume, James Madison, Chief Justice Marshall, Abraham Lincoln, Chief Justice Taney, and Justice Brandeis, along with a host of others.

Part III argues that public opinion ought to influence many constitutional decisions. In other words, public opinion is a legitimate interpretive factor, comparable to text, history, structure, precedent, and policy. Indeed, some constitutional disputes, such as impeachment standards and proceedings, can only be effectively regulated by public opinion.

Public opinion can either expand or contract important constitutional rights. The different fates of Supreme Court nominees Robert Bork and Ruth Bader Ginsburg are public reaffirmations of the Supreme Court's previous decisions outlawing gender discrimination; Bork characterized such non-originalist outcomes in the area of sexual equality as "illegitimate," or "unsatisfactory"[5] while Ginsburg was a leading advocate of gender neutrality. On the other hand, the Court's unwillingness to combat segregated suburban schools in *Milliken v. Bradley*[6] becomes somewhat defensible because of probable adverse public opinion, confirmed by the country's continued unwillingness to rectify the underlying problems. Other important cases appear different when viewed from this perspective. Justice Powell's condemnation in *Regents of the University of California v. Bakke*[7] of "quotas" while approving of "diversity" in affirmative action plans may not be very coherent or elegant, yet his opinion was arguably the "best" decision, simply because both political sides have adopted his rhetoric in the subsequent debate over this inherently contentious issue.

Some constitutional rights, however, are so important that the Court should resist public opinion. For example, the "core"

---

5. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 131, 330 (1990); *see also* Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1272 n.397 (1987) (regretfully concluding that gender discrimination decisions are illegitimate).

6. 418 U.S. 717 (1974).

7. 438 U.S. 265 (1978).

right in *Brown v. Board of Education*[8] of all schoolchildren to be able to attend public schools that do not overtly, maliciously segregate on the basis of race, should be immune from current public influence. Such observations and arguments lead to a questioning, or at least to a qualification, of the significance of "principles," neutral or otherwise, in constitutional adjudication.

For those who are theoretically inclined, the most important constitutional debate is not about any particular decision but involves the permissible modes of constitutional interpretation.[9] The Supreme Court, leading political thinkers,[10] and major American politicians have frequently

---

8. 347 U.S. 483 (1954).

9. The history of constitutional adjudication extends beyond the rise and fall of certain cases and doctrines to the ebb and flow of particular forms of argument. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982). Precluding particular forms of rhetoric can constrain judicial discretion, determining the appropriate role for the unelected judiciary within the American constitutional system. Justices can claim to be more "neutral" and more consistent if they apply the same forms of reasoning in different contexts.

Most importantly, the "legitimacy" of outcomes depends upon the choice of "legitimate" arguments. Raoul Berger's unyielding originalism calls into question the seminal school desegregation case, *Brown v. Board of Education*, because the Fourteenth Amendment's Framers stated that public schools could remain segregated. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 118-19 (1977). Bork's originalism undermines *Brown*'s cousin, Bolling v. Sharpe, 347 U.S. 497 (1954). *Bolling* applied the "equal protection component" of the Due Process Clause of the Fifth Amendment to outlaw school segregation in the District of Columbia, even though the Framers never intended such an interpretation. BORK, *supra* note 5, at 83, 305-06. John Hart Ely construed "representation reinforcement" to uphold the school desegregation cases but to question the abortion decision, Roe v. Wade, 410 U.S. 113 (1973). JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

10. The battle over the role of public opinion recurs in many doctrinal debates. For instance, Professor Blasi partially defended the prior restraint doctrine because "the dissemination of speech may create public opinion pressures that can exert a healthy influence on the formulation and application of first amendment standards." Vincent Blasi, *Towards a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 50-51 (1981).

As part of his critique of Blasi's multifaceted defense of the prior restraint doctrine, Professor Redish made three interrelated arguments:

> Initially, the public would not likely react to particular expression with sufficient fervor and unanimity that the reaction would be widely noticed . . . . [E]ven if the public did express a coherent and favorable opinion, it is doubtful that that view would influence a court's substantive constitutional analysis. Moreover, it is arguable that it should not do so in any event because most would agree that generally a strong *negative* public reaction to challenged expression should have no influence on judicial constitutional analysis.

Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First*

and legitimately used several conceptions of "public opinion" in constitutional interpretation to create a complex constitutional tradition. The Supreme Court, in particular, has ranged from giving determinative weight to public opinion, conceptualized in a variety of ways, to excluding public opinion completely from constitutional interpretation. Furthermore, the Court has tended to refer expressly to public opinion when the issues were particularly contentious.

Some historical context is needed before turning to the *Casey* decision. *United States v. Hudson*[11] is a classic, early example of the Court expressly applying public opinion to resolve a controversial issue, *e.g.*, whether federal courts could recognize common law crimes. The issue had embroiled the country for some years before the Supreme Court resolved it. In 1793, a lower federal court instructed the jury to find the defendant, Gideon Henfield, guilty for violating a presidential proclamation: "As a citizen of the United States, he was bound to act no part which could injure the nation . . . . This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed."[12] In 1798, Justice Chase, presiding over a lower court trial of a man charged with bribing a federal official, disagreed: "[T]he United States, as a federal government, have no common law; and, consequently, no indictment can be maintained in their courts, for offences merely at the common law."[13] When the Supreme Court finally addressed the issue fourteen years later in *United States v. Hudson*, Justice Johnson adopted Justice Chase's conclusion that federal courts could not create common law crimes. The most startling aspect of Johnson's opinion was his reasoning:

> Although this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shews the prevalence of

---

Amendment Theory, 70 VA. L. REV. 53, 60 (1984).

11. 11 U.S. (7 Cranch) 32 (1812) (holding that government cannot bring common law seditious libel action against newspaper).

12. Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6360).

13. United States v. Worrall, 28 F. Cas. 774, 779 (C.C.D. Pa. 1798) (No. 16,766). For a brief discussion of Justice Chase's jurisprudence, see STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING 98-99 (1991).

opinion in favor of the negative of the proposition.[14]

Justice Johnson's argument has enormous contemporary implications. For example, what if Justice Blackmun had based the right to abortion in *Roe v. Wade* completely on the views of the American Medical Association?[15] Further, imagine the Supreme Court stating in *Bowers v. Hardwick* that homosexuals have a fundamental right to engage in their form of consensual sexuality solely because public opinion resolved the issue.[16]

II. *PLANNED PARENTHOOD V. CASEY*: A MODERN EXAMPLE OF THE SUPREME COURT'S RELATIONSHIP TO PUBLIC OPINION

Although it is chilling to imagine the existing Court basing its decisions only on public opinion, Supreme Court Justices have considered public opinion's relevance to constitutional adjudication. The most dramatic recent example is *Planned Parenthood v. Casey*.[17] In *Casey*, five Justices refused to reverse the "essential holding" of *Roe v. Wade*, "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[18]

Premising the joint opinion[19] on such relatively immutable concepts as the rule of law, stare decisis and a judicial commitment to principle,[20] Justice Souter claimed that the people would only support judicial opinions that transcend immediate public opinion:

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by

14. 11 U.S. (7 Cranch) at 32.
15. 410 U.S. 113, 141-44 (1973).
16. 478 U.S. 186 (1986) (holding that homosexuality is not protected by substantive due process).
17. 112 S. Ct. 2791 (1992).
18. *Id.* at 2804.
19. Justices O'Connor, Souter, and Kennedy signed the joint opinion.
20. 112 S. Ct. at 2804.

the Nation.[21]

According to Justice Souter, the Court must resist partisan opposition to its most important, "watershed" opinions: "So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."[22] In other words, *Roe v. Wade* gained additional authority by being so fiercely criticized, so divisive.

Justice Souter had at least two conceptions of the public who create public opinion: First, the partisans who evaluate an opinion for its compatibility with their beliefs, and second, the broader spectrum of society that believes in the "rule of law." The Supreme Court needs the latter group's sympathy, support, and respect to preserve the overall legitimacy of the legal system: "Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible *to be accepted by the Nation.*"[23] One reason Justice Souter affirmed *Roe* was to create the judicial constancy that would sustain overall public respect for the Supreme Court, even if many members of the public disliked the Court's protecting women's right to an abortion under the Constitution.

In his concurrence/dissent, Chief Justice Rehnquist agreed with what he viewed to be the plurality's position: "[T]his Court's duty [is] to ignore the public criticism and protest that may arise as a result of a decision. Few would quarrel with this statement."[24] Chief Justice Rehnquist then criticized the plurality for actually incorporating public opinion into its analysis by being less willing to overrule "intensely divisive" cases.[25] According to Chief Justice Rehnquist, the "divisiveness" standard leads to the paradox of retaining unpopular decisions until opposition fades away. Furthermore, the standard forces the Court to make judgments beyond the Court's capacity: "[B]ecause *the Court's duty is to ignore public opinion and criticism* on issues that come before it, its members are in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such

21. *Id.* at 2814.
22. *Id.* at 2815.
23. *Id.* at 2814 (emphasis added).
24. *Id.* at 2862 (Rehnquist, C.J., concurring & dissenting).
25. *Id.* at 2862-63.

uncommon protection."[26] Although he claimed to agree with Justice Souter, Chief Justice Rehnquist created a far more severe form of isolationism. The Court is obligated to *ignore* not only public opinion but also "criticism." If one takes Chief Justice Rehnquist literally, there is one less reason for commentators to critique constitutional law.[27]

Justice Souter's opinion did not preclude public opinion from consideration even as much as Chief Justice Rehnquist had claimed. In addition to justifying his commitment to principle and stare decisis because such steadfastness preserves public respect for the Court, Justice Souter consulted public opinion to determine which "watershed" constitutional cases should have been overruled. For example, he concluded that the *Lochner* substantive due process cases[28] were properly reversed because it *"seemed unmistakable to most people* by 1937, that the interpretation of contractual freedom protected . . . rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."[29] He also quoted Professor Charles Black's explanation of why *Brown* legitimately overruled *Plessy v. Ferguson*: "[T]hat question has meaning and can find an answer only on the ground of history and of *common knowledge about the facts of life* in the times and places aforesaid."[30] Justice Souter believed that the Court could only keep favorable public opinion by ignoring divisive

---

26. *Id.* at 2863 (emphasis added).

27. "Most lobbying by the executive and legislative branches is open and direct; lobbying by the judiciary is filtered through legal briefs, professional meetings, and law review articles." FISHER, *supra* note **, at 19; *see also* Fowler V. Harper & Edwin D. Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172 (1953); Chester A. Newland, *The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-Antitrust Lobby?*, 48 GEO. L.J. 105 (1959).

28. Lochner v. New York, 198 U.S. 45 (1905); Adkins v. Children's Hosp., 261 U.S. 525 (1923); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (signalling demise of *Lochner* era).

29. 112 S. Ct. at 2812 (emphasis added).

30. 112 S. Ct. at 2813 (quoting Charles L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960) (emphasis added)). Turning to *Roe*, Justice Souter used the ambiguous collective pronoun "our," apparently extending his perspective beyond the Court (which frequently refers to itself as "We"): "[N]either the factual underpinnings of *Roe*'s central holding nor *our understanding of it has changed.*" 112 S. Ct. at 2813 (emphasis added). Justice Souter used the same ambiguous pronoun later in the same opinion to reject cases refusing to extend equal protection to women: "These views, of course, are no longer consistent with *our* understanding of the family, the individual, or the Constitution." *Id.* at 2831 (emphasis added).

public reactions, at least until the public is no longer divisive and has developed a broad consensus that the Court has erred. Justice Souter's opinion is simultaneously a plea for continuity and a justification of perpetual constitutional reinterpretation. The Supreme Court can transform "watershed" constitutional caselaw whenever it discerns a widespread belief that a particular form of constitutional jurisprudence is ineffective or otherwise inappropriate.[31] In the absence of such a finding, the Court should accept the status quo, applying the doctrine of stare decisis. Justice Souter is assuming that the Court can make some very fine-tuned determinations. Not only must the Court determine when an issue is so contentious that the Court should remain committed to the status quo, but the Court must also ascertain when public opinion has so shifted that the Court should overrule its prior decisions. This task will be difficult because some disagreement will linger over virtually every important constitutional issue. In other words, when do judicial critics constitute a merely divisive dissent instead of an overwhelming majority that should pressure the Court to change watershed decisions?

Justice Scalia noted in his concurrence/dissent that the furious controversy over abortion placed the Court in a hopeless position in terms of public opinion. Many would see the Court as capitulating to public pressure no matter what it did:

> [W]e have been subjected to what the Court calls "political pressure" by *both* sides of this issue .... Maybe today's decision *not* to overrule *Roe* will be seen as buckling to pressure from *that* direction. Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is *legally* right ....[32]

Justice Scalia also bemoaned the public's impression that their reactions mattered: "How upsetting it is, that so many of our citizens ... think that we Justices should properly take into account their views, as though we were engaged not in

---

31. Justice Souter's argument suggests that the Court periodically transforms its doctrine, modes of argument, and outcomes. Similar notions have arisen in legal academia. Professor Ackerman has delineated three major constitutional "moments": the Founding, the Reconstruction Amendments, and the New Deal. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

32. *Casey*, 112 S. Ct. at 2884 (Scalia, J., dissenting & concurring).

ascertaining an *objective law* but in determining some kind of social consensus."[33]

This Article's review of Supreme Court cases that consider public opinion, usually in express terms, concludes that Justice Souter's candid, flexible incorporation of public opinion into constitutional interpretation better reflects constitutional history. His approach is more consistent with the weight of Supreme Court precedent, as seen in *Hudson*, than with the more monastic views of Chief Justice Rehnquist and Justice Scalia. But Justice Souter is only employing the historically dominant view; the Rehnquist-Scalia position retains its own constitutional pedigree. Putting the issue more generally, the Court traditionally has vacillated between the two competing sub-traditions expressed in *Casey*.

This Article does not argue solely from tradition. If consequentialism is to play any role in constitutional adjudication,[34] the Court should consider public reactions, including enforcement difficulties, whenever it formulates doctrine. As Justice Frankfurter explained, constitutional adjudication is "applied politics."[35] Frankfurter gave a compelling example to support his precept: "The simple truth of the matter is that decisions of the Court denying or sanctioning the exercise of federal power, as in the first child labor case, largely involve a judgment about practical matters, and not at all any esoteric knowledge of the Constitution."[36] Judicial politics must include a strain of realpolitik, an awareness of the limitations of both power and principle. The Court must not only evaluate previous public responses and the existing state of public opinion, but it must also anticipate how the public will react to its decisions.[37]

---

33. *Id.* (emphasis added). Justice Scalia expressed similar sentiments in his concurring opinion in Webster v. Reproductive Health Services, 492 U.S. 490, 535 (Scalia, J., concurring) (1989) (permitting extensive state regulation of abortion).

34. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102-03 (1921).

35. Felix Frankfurter, *The Zeitgeist and the Judiciary*, SURVEY (1913), *reprinted in* LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913-1918, at 3, 6 (Archibald MacLeish & E.F. Prichard, Jr. eds., 1962).

36. Felix Frankfurter, *The Red Terror of Judicial Reform*, NEW REPUBLIC, Oct. 1, 1924 (unsigned editorial), *reprinted in* LAW AND POLITICS, *supra* note 35, at 10, 12. The Court's political role made judges "less than ever technical expounders of technical provisions of the Constitution. They are arbiters of the economic and social life of vast regions and at times of the whole country." FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 173 (1928); *see also* Louis Fisher, *Social Influences on Constitutional Law*, 15 J. POL. SCI. 7 (1986).

37. *See, e.g.*, R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION

Self-consciously including public opinion in constitutional adjudication also raises basic jurisprudential questions. For instance, how can Justice Souter's sensitivity to public opinion coexist with his commitment to "principle"?[38] Does public opinion have any place in Justice Scalia's search for "objective law"?[39] Does the concept of public opinion destroy the distinction between law and politics, thereby undermining "the rule of law," the autonomy, and even the legitimacy of the Court?[40] How can the constitutionalization of public opinion be reconciled with the anti-majoritarian impulse that questions yet justifies judicial review?[41] Are there methodological and ideological differences in trying to ascertain public opinion instead of "tradition" and "history"? On a more disturbing level, is law nothing more than an elaborate fiction, a fluid collection of metaphors which creates a secular "religion" that we lawyers hope the public will find acceptable?[42] This Article cannot pretend to resolve such difficult questions; it seeks to make those queries more immediate. At the very least, conscious incorporation of public opinion into constitutional doctrine makes constitutional law even more indeterminate.

III. A BRIEF HISTORY OF THE ROLE OF PUBLIC OPINION IN CONSTITUTIONAL INTERPRETATION FROM THE GLORIOUS REVOLUTION THROUGH THE *LOCHNER* ERA

This section presents a brief intellectual history describing the evolution of the concept of public opinion from an eighteenth-century, aristocratic sense of honor among gentlemen to the triumph of the masses by the early

---

(1990) (discussing how politicians anticipate public opinion as well as respond to it.)

38. *Casey*, 112 S. Ct. at 2814.

39. *Id.* at 2884 (Scalia, J., concurring).

40. *See* ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989); *see also* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989) (describing relationship of Supreme Court opinions to public opinion polls).

41. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989). Justice Chase held that the federal courts were "the only proper and competent authority to decide whether any statute made by congress . . . is contrary to . . . the federal constitution." United States v. Callender, 25 F. Cas. 239, 256 (C.C.D. Va. 1800) (No. 14,709).

42. I wish to thank Professors Lazarus and Gellman for helping me develop this question. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988); Sanford Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123.

nineteenth century. Different conceptions of public opinion influenced leading pre-Revolutionary cases, political theorists, the Constitutional ratification debates, the political conflict between the Republicans and the Federalists, decisions by the early judiciary, and the controversy over slavery. Most of these conceptions of public opinion have continued to influence constitutional thought.[43]

A. The Influence of Public Opinion on Law and Constitutional Thought Prior to the Constitution

America's cult of celebrity is merely a perversion of the Enlightenment. When the Enlightenment thinkers rejected the centrality of a Christian God, including the accoutrements of Heaven and Hell,[44] they had to find substitutes to bind and regulate society. Part of the Enlightenment's solution,[45] as expressed by Adam Smith, was the Principle of Approbation: "For approbation, heightened by wonder and surprise, constitutes the sentiment which is properly called admiration, and of which applause is the natural expression."[46] Human beings, governed by passion,[47] naturally seek the approval of other humans. They will perform great feats, benefitting all, to gain that recognition. Smith asked: "For to what purpose is all the toil and bustle of this world? What is the end of avarice and ambition, of the pursuit of wealth, of power, and pre-eminence?" His answer was a cheerful echo of Ecclesiasticism:

---

43. Because public opinion is such a protean concept, it has played numerous roles. Dicey wrote that the concept of public opinion was an "abstraction." A.V. DICEY, LAW AND OPINION IN ENGLAND 414 (2d ed. 1914).

44. According to Professor Horwitz, the *Lochner* formalists hoped "neutral," "autonomous" law would serve as a secular replacement to keep society cohesive. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 193 (Oxford University Press 1992) (1977) [hereinafter HORWITZ, TRANSFORMATION 1870-1960].

45. The eighteenth-century Enlightenment thinkers offered other social binding agents. Adam Smith recommended the market. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell et al. eds., Clarendon Press 1976) (1776). Most Enlightenment theorists preferred some form of "republicanism," premised upon virtue instead of force. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 104-05 (1992) (discussing evolution of beliefs about necessary societal adhesives).

46. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 64 (1759).

47. *Id.* at 75; *see also* ROBERTO M. UNGER, PASSION: AN ESSAY ON PERSONALITY (1984).

> To be observed, to be attended to, to be taken notice of with sympathy, complacency, and approbation, are all the advantages. It is the vanity, not the ease, or the pleasure, which interests us. But vanity is always founded upon the belief of our being the object of attention and approbation.[48]

David Hume had another, more global definition of public opinion: "It may farther be said, that, though men be much governed by interest; yet even interest itself, and all human affairs, are entirely governed by *opinion*."[49] On the Continent, Rousseau also concluded that opinion was the foundation of government:

> What means has the government for shaping behavior? I respond: public opinion. If our conduct arises from our own feelings in solitude, it arises from the opinion of others in society . . . . Not reason, not virtue, not the laws can oversway public opinion unless one finds a means of changing the latter.[50]

For Rousseau, public opinion was a country's actual constitution.[51]

Public opinion was not just a device of abstract political theory. At several critical moments, public opinion dramatically influenced the Anglo-American legal system. The protracted

---

48. SMITH, *supra* note 46, at 113.

49. DAVID HUME, *Whether the British Government Inclines More to Absolute Monarchy or to a Republic*, *in* 1 ESSAYS MORAL, POLITICAL, AND LITERARY 51 (Eugene F. Miller ed., Liberty Classics 1985) (1777) [hereinafter HUME, *British Government*]; *see* DAVID HUME, *Of the First Principles of Government*, *in* 1 ESSAYS MORAL, POLITICAL, AND LITERARY, *supra*, at 32-36 [hereinafter HUME, *First Principles*]. There is a narrower version of Hume's argument; the Court always considers public opinion in constitutional cases because elected officials' actions invariably reflect public opinion, at least to some degree. *See* DICEY, *supra* note 43, at 3. Professor Dicey was not the first to make such an argument. In 1795, a lawyer told the United States Supreme Court that "[t]he Conftitution of Pennfylvania explicitly provides, that no law fhall be paffed prohibiting emigration from the ftate. This is, perhaps, the only direct expreffion of the public fentiment on the fubject." Talbot v. Janson, 3 U.S. (3 Dall.) 133, 142 (1795) (argument of counsel). Indeed, the entire constitutional text expresses a form of public opinion. The public that ratified the constitutional text approved of certain words with generally understood meanings. Part of the Court's job is to determine what the public meant when it ratified a particular text.

50. GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 99-100 (1984) (quoting JEAN-JACQUES ROUSSEAU, LETTRE A M. D'ALEMBERT 176, 178 (Paris, Garnier-Flammarion 1967)).

51. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 272 (Charles M. Sherover trans., 1984) (1762).

struggle between Lord Coke and King James over the relationships between the Common Law and the Royal Prerogative took place during "heightened popular feeling" caused by the High Commission's imprisoning the lawyer Nicholas Fuller for contempt. Fuller had been battling that Royal Court's efforts to force individuals to make an oath affirming particular religious beliefs.[52] In the absence of such angry public sentiments, Coke might have been unable to defy the King.

The trial of the Seven Bishops in 1688 was a turning point in the almost century-long conflict between the Stuart Kings and the coalition of Parliament and Common Law lawyers. King James, a Catholic, demanded that seven Anglican Church Bishops read in their churches a declaration endorsing James' annulment of existing religious laws. When the Bishops refused, James charged them with seditious libel. Three judges rejected the Bishops' defense of truth. But Judge Powell instructed the jury that James had acted illegally by annulling existing laws and that truth was a defense.[53] Lord MacAulay graphically described the public reaction to the jury's acquittal, showing how emotional public opinion can be: "Yet were the acclamations less strange than the weeping. For the feelings of men had been wound up to such a point that at length the stern English nature, so little used to outward signs of emotion, gave way, and thousands sobbed aloud for very joy."[54]

The Seven Bishops case affected the American trial of Peter Zenger for seditious libel in 1735. Zenger printed some pieces, written by James Alexander, which criticized the Royal Governor's administration. Like the Bishops, Zenger pled truth as a defense. The prosecution claimed truth was either irrelevant or an aggravating factor, undermining and insulting the government. The prosecutor argued that three of the four judges in the Seven Bishops case had rejected the defense of truth. Zenger's attorney replied:

> If it be objected *that the opinions of the other three judges were against [Powell]*, I answer that the censures the judgments of these men have undergone, and the approbation Justice Powell's opinion, his judgment and conduct upon that trial has met with, and the honor he gained to himself for

52. CATHERINE DRINKER BOWEN, THE LION AND THE THRONE 298-306 (1957).

53. 2 LORD THOMAS B. MACAULAY, MACAULAY'S HISTORY OF ENGLAND 165-67 (1954).

54. *Id.* at 168.

> daring to speak truth at such a time, upon such an occasion, and in the reign of such a King, is more than sufficient in my humble opinion, to warrant our insisting on his judgment as a full authority to our purpose.[55]

Zenger's lawyer was arguing that the public reaction, both immediate and historical, legitimated Powell's sole opinion in the Seven Bishops case, giving it *full authority*, not just relevance. Zenger's judges, however, agreed with the prosecution. They defined and applied "opinion" to achieve the opposite result; the government should not be libelled even by true statements because the people need to have "a good opinion of it."[56] The jury ignored the judges and acquitted Zenger, triggering another enthusiastic public outburst.[57] Public opinion

---

55. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 72 (Stanley N. Katz ed., 2d ed., Belnap Press 1972) (1736).

56. *Id.* at 100 (quoting The Queen v. Tutchin, 14 Howell's State Trials 1096, 1128 (1704)).

57. *Id.* at 101. It should not be surprising that the *Zenger* and Seven Bishops case juries, which had the power to decide questions of law and fact, reflected existing public opinion. Juries are an essential part of the Anglo-American legal tradition because they manifest community mores. Just as juries sometimes ignore existing law, they also protect the "rule of law" from corrupt rulers. John Adams explained that the jury placed inside the "executive branch of the constitution . . . a mixture of popular power." Because of this popular power, "the subject is guarded in the execution of the laws." BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 74 (1967) (quoting Letter from John Adams). Members of the Court have acknowledged the link between juries and general public opinion: "[T]welve people are more likely than one person to reflect public sentiment." Spaziano v. Florida, 468 U.S. 447, 487 n.33 (1984) (Stevens, J., concurring & dissenting) (holding that judge can implement death penalty despite jury recommendation of mercy) (quoting Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 63 (1980)).

The eighteenth- and nineteenth-century debate over the appropriate role of the jury, a struggle the jury system largely lost as the judges gradually excluded juries from deciding "questions of law," revolved around the appropriate role of public opinion in all types of adjudication. In the early 1800s, former Speaker of the House Theodore Sedgwick recommended major changes in the judge-jury relationship: "In all instances where trial by jury has been practiced, and a separation of the law from the fact has taken place, there have been expedition, certainty, system and their consequences, general approbation." RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 190 (1971). Justice Gray also defended the expanded judicial role: "[W]hen the law is settled by a court, there is more certainty than when done by a jury, it will be better known and more respected in public opinion." Sparf v. United States, 156 U.S. 51, 164 (1895) (Gray, J., dissenting) (holding uncontradicted confession by one defendant of joint commission of murder admissible against both defendants). Nevertheless, continuing jury powers, particularly nullification, demonstrate that public opinion plays a major role within the legal system at the critical point of determining criminal

had made truth a defense.

According to the historian Gordon Wood, it was no coincidence that the *Zenger* case was a libel case involving rulers' reputations. Unique social and economic forces made the American elite protective of their reputations. Bereft of formal ranks of nobility, the elite needed their reputation to gain respect and financial credit.[58] As a result, libel litigation flourished in the eighteenth century. For instance, a boat manufacturer sued someone for saying his boats were "only fit to drown people."[59]

The American aristocracy's quest for fame extended beyond personal benefit. Douglas Adair asserted in his famous essay, *Fame and the Founding Fathers*, that the leaders of the Revolutionary generation, many of whom also framed the Constitution, were obsessed with public opinion and with their place in history.[60] Furthermore, the pursuit of glory was virtuous. Gordon Wood has described that impulse in almost existential terms: "Everyone had appetites and interests, but only the restless-minded, the great-souled, the extraordinary few, had ambition—that overflowing desire to excel, to have precedence, and to achieve fame."[61]

There were obvious political ramifications in courting public opinion. The Revolutionary leaders knew their revolution succeeded because public opinion supported it; the Revolutionaries had put into practice Hume's truism about the primacy of opinion.[62] John Adams reminisced about this point in a letter to Jefferson:

> What do we mean by the Revolution? The war? That was no part of the Revolution; it was only an effect and consequence of it. The Revolution was in the minds of the people, and this was effected, from 1760 to 1775, in the course of fifteen years before a drop of blood was shed at Lexington.[63]

Jefferson would hardly disagree. His plea in the Declaration of

---

guilt or innocence. At the very least, the Anglo-American legal system has never been completely premised on objectivity and principle.

58. WOOD, *supra* note 45, at 38-39.

59. *Id.* at 60.

60. DOUGLAS ADAIR, FAME AND THE FOUNDING FATHERS (1974).

61. WOOD, *supra* note 45, at 39. Wood believed that the gentlemen of the period were far more concerned about their reputation among their peers than with general public opinion. *Id.* at 40-41.

62. *See* HUME, *British Government*, *supra* note 49.

63. BAILYN, *supra* note 57, at 1 (quoting Letter from John Adams to Thomas Jefferson, 1815).

Independence was addressed to the court of world opinion and thus to history: "When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another . . . *a decent Respect to the Opinions of Mankind* requires that they should declare the causes which impel them to the Separation."[64]

The pre-Revolutionary American public did not express its views solely through juries or eloquent revolutionary documents and pamphlets. The lower classes, generally excluded from power, periodically took to the streets as semi-organized mobs. They undermined the Royal government's capacity to enforce general writs of assistance by gathering near buildings that were to be searched, thereby intimidating the officials.[65] Thomas Hutchinson, the Chief Justice of Massachusetts, felt the sting of public opinion most directly: a mob burned his house down in 1765. Hutchinson's Humean analysis should come as little surprise: "Authority is in the populace . . . no law can be carried into execution against their mind."[66]

Not all eighteenth-century thinkers found even cold comfort in the dominance of opinion. David Hume agreed with Rousseau that public opinion determined governmental rule but did not find that linkage reassuring:

> As force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, on opinion only that government is founded; and this maxim extends to the most despotic and most military governments, as well as to the most free and most popular.[67]

Opinion was simply a fearsome, inevitable force: "Government is instituted in order to restrain the fury and injustice of the people, and being always founded on opinion, not on force, it is dangerous to weaken, by speculation, the reverence that the multitude owe to authority."[68] Hume would not have been sur-

---

64. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (emphasis added). The original feminist manifesto made a similar plea to "the opinions of mankind." THE SENECA FALLS DECLARATION OF SENTIMENTS AND RESOLUTIONS para. 1 (1848).

65. M.H. SMITH, THE WRITS OF ASSISTANCE CASE 446 (1978).

66. BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON 73-74 (1974) (quoting Letter from Thomas Hutchison to Samuel Jackson).

67. HUME, *First Principles*, *supra* note 49, at 32-33, *quoted in* DICEY, *supra* note 43, at 2. Hume noted that governments gained strength over time from opinion. HUME, *First Principles*, *supra* note 49, at 33.

68. 5 DAVID HUME, HISTORY OF ENGLAND 59 (1863). Nor would Hume have

prised by the blunt reductionism of the despot Napoleon: "Opinion rules everything."[69]

Many other pre-revolutionary leaders in America expressed views similar to Hume's, revealing the self-conscious hierarchical gap between the untitled American aristocracy and their fellow Americans.[70] Early in his career, John Adams referred to the masses as the "common Herd of Mankind."[71] In 1774, John Randolph applied a class analysis to public opinion, bluntly stating: "When I mention the public, . . . I mean to include only the rational part of it. The ignorant vulgar are as unfit to judge of the modes, as they are unable to manage the reins of government."[72] Randolph elevated the "reasoned" views of the elite above the ignorant reactions of the passionate masses.

Soon after the American Revolution, the Federalists, who agreed with Hume's concerns about the masses, battled Jefferson's Republicans over the significance of public opinion, both in and out of court. Hume's conservatism infuriated men like Jefferson,[73] who saw public opinion as presumptively liberating. Perhaps Hume provoked Jefferson by striking a nerve. Jefferson wrote in 1788, twelve years after the Declaration of Independence, that " 'tavern keepers, Valets de place, and postilions'—were 'the hackneyed rascals of every country' who

---

quarrelled with Samuel Johnson's basing aesthetic evaluations upon public opinion: "A man . . . who writes a book, thinks himself wiser or wittier than the rest of mankind; he supposes that he can instruct or amuse them, and the publick to whom he appeals, must, after all, be the judges of his pretensions." JAMES BOSWELL, LIFE OF JOHNSON 142 (R.W. Chapman ed., Oxford Univ. Press 1980) (1791). Boswell prefaced that quote by noting: "[Johnson] had, indeed, upon all occasions, a great deference for the general opinion." *Id.*

69. DICEY, *supra* note 43, at 1 n.1.

70. The debate over whose public opinion should count more, the views of the elite or the masses, continues to this day. For a powerful defense of democracy against elitist "guardianships," see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 52-79 (1989). *See also* Stephen L. Carter, *The Right Questions in the Creation of Constitutional Meaning*, 66 B.U. L. REV. 71 (1986); Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

71. WOOD, *supra* note 45, at 27.

72. Gordon S. Wood, *The Democratization of Mind in the American Revolution*, *in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 102, 106-07 (Robert H. Horwitz ed., 2d ed. 1979) (quoting JOHN RANDOLPH, CONSIDERATIONS ON THE PRESENT STATE OF VIRGINIA (1774)).

73. GARY WILLS, EXPLAINING AMERICA: THE FEDERALIST 32 (1981).

'must never be considered when we calculate the national character.' "[74] Jefferson preferred the small agrarian farmer, made independent by his land, to the urban masses. Nor was Jefferson sanguine about human nature. He warned the Virginia assembly about governmental corruption because "human nature is the same on every side of the Atlantic."[75] Thomas Paine had a purer Republican perspective, linking public opinion, free speech, and democracy together through a plain writing style designed to reach a broad audience.[76] In his libel defense of Thomas Paine for writing *Rights of Man*, Erskine explained the basic linkage between free speech, public opinion, and a just government: "[T]he liberty of opinion keeps governments themselves in due subjection to their duties."[77]

In conclusion, the concept of "opinion" already had several meanings before the drafting and ratification of the Constitution. Political theorists like Hume and Rousseau used "opinion" as an all-embracing concept that described the temper of the times, the Zeitgeist.[78] During the colonial period, most of the American elite saw mass public opinion as an irrational threat to individual liberties, while revolutionaries like Erskine and Thomas Paine believed only public opinion could prevent tyranny.[79] Finally, early leaders sometimes conceived of public opinion as the verdict of their gentlemen peers and at other times as the will of the entire people. Public opinion analysis therefore has at least two factors: (1) a determination of whose opinions are to be consulted, and (2) an assessment of what weight, if any, should be given to those views.

---

74. WOOD, *supra* note 45, at 28 (quoting Thomas Jefferson, Hints to Americans Traveling in Europe (June 19, 1788), *reprinted in* 13 THE PAPERS OF THOMAS JEFFERSON 268 (Julian P. Boyd et al. eds., 1954-55)).

75. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., Univ. of N.C. Press 1955) (1787).

76. Wood, *supra* note 72, at 110-11.

77. Herbert v. Lando, 441 U.S. 153, 186 n.4 (1979) (Brennan, J., dissenting) (holding that plaintiff who is public figure can depose news media about state of mind to determine malice); Grosjean v. American Press Co., 297 U.S. 233, 247-48 (1936) (enjoining state tax on newspapers) (quoting 1 LORD ERSKINE, SPEECHES OF LORD ERSKINE 525 (James L. High ed., 1876); *see also* LLOYD P. STRYKER, FOR THE DEFENSE 210-16 (1947).

78. To the degree that Hume is right, this article involves everything and therefore has difficulty proving anything. Supreme Court Justices are no more capable of escaping the Zeitgeist than the rest of us.

79. *See* ERSKINE, *supra* note 77, at 525.

B. Public Opinion and the Framing of the Constitution

The Framers of the Constitution viewed public opinion as a constitutional lodestone. In *The Federalist*, Madison accepted Hume's truism as a premise: "If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number which he supposes to have entertained the same opinion."[80] However, Madison did not fear public opinion as much as Hume, creating two definitions of public opinion: public passion and public reason,[81] Madison wrote: "[I]t is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."[82] Because he had to obtain votes from average citizens as well as from his fellow gentlemen, Madison broke down the prevailing distinction, as expressed by Randolph, between the elite and the rest of the citizenry. One can assume Madison believed that constitutional supporters, of whatever class, exercised "public reason." "Reason" and "passion" were no longer class differences but rather political distinctions.

Because the Constitution had to be ratified by the voters, the Framers were intensely aware of and deferential to public opinion. They believed the voters could legitimate the new Constitution by consent. Madison wrote in *The Federalist*[83] that the constitutional delegates "must have borne in mind that as the plan to be framed and proposed was to be submitted to *the people themselves*, . . . its approbation [would] blot out antecedent errors and irregularities."[84] Some of the irregu-

---

80. THE FEDERALIST No. 49, at 314-15 (James Madison) (Clinton Rossiter ed., 1961); *see* James G. Wilson, *The Most Sacred Text: The Supreme Court's Use of* The Federalist *Papers*, 1985 B.Y.U. L. REV. 65 (discussing how the Supreme Court has utilized *The Federalist* in opinions).

81. Madison's distinction between reason and passion permitted the people, who tend toward passion, to create a legitimate, viable government if they followed reason: "Elsewhere [Madison] has said that only the people have the right to establish a constitutional system; but now he adds a qualifier—the people can do it only when they are calm." WILLS, *supra* note 73, at 28.

82. THE FEDERALIST No. 49, *supra* note 80, at 317.

83. *The Federalist* Papers were carefully written to influence an uncertain electorate. George Washington feared he would undermine the drive for nationalization by making any public endorsements; many would believe he was seeking despotic power. WILLS, *supra* note 50, at 102-03.

84. THE FEDERALIST No. 40, *supra* note 80, at 253 (James Madison). Madison later made the same argument about the Bill of Rights. *See* 4 ANNALS OF CONG. 772 (1796) (Statement of James Madison), *reprinted in* 6 THE WRITINGS OF JAMES

larities were rather significant. The Constitution's ratification process ignored the existing Article of Confederation's requirement that all states consent to any amendments.[85] The Constitutional convention drafted a document that vastly exceeded what many people understood the primary purpose of the convention to be: facilitating commercial relations.[86] Thus the electorate had to decide the most important constitutional question of all: Should the new Constitution be ratified in express violation of the terms of the existing constitution? In other words, the crucial jurisprudential concept of consent is a form of public opinion.

During the ratification campaign, the Framers had cause to fear existing public opinion. Many Framers were strong nationalists, even monarchists, but they lived in a land still fearful of any concentration of power. Their rebuttals to the Anti-Federalists' claims that the new Constitution would concentrate governmental power were less than candid: "The Federalists met this attack by an attempt to deny the accusation in public, but it seems from their private statements that they intended to create a national government, although prevailing opinion obliged them to compromise."[87] The Federalists may have designed the Constitution to rein in democratic sentiments, but the ratification campaign required them to glorify those sentiments: "We, sir, idolize democracy."[88]

Neither Madison nor Hamilton thought any written Constitution could ever transcend public opinion. For Hamilton, public opinion limited all written constitutions. Concerning freedom of the press he said, "[W]hatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."[89] Madison concurred: "The restric-

---

MADISON 263 (Gaillard Hunt ed., 1906). For a discussion of the multiple levels of constitutional thought and power, see John M. Rogers & Robert E. Molzon, *Essay: Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992 (1992).

85. Forrest McDonald, however, argued that the Constitution actually complied with the Articles' requirements. FORREST MCDONALD, NOVUS ORDO SECLORUM 279 (1985).

86. *Id.* at 98.

87. JACKSON T. MAIN, THE ANTI-FEDERALISTS 121 (1961).

88. Wood, *supra* note 72, at 116 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 222 (reprint ed. Ayer Co. 1987) (1888) (statement of John Marshall)).

89. THE FEDERALIST No. 84, *supra* note 80, at 514 (Alexander Hamilton).

tions however strongly marked on paper will never be regarded when opposed to the decided sense of the public."[90] Madison demonstrated how public opinion could transform the constitutional debate over federalism:

> If, therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.[91]

The Framers of the Constitution designed the new government both to incorporate and regulate public opinion. Most tellingly, the people only directly elected the members of the House of Representatives. Nevertheless, the will of the people permeated the entire Constitution: "Even the judges, with all other officers of the Union will, as in the several States, be the choice, though a remote choice, of the people themselves."[92]

---

90. WILLS, *supra* note 50, at 101. Gordon Wood concluded that Madison still considered "public opinion" to be the views of the elite as late as 1791. Wood, *supra* note 72, at 125-26. Yet in *The Federalist*, Madison distinguished public reason from public passion on the merits, not on class grounds. THE FEDERALIST No. 49, *supra* note 80, at 317 (James Madison).

91. THE FEDERALIST No. 46, *supra* note 80, at 296 (James Madison). Madison's comment could help resolve notably volatile Tenth Amendment doctrine. In 1968, the Supreme Court upheld federal regulation of state minimum wages in Maryland v. Wirtz, 392 U.S. 183 (1968). *Wirtz* was overruled by National League of Cities v. Usery, 426 U.S. 833 (1976) (prohibiting congressional regulation of state workers' wages and hours), which in turn was overruled nine years later in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). In Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), and New York v. United States, 112 S. Ct. 2408 (1992), the Court undermined *Garcia* by distinguishing it; *Garcia* had been largely decided on the ground that the Court could not develop any meaningful Tenth Amendment distinctions, 469 U.S. at 537-39.

The Tenth Amendment activists have their own tradition. The *Slaughter-House Cases* admitted the Court would have problems determining the appropriate doctrine: "[T]his line has never been very well defined in public opinion," Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81-82 (1872) (upholding monopoly over slaughter-house locations). That lack of clarity did not preclude judicial review. *Id.* at 82; *see also* Newton v. Commissioners, 100 U.S. 548, 560 (1879) (concluding that a state can move a county seat).

92. THE FEDERALIST No. 39, *supra* note 80, at 242 (James Madison). Even relatively arcane issues were analyzed in terms of public opinion. Pinckney explained in 1800 why congressional immunity under the Speech and Debate Clause was so important:

> [O]ur Constitution supposes no man . . . to be infallible, but considers

Yet some of the choices were designed to be quite remote. Hamilton argued that independent Courts would protect the Constitution from temporary majorities reflecting prevailing public opinion: "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from . . . dangerous innovations in the government, and serious oppressions of the minor party in the community."[93] Lifetime judicial tenure was essential: "[Otherwise] there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws."[94] Madison saw another advantage in giving the judiciary the primary interpretive role: "The danger of disturbing the public tranquillity by interesting too strongly the public passions is a still more serious objection against a frequent reference of constitutional questions to the decision of the whole society."[95]

C. The Battle Between the Republicans and the Federalists

1. The Republicans' glorification of public opinion

The electoral process, which now determined leadership,

---

them all as mere men, and subject to all the passions, and frailties, and crimes, that men generally are, and accordingly provides for the trial of such as ought to be tried, and leaves the members of the Legislature for their proceedings, to be amenable to their constituents and to public opinion.

10 ANNALS OF CONG. 71 (1800).

93. THE FEDERALIST No. 78, *supra* note 80, at 469 (Alexander Hamilton).

94. *Id.* at 471.

95. THE FEDERALIST No. 49, *supra* note 80, at 315 (James Madison). During the drafting of the Bill of Rights, the First Congress considered requiring legislators to comply with the instructions of their electorate. Hartley successfully made the Burkean argument that representatives should implement their own views instead of being pure proxies for the majority will: "The right of instructing is liable to great abuses; it will generally be exercised in times of popular commotion . . . . I have known, Sir, so many evils arise from adopting the popular opinion of the moment, that I hope this government will be guarded against such an influence." CREATING THE BILL OF RIGHTS 154 (Helen E. Veit et al. eds., 1991).

Jefferson defended the First Amendment because it served public opinion so well: "[T]he only security of all, is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary, to keep the waters pure." Letter from Thomas Jefferson to Marquis de la Fayette (Nov. 4, 1823), *in* 7 WRITINGS OF THOMAS JEFFERSON 325 (H.A. Washington ed., Philadelphia, J.B. Lippincott & Co. 1871) [hereinafter Jefferson to Fayette], *quoted in* Martin v. City of Struthers, 319 U.S. 141, 143 n.3 (1943) (alteration in original) (holding that municipality cannot forbid person to knock on doors to distribute religious handbills).

undermined the pre-Revolutionary cohesion among the American elite. All political leaders needed votes in a country which was turning increasingly democratic after the Revolution.[96] Whatever other virtues democracy may have, it forces elites to compete among themselves to gain the populace's favor.

Madison's distinction between reason and passion as good and bad public opinion faded during the ensuing political conflict between the Federalists and the Republicans.[97] The debate between the Federalists and the Republicans became ever more polarized, more Manichean. The partisan split between the Republicans and Federalists revived class-based definitions of public opinion. Jefferson summed up the Republican perspective when he explained why he preferred the nature of the people to the elite: "[T]he sickly, weakly, timid man, fears the people, and is a Tory by nature. The healthy, strong and bold, cherishes them, is formed a Whig by nature."[98] Jefferson trusted an educated populace more than any elite: "Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe, their minds must be improved to a certain degree."[99] This general perspective explains Jefferson's wariness of judicial review:

> You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy . . . . [T]heir power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control.[100]

During the debate over the Alien and Sedition Act, Madison, who had become a Republican, opposed the Federalist Act,

---

96. *See* WOOD, *supra* note 45; Wood, *supra* note 72.

97. *See* WOOD, *supra* note 45, at 363-64. For a thorough review of these political conflicts, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800 (1993).

98. *See* WOOD, *supra* note 44, at 97 (quoting Jefferson to Fayette, *supra* note 95).

99. JEFFERSON, *supra* note 75, *reprinted in* 3 WRITINGS OF THOMAS JEFFERSON 254 (Paul L. Ford ed., 1894).

100. Letter from Thomas Jefferson to William C. Jarvis (Sept. 28, 1820), *in* 15 WRITINGS OF THOMAS JEFFERSON 276, 277-78 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903). Lincoln read this letter during the Lincoln-Douglas debates. *See* Wallace Mendelson, *Jefferson on Judicial Review: Consistency Through Change*, 29 U. CHI. L. REV. 327 (1962).

which heavily regulated political speech. Madison defended the Virginia Resolutions' opposition to the Act as

> expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will—possibly, to a change in the opinion of the judiciary; the latter enforces the general will, whilst that will and that opinion continue unchanged.[101]

According to Madison, "judicial will," and the force that accompanies it, should never be completely insulated and isolated from public opinion. Madison explicitly appealed to the public for constitutional change: "The truth declared in the resolution being established, the expediency of making the declaration at the present day may safely be left to the temperate consideration and candid judgment of the American public."[102] To Republicans, opinion was everything. Thomas Cooper defiantly accepted the costs of punishment for violating the Seditious Libel Act: "I depend principally on my practice: that practice, imprisonment will annihilate. Be it so. I have been accustomed to make sacrifices to opinion, and I can make this."[103]

Many early politicians believed that the public could reinterpret the Constitution. Jefferson relied on a "just" public opinion to validate the Louisiana purchase, an exercise of presidential power exceeding Jefferson's prior strict constructionism:

> An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.[104]

---

101. JAMES MADISON, REPORT ON THE RESOLUTIONS (1800), *reprinted in* 6 THE WRITINGS OF JAMES MADISON 341, 402 (Gaillard Hunt ed., 1906).

102. *Id.* at 352.

103. United States v. Cooper, 25 F. Cas. 631, 643 (C.C.D. Pa. 1800) (No. 14,865).

104. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* 9 WRITINGS OF THOMAS JEFFERSON, *supra* note 99, at 279, 281-82.

Whether the politicians and leaders wanted it or not, the Constitution quickly evolved into something far different than the Framers intended. Henry Jones Ford contended that the rapid evolution of the Electoral College was "conclusive evidence of the ability of public opinion to modify the actual constitution to any extent required."[105] Nor were such changes limited to such basic structural questions as who should elect the President. For example, the demand for paper money overwhelmed the Framers' constitutional protections of specie.[106] John Pope used public opinion to legitimate the National Bank.[107] When President Andrew Jackson vetoed a subsequent National Bank bill, he also acknowledged public opinion: "Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled."[108] Note that President Jackson invoked a corporate form of opinion: the views of the people and the States.

The country's rapid changes precipitated a change in consciousness among the elite. They worried less about personal reputation and more about the overall will of the country. By 1817, "public opinion" had reached a novel status in American consciousness; it was "that invisible guardian of honour—that eagle-eyed spy on human actions—that inexorable judge of men and manners—that arbiter, whom tears cannot appease, nor

---

105. HENRY J. FORD, THE RISE AND GROWTH OF AMERICAN POLITICS 161 (1914).

106. WOOD, *supra* note 45, at 316.

107. Pope defended the Bank by distinguishing between "individual liberty" and "measures of general policy":

> My reflections and practical observations on the Government incline me to the opinion that, with regard to measures of general policy not assailing individual liberty or right or the independence of any State, there is not that danger to be apprehended from a liberal construction of the Constitution which gentlemen seem to imagine. So long as the Government is in the hands of the people, measures affecting the whole nation, if oppressive or inconvenient, will be resisted and corrected by the public feeling and opinion.

22 ANNALS OF CONG. 233-34 (1811) (Statement of Sen. John Pope). Eight years later, Chief Justice Marshall would uphold the Bank partially because the Bank did not affect "the great principles of Liberty," but only "the respective powers" of the federal government. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).

108. Andrew Jackson, Veto Message (July 10, 1832), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 1139, 1144-45 (James D. Richardson ed., 1897).

ingenuity soften—and from whose terrible decisions there is no appeal."[109] Public opinion was the "vital principle" that permeated America; it undermined all fixed principles, whether they be rules of law or social mores.[110] Tocqueville described how public opinion and the rule of law uniquely reinforced each other in American culture: "Those who wish to attack the laws must consequently either change the opinion of the nation or trample upon its decision."[111]

2. *The Federalist perspective*

The first Chief Justice of the Supreme Court, John Jay, summed up the Federalists' pessimistic view of the average citizen, a premise that justified putting an enlightened elite at the helm of power: "The mass of men . . . are neither wise nor good, and virtue, like the other resources of a country, can only be drawn to a point and exerted by strong circumstances ably managed, or a strong government ably administered."[112] Led by Hamilton, the Federalists did not rely on republican virtue or approbation; they preferred the monarchial device of corruption, of providing financial benefits to those who supported the government.[113] They also benefited from a post-Revolutionary disillusionment: "[T]he people do not exhibit the virtue that is necessary to support a republican government."[114] According to one Federalist critic, North Carolina laws were "[t]he vilest collection of trash ever framed by a legislative body."[115]

The Federalists quickly turned to the judiciary for protection of property,[116] contract,[117] and the new written

---

109. Wood, *supra* note 72, at 125 (quoting WILLIAM CRAFTS, JR., AN ORATION ON THE INFLUENCE OF MORAL CAUSES ON NATIONAL CHARACTER, DELIVERED BEFORE THE PHI BETA KAPPA SOCIETY, ON THEIR ANNIVERSARY 5-6 (Aug. 28, 1817)).

110. *Id.*

111. TOCQUEVILLE, *supra* note **, at 247.

112. WOOD, *supra* note 45, at 261 (quoting John Jay, *quoted in* DAVID H. FISCHER, THE REVOLUTION OF AMERICAN CONSERVATISM: THE FEDERALIST PARTY IN THE ERA OF JEFFERSONIAN DEMOCRACY 7 (1965)).

113. WOOD, *supra* note 45, at 263 (quoting HELEN R. PINKNEY, CHRISTOPHER GORE: FEDERALIST OF MASSACHUSETTS, 1758-1827, at 37 (1969)). Hamilton's "corruption" may have included more illegal techniques. His chief aide went to jail. GORE VIDAL, *Political Melodramas*, *in* UNITED STATES; ESSAYS 1952-1992, at 854 (1993).

114. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 132 (2d. ed. 1989).

115. *Id.*

116. Common law property rights also yielded to changes in technology and ideology: "The onward spirit of the age must, to a reasonable extent, have its way.

constitutions. Chancellor James Kent lectured on the need for judicial review of the constitutionality of legislative actions: "If public opinion was in every case to be presumed correct and competent to be trusted, it is evident, there would have been no need of original and fundamental limitations. But sad experience has sufficiently taught mankind, that opinion is not an infallible standard of safety."[118] Chancellor Kent, however, did not give the judiciary the last word:

> [I]f the [judiciary] should at any time be prevailed upon to substitute arbitrary will, to the exercise of a rational Judgment, as it is possible it may do even in the ordinary course of judicial proceeding, it is not left like [the legislature], to the mere controul of public opinion. The Judges may be brought before the tribunal of the Legislature, and tried, condemned, and removed from office.[119]

It should not be surprising that lawyers and courts led the Federalists' efforts to constrain the democratic will. Tocqueville described the inherently conservative, aristocratic instincts of most lawyers:

> Men who have made a special study of the laws derive from this occupation certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.[120]

The law is made for the times, and will be made or modified by them." Lexington & O.R.R. v. Applegate, 38 Ky. (8 Dana) 289, 309 (1839) (holding railroad not a nuisance).

117. In his famous argument in *Dartmouth College* opposing a state law which modified an existing contract with Dartmouth College, Daniel Webster said:

> It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. If the franchise may be at any time taken away, or impaired, the property also may be taken away, or its use perverted.

TIMOTHY FARRAR, REPORT OF THE CASE OF THE TRUSTEES OF DARTMOUTH COLLEGE AGAINST WILLIAM H. WOODWARD 282-83 (Boston, 1819).

118. JAMES KENT, INTRODUCTORY LECTURE TO A COURSE OF LAW LECTURES (1794), *reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760-1805, at 936, 942 (Charles S. Hyneman & Donald S. Lutz eds., 1983). Kent equated public opinion with faction: "The Courts of Justice which are organized with peculiar advantages to exempt them from the baneful influence of Faction." *Id.* (footnote omitted).

119. *Id.* at 943-44.

120. TOCQUEVILLE, *supra* note **, at 273. A.V. Dicey observed that judges are older than most of their contemporaries. Their views will usually lag two gener-

The Federalists heeded Hamilton's vision in *The Federalist Papers*, interpreting constitutions and protecting vested property rights under "fixed principles" of law that only could be divined and applied by judges.[121]

The Federalists did not completely exclude public opinion from their constitutional analysis. During the debate over the Alien and Sedition Act, the Federalist Massachusetts legislature endorsed the Act, using the rhetoric of public opinion: "[The freedom of the press] is a security for the rational use and not the abuse of the press—of which courts of law, the juries, *and people will judge*; this right is not infringed but confirmed and established by the late act of Congress."[122] The Resolution's conclusion was equally forceful, linking constitutional interpretation to public opinion manifested through election returns: "The legislature further declare, that in the foregoing sentiments they have expressed the general opinion of their constituents, who have not only acquiesced without complaint in those particular measures of the Federal Government, but have given their explicit approbation by reelecting those men who voted for the adoption of them."[123]

How could Republicans and Federalists applaud and appeal to public opinion during conflicts like the Alien and Sedition Act? To a large degree, they had two different audiences in mind: The Republicans referred to the "whole people" while the Federalists tended to value the views of "those philosophical and patriotic citizens who cultivate their reason."[124] The Republicans had the last word. They won the next election and repealed the Act.

The debate between the Republicans and the Federalists over the primacy of public opinion was not limited to political power. Gordon Wood has explained how the Alien and Sedition Act, which had made "truth" a defense, triggered an

---

ations behind the times, because people tend to reflect the most powerful thinking of their immediate forefathers. DICEY, *supra* note 43, at 369.

121. WOOD, *supra* note 45, at 325.

122. MASSACHUSETTS RESOLUTIONS IN REPLY TO VIRGINIA (1799), *reprinted in* JEFFERSON POWELL, LANGUAGES OF POWER 136 (1991) (emphasis added).

123. *Id.* at 138.

124. WOOD, *supra* note 45, at 363 (quoting Letter from James Madison (Mar. 7, 1790)). Gordon Wood also described a social component to the dispute: "[M]ost Revolutionary writers, at the outset at least, presumed the existence of these universal principles, of right behavior and expected a uniformity of response, supposing that their audience either was, or would like to be, part of that restricted circle of men of good taste and judgment." Wood, *supra* note 72, at 109.

epistemological disagreement over the meaning of "truth":

> While the Federalists clung to the traditional assumption that truth was constant and universal and capable of being discovered by enlightened and reasonable men, their Republican opponents argued that opinions about government and rulers were many and diverse and the truth of such opinions could not be determined simply by judges and members of juries, no matter how educated and reasonable such men might be.[125]

The dispute between the Republicans and the Federalists over public opinion can be exaggerated. No American politician seeking elected office could contemptuously dismiss the public and remain in power. Although his views were unique at the time, Federalist James Wilson combined the Hamiltonian commitment to a strong central government with the Jeffersonian belief in majority rule, anticipating the ultimate outcome of the Federalist-Republican debate.[126] Only a few bitter Federalists withdrew from the public arena during the early nineteenth century.[127]

Such divergent views reveal the inherent difficulty of determining the appropriate role of the public in constitutional theory. This rich discourse also demonstrates that the early political leaders, including conservative Federalist judges, did not have a one-dimensional idea of how to organize their novel republic. They groped toward their new form of government. Most leaders believed the public had to participate in the evolution of the Constitution. Nobody knew how or how much. But many changes took place in the early years; the public ignored the Framers' views on the electoral college, the prohibition against paper money, but legitimated rival political parties.[128] Admittedly, the rate of constitutional change diminished. But myriad constitutions could have emerged out of that single text; the courts and the public joined together to create the basic system that we continue to use today.

---

125. WOOD, *supra* note 45, at 362.

126. Robert G. McCloskey, *Introduction* to 1 THE WORKS OF JAMES WILSON 1, 4-5 (Robert G. McCloskey ed., 1967). Wilson believed that all three branches of the federal government had to be premised upon popular consent, not command. *Id.* at 24-25, 47.

127. James Wilson, Of the General Principles of Law and Obligation, *in* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (1804), *reprinted in* 1 THE WORKS OF JAMES WILSON, *supra* note 126, at 97, 119.

128. *See, e.g.*, RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM (1969).

D. Public Opinion and the Early Courts

Both State and Federal Courts sought and needed public support to prevail against the more powerful elected branches. In 1788, the Virginia State Legislature passed a statute increasing the responsibilities of many judges. "The judges therefor sent a 'Respectful Remonstrance' . . . asking that 'the present infraction of the constitution may be remedied by the legislature themselves.' "[129] The judges said if the legislature refused to act, "they see no other alternative for a decision between the legislature and judiciary than an appeal to the people."[130] After the legislature refused to change the law, the judges made that appeal by resigning. The legislature capitulated, amending the statute and reappointing the judges.[131]

Like Justice Souter in *Casey*, early judges used public opinion to justify judicial review. Several early courts developed Hamilton's argument that the judiciary was the intermediary between the people and their elected representatives:

> This constitution is sanctioned by the consent and acquiescence of the people for seventeen years; and it is admitted by the almost universal opinion of the people, by the repeated adjudications of the courts of this commonwealth, and by very many declarations of the legislature itself, to be of superior authority to any opposing act of the legislature.[132]

The judges envisioned a dialogue between the judiciary and the public. They wrote their opinions to persuade both the litigating parties and the public of the correctness of their decisions. In other words, the courts initially interpret constitutions, but the public could oppose particular adjudications and statutes, as they did with the Alien and Sedition Act. This process ultimately extended beyond discourse. Many judges accepted the Republican argument that the people, not the judiciary, are the

---

129. POWELL, *supra* note 122, at 73.

130. *Id.*

131. *Id.* at 72-73. This early episode confirms Justice Souter's argument that the judiciary depends on widespread public support.

132. Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 37 (1793). Judicial opinions and legislative acts can increase in authority due to the passage of time and the validation by public opinion: "[T]he constitution, and the subsequent acts of the convention . . . [b]oth depend upon the acquiescence of the people, as the convention was not deputed to make the constitution; or to pass laws under it; and, therefore, if the people acquiesced under the constitution, they acquiesced in the interpretation also." Turpin v. Locket, 10 Va. (6 Call) 113, 185 (1804).

ultimate guardians of liberty.[133]

The federal courts initially did not fulfill Hamilton's expectations that the unelected courts would effectively constrain the elected branches.[134] In 1801, Chief Justice John Jay refused President Adams' reappointment because "under a system so defective" the Court would never "obtain the energy, weight and dignity which were essential to its affording due support to the National Government, nor [would it] acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."[135]

The Court gradually asserted itself against the two more powerful branches. Attorney General Caesar Rodney published a letter he wrote to President Jefferson complaining about a judicial decision, *Gilchrist v. Collector of Charleston*,[136] that undermined Jefferson's embargo. Justice Johnson, the author of *Gilchrist*, turned to the newspapers to sway public opinion:

> That the president should have consulted that officer upon a legal subject [in private], is perfectly consistent with the relation subsisting between [the executive and judicial departments] . . . . But when that opinion is published to the world . . . an act so unprecedented in the history of executive conduct could be intended for no other purpose than to secure the public opinion on the side of the executive and in opposi-

---

133. But, should usurpation rear its head; should the unnatural case ever occur, when the representatives of the people should betray their constituents, we are referred, for consolation and remedy, to the power and vigilance of the state governments; to publick opinion; to the active agency of the people in their elections; to that perpetual dependence on the people, which is the primary controul on the government . . . .

United States v. The William, 28 F. Cas. 614, 619 (D. Mass. 1808) (No. 16,700).

Justice Chase asserted that the courts were the primary guardians of liberty: "If your constitution was destroyed, so long as the judiciary department remained free and uncontrolled, the liberties of the people would not be endangered. Suffer your courts of judicature to be destroyed: there is an end to your liberties." United States v. Cooper, 25 F. Cas. 631, 640-41 (C.C.D. Pa. 1800) (No. 14,865).

134. Hamilton complained in 1802: "I am still labouring to prop the frail and worthless fabric [of the Constitution] . . . . What can I do better than withdraw from the scene? Every day proves to me more and more that this American world was not made for me." FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 356 (1979). Gordon Wood has described how many other early leaders, including Jefferson, became discouraged about the fate of America by the end of their lives. WOOD, *supra* note 45, at 367-68.

135. EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 23-24 (1919) (quoting John Jay).

136. 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5420).

tion to the judiciary.[137]

The Court needed the public to support its power to ignore the public. In 1810, the Supreme Court stated in *Fletcher v. Peck* that judicial interpretations of the relevant text must prevail over public opinion: "Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?"[138] In *Osborn v. Bank of the United States*, Justice Johnson dissented because the Court may have satisfied "the public mind" but failed to comply with the Constitution when it upheld a congressional law giving the Bank of United States jurisdiction to sue in federal circuit courts.[139]

From the very beginning, Justices have had two different conceptions of their role. Some believe that the Court interacts with the country, while others believe the Court must insulate itself from outside pressures. Some Justices, like Justice Johnson, who wrote *Hudson*[140] and dissented in *Osborn*,[141] appear to hold both viewpoints at different times. Justice Johnson thus personified the two competing sub-traditions (incorporating public opinion and being hostile to public opinion) that constitute the Supreme Court's approach.

Chief Justice Marshall increased the Supreme Court's power by synthesizing Republican and Federalist thinking.[142] He sought to separate law from politics but remained attuned to the country's political mood when applying that distinction:

> [Marshall] has a strong attachment to popularity but indisposed to sacrifice to it his integrity; hence it is that he is disposed on all popular subjects to feel the public pulse and hence results indecision and *an obsession* of doubt . . . . Doubts suggested by him create in feeble minds those which are irremovable. He is disposed . . . to express the great respect for the sovereign people and to quote their opinions as a

---

137. WILLIAM JOHNSON, REPLY TO ATTORNEY GENERAL CEASAR RODNEY'S ATTACK ON HIS DECISION IN THE *GILCHRIST* CASE (1808), *reprinted in* 1 THE GROWTH OF PRESIDENTIAL POWER 563-64 (William M. Goldsmith ed., 1974).

138. 10 U.S. (6 Cranch) 87, 130 (1810) (prohibiting State from rescinding legislative land grants made by prior, fraudulent legislature).

139. 22 U.S. (9 Wheat.) 738, 871 (1824) (Johnson, J., dissenting) (holding that Bank of United States' charter gives jurisdiction to United States circuit courts).

140. 11 U.S. (7 Cranch) 32 (1812).

141. 22 U.S. (9 Wheat.) at 871.

142. Many Federalists did not think Chief Justice Marshall was sufficiently committed to their ideology. POWELL, *supra* note 122, at 173.

matter of truth.[143]

Chief Justice Marshall systematically sought the public approbation and support that Chief Justice Jay believed the Court could never achieve.[144] Chief Justice Marshall's careful, pathbreaking opinion in *Marbury v. Madison* obtained significant judicial power over both the President and Congress without forcing either elected branch to counter-attack.[145]

Chief Justice Marshall did not limit himself to his opinions to convince the public; he wrote letters to newspapers to persuade the populace of the validity of *McCulloch v. Maryland*,[146] which upheld the Second National Bank.[147] He began *McCulloch* by observing that the elected branches had created such banks in the past. His constitutional jurisprudence was formed not only by theory but also by practice. Chief Justice Marshall's successes led to Tocqueville's observation that the American public had ratified another fundamental question of constitutional law: "Americans have acknowledged

---

143. Letter from Theodore Sedgwick to Rufus King (May 12, 1800), *in* 3 THE LIFE AND CORRESPONDENCE OF RUFUS KING 236-39 (Charles R. King ed., 1896).

144. Chief Justice Marshall eventually achieved his goal. In a dissent to Marshall's opinion permitting Georgia to expel the Cherokee Indians, Justice Baldwin observed: "The opinion of this court is of high authority in itself; and the judge who delivers it [Marshall] has a support as strong in moral influence over public opinion, as any human tribunal can impart." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 32 (1831) (Baldwin, J., dissenting).

145. Marshall held that the Executive acted unconstitutionally by depriving Marbury of his "vested legal right" to his commission but that Marbury could not prevail because Congress had unconstitutionally expanded the Supreme Court's original jurisdiction. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803); *see* William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1; James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

146. 17 U.S. (4 Wheat.) 316 (1819).

147. *See generally* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969). Given its abstract, protean nature, the concept of public opinion is putty in the hands of a skillful judge, particularly a relatively nonpartisan judge like Chief Justice Marshall. Depending upon the issue, Chief Justice Marshall emphasized different relationships between the people, the elected branches, and the Court. When validating an act, he emphasized that the Legislature is the agent of people and a co-interpreter of the Constitution. For example, in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819), Chief Justice Marshall began his defense of the National Bank by referring to prior legislative acts, not to constitutional text. When Chief Justice Marshall decided that an Act ran counter to the Constitution, he ignored existing public opinion as reflected through legislation and the Legislature as the people's agent. Instead, the Court became the intermediary on behalf of the people. For example, neither the people nor their representatives could disturb the "vested legal right" of Marbury to his commission, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803), or of innocent holders in due course, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 132-33 (1810).

the right of judges to found their decisions on the *Constitution* rather than on the *laws*. In other words, *they have permitted them* not to apply such laws as may appear to them to be unconstitutional."[148]

Although Justice Story was far more of a Federalist than Chief Justice Marshall, he sometimes incorporated public opinion into constitutional interpretation.[149] In *Martin v. Hunter's Lessee*, Story extrapolated, at least in part, his constitutional interpretation of the meaning of Article III from an existing congressional statute: "[This distinction has] been brought into view in deference to the legislative opinion, which has so long acted upon, and enforced, this distinction."[150] Observe that in *McCulloch*, *Hudson* and *Hunter's Lessee*, the Supreme Court believed that ten to twenty years was a sufficient length of time for judicial and/or public interpretations of the Constitution to become crystallized.[151]

The Framers designed the Constitution to protect private property from pro-debtor, majoritarian legislatures.[152] The Supreme Court eventually fulfilled Hamilton's hopes of being the primary guarantor by significantly immunizing private property and contract rights from public opinion through the doctrine of "vested legal rights."[153] For example, in *Fletcher v.*

---

148. TOCQUEVILLE, *supra* note **, at 100 (emphasis added).

149. Justice Story described the abortive constitution that the philosopher John Locke drafted for Caroline in 1669 in a way that summarizes this article's thesis:

> Perhaps in the annals of the world there is not to be found a more wholesome lesson of the utter folly of all efforts to establish forms of governments upon mere theory; and of the dangers of legislation without consulting the habits, manners, feelings, and opinion of the people, upon which they are to operate.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 58 (reprint ed. 1987) (1833).

150. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 336 (1816) (holding that state supreme court must follow decision of United States Supreme Court). Professor Amar partially premised his "two-tiered" theory of Article III jurisdiction upon Story's arguments in *Martin*. Alchil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 210 (1985).

151. In *Casey*, Justice Souter partially gave *Roe v. Wade* more authority because it had endured for almost twenty years and many women had relied on it. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2809 (1992).

152. CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913). For a discussion of the historiography that followed from Beard's thesis, see WILLS, *supra* note 73, at xiv-xvi.

153. *See supra* note 145 and accompanying text.

Peck,[154] Chief Justice Marshall protected allegedly innocent, third-party purchasers of legislative land grants from a state legislature which sought to revoke the grants due to prior legislative fraud.[155] Chief Justice Marshall rejected the parliamentary sovereignty argument that public opinion was the only constraint on governmental alterations of existing eleemosynary corporate charters in *Trustees of Dartmouth College v. Woodward*.[156] In his concurrence in that case, Justice Story made an argument Justice Scalia would appreciate: "I have endeavored to keep my steps . . . under the guidance of authority and principle. It is not for judges to listen to the voice of persuasive eloquence or popular appeal."[157]

The constitutionalization of the common law did not completely isolate private "vested legal rights" from public opinion. The common law had been formed by a combination of "learned men," judges, and public opinion:[158] "[W]e must suppose, that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract."[159] If the common law is formed by an interaction between "learned men" and public opinion,[160] and if the Constitution protects the common law, cannot public opinion change the common law and thus the Constitution?[161]

---

154. 10 U.S. (6 Cranch) 87 (1810).

155. *Id.* at 132-33.

156. 17 U.S. (4 Wheat.) 518, 643 (1819). "According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned." *Id.* Chief Justice Marshall also wrote that the public opinion was the only effective monitor of abuses by corporate officers: "Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution." *Id.* at 650.

157. *Id.* at 713 (Story, J., concurring). Justice Story defended "principles" as a necessary aspect of the virtue of judicial certainty. STORY, *supra* note 149, at 175.

158. *See* JAMES C. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW 5-6 (1884) (equating the common law with the "popular will").

159. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 353-54 (1827) (holding that congressional bankruptcy power does not exclude states from also regulating bankruptcies).

160. CARTER, *supra* note 158, at 6.

161. More particularly, public opinion has been able to change the definition of nuisance over the centuries, incorporating new forms of injury, including environmental damage. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that coastal regulation reducing property to no economic worth was a "taking," unless it constitutes a nuisance under background principles of state

By the middle of the nineteenth century, the rule of law appeared triumphant.[162] While still a lawyer, Abraham Lincoln told a crowd in 1838:

> Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others.
>
> . . . .
>
> . . . [A]lthough bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed.[163]

In the early years of the Republic, Americans temporarily managed to combine the cult of public opinion with their belief in the rule of law. All common, statutory, and constitutional laws ultimately expressed the people's will. As Tocqueville made clear throughout his famous study of American society, public opinion, defined in the modern sense as the overall mood of the country, completely prevailed.

---

nuisance laws).

162. The debate over the relationship between law and public opinion extended beyond constitutional law. State courts transformed common law by preserving some desirable Blackstonian principles but changing others. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (Oxford University Press 1992) (1977) [hereinafter HORWITZ, TRANSFORMATION 1780-1860]. Such legal flexibility undercut the codification movement, which reflected the belief that the public could better express their will through statutes than by accepting judicial interpretations of common law:

> Statutes, enacted by the legislature, speak the public voice. Legislators, with us, are not only chosen because they possess the public confidence, but after their election, they are strongly influenced by public feeling. They must sympathize with the public, and express its will: should they fail to do so, the next year witnesses their removal from office, and others are selected to be the organs of the popular sentiment.

ROBERT RANTOUL, JR., Oration at Scituate, *in* MEMOIRS, SPEECHES AND WRITINGS OF ROBERT RANTOUL, JR. 251, 280 (Luther Hamilton ed., Boston, John P. Jewett & Co. 1854).

Even common law adjudication included assessment of public views. In his infamous concurrence precluding women from practicing law because of the "law of the Creator," Justice Bradley referred to the common law: "So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (Bradley, J., concurring).

163. *Abraham Lincoln, The Perpetuation of Our Political Institutions: Address Before the Springfield Young Men's Lyceum*, (1838), *reprinted in* THE POLITICAL THOUGHT OF ABRAHAM LINCOLN 16-17 (Richard N. Current ed., 1967).

Where do the three *Casey* opinions that considered public opinion fit in this ideological continuum? Justice Souter sounded like a Federalist when he wrote that the Court gained its prestige by deciding cases using "fixed principles." But his conscious courting of public opinion places him with moderates like Madison. The country's early history also confirms his observation that the Supreme Court needs popular support. By dismissing public opinion as an annoyance, Chief Justice Rehnquist resembled those embittered Federalists who withdrew from the public arena because they were disgusted by the triumph of the public.[164] Justice Scalia made the Federalist philosophical argument by praising "objective" law. Both dissenters can find comfort in the dissent in *Osborn*, just as Justice Souter can find support in *Hudson*. In fact, the real tradition is the fluctuation of the Court between the two approaches. After all, Justice Johnson wrote the dissent in *Osborn* and the majority opinion in *Hudson*.

E. Public Opinion and Slavery

No issue divided the United States as much as slavery.[165] In the course of sending slaves back to their captors, Chief Justice Marshall observed in *The Antelope*: "That the course of opinion on the slave trade should be unsettled, ought to excite no surprise. The Christian and civilized nations of the world, with whom we have most intercourse, have all been engaged in it."[166] Nevertheless, Chief Justice Marshall believed that the public's views were changing: "Public sentiment has, in both countries, kept pace with the measures of government; and the opinion is extensively, if not universally entertained, that this unnatural traffic ought to be suppressed."[167] Justice Baldwin, who struggled with the slavery question, pitted judicial "principle" against current public opinion:

> To consider [slaves] as persons merely, and not property, is, in my settled opinion, the first step towards a state of things to be avoided only by a firm adherence to the fundamental principles of the state and federal governments, in relation to this species of property. If the first step taken is a mistaken

164. Wood, *supra* note 72, at 119.

165. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 68 (1872).

166. The Antelope, 23 U.S. (10 Wheat.) 66, 114-15 (1825) (requiring slaves from forfeited ship to be returned to their masters).

167. *Id.* at 116.

> one, the successive ones will be fatal to the whole system. I have taken my stand on the only position which, in my judgment, is impregnable; and feel confident in its strength, however it may be assailed in public opinion, here or elsewhere.[168]

Part of the problem was that each side could assert a basic legal principle: liberty competed against property.[169]

The courts frequently had to decide the legal status of alleged fugitive slaves.[170] Leonard Levy described how a small but very aggressive minority in Massachusetts effectively challenged the administration of fugitive slave laws.[171] In such a context, "public opinion" became the views and actions of a few zealous advocates who may or may not have reflected the majority of the populace. To a certain degree, the American form of government needs the consent of minorities as well as the majority. A profoundly alienated or angry minority can influence policy as much as the more passive majority. Justice Story tried to solve the problem in *Prigg v. Pennsylvania* by releasing the states from any obligation to return fugitive slaves: "[I]t would be left to the mere comity of the states to act as they should please; and would depend for its security upon the changing course of public opinion, the mutations of public policy, and the general adaptations of remedies for purposes strictly according to the lex fori."[172] Story upheld Congress's fugitive slave act by combining current public acceptance with

---

168. Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 517 (1841) (Baldwin, J., dissenting) (avoiding decision on state constitutional provision banning slave importation because state did not pass activating legislation). Baldwin concluded that states could ban slavery but could not exclude slaves from out of state if slavery were continued within the state.

169. *See* The Nereide, 13 U.S. (9 Cranch) 388, 421 (1815) (holding that neutral may hire an armed belligerent vessel to ship goods).

170. According to one Supreme Court advocate, hostile public opinion negated state enforcement of state fugitive slave laws:

> It is true that the legislature of the state of New York, several years ago, enacted a law authorizing the governor of the state, in his discretion, to surrender fugitives from foreign countries. But public opinion has lately manifested itself strongly against the validity of the law; and the governor, during the last year, refused to act under it.

Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 554 (1840) (argument of counsel) (equally divided Court dismissing habeas corpus petition).

171. *See* LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 72-108 (1957).

172. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 614 (1842) (freeing fugitive slave catcher for violating state law).

the views of Framers and ratifiers:

> This very acquiescence . . . of the highest state functionaries, is a most decisive proof of the universality of the opinion that the act is founded in a just construction of the Constitution; independent of the vast influence which it ought to have as a contemporaneous exposition of the provisions, by those who were its immediate framers, or intimately connected with its adoption.[173]

Story's argument coexists somewhat uncomfortably with his consultation of the "legislative mind" in *Hunter's Lessee* and his refusal to consider public opinion in *Dartmouth College*. For Story, the significance of public opinion varied with the issue.

Until *Casey*, no Justice discussed the role of public opinion more fully than Chief Justice Taney in *Dred Scott*.[174] Taney contrasted the "public opinion" at the time of the Framers with public opinion at the time of the case. Current public opinion was constitutionally irrelevant:

> No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended.[175]

Turning to historical public opinion, Taney claimed that the entire country considered blacks to be inferior during the Revolution. Nobody intended the Declaration of Independence's phrase "all Men are created equal"[176] to apply to blacks: "It is difficult at this day to realize the state of public opinion in relation to that unfortunate race."[177] Racial discrimination persisted in all parts of the country during the ratification of

---

173. *Id.* at 620-21.

174. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856) (holding slave is not American citizen and Congress cannot ban slavery from Territories).

175. *Id.* at 426.

176. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

177. *Dred Scott*, 60 U.S. (19 How.) at 407.

the Constitution.[178] Even the disappearance of the slave trade in the North was not attributable to public opinion: "[T]his change had not been produced by any change of [public] opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States."[179] According to Taney, these facts determined the meaning of the Constitution: "We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted."[180]

As has been discussed elsewhere, Taney's grasp of history was quite faulty.[181] Many Revolutionary pamphleteers had extended their egalitarian analysis to castigate American slavery.[182] Eighteenth-century Pennsylvania Quakers led the fight against the slave trade.[183] Thomas Jefferson, author of the Declaration of Independence, expressed racist sentiments, but he also believed blacks had equal liberties.[184] Better history probably would not have changed the outcome. Taney could have accurately distinguished such progressive views as

---

178. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

Id. at 410.

179. *Id.* at 412.

180. *Id.* at 409; *see also* Woodson v. Murdock, 89 U.S. (22 Wall.) 351, 376 (1374) (Miller, J., dissenting) (holding that state can release lien on railroad).

181. *See generally* Christopher L. Eisgruber, Dred *Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37 (1993); Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, *in* MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 214-33 (Robert H. Horwitz ed., 1979).

Taney's history was controversial at the time. One of the lawyers in *Prigg v. Pennsylvania* had stated more than a decade earlier: "Before the close of the Revolution, however, public opinion in the northern section of the country, had materially changed with regard to the policy and humanity of [slavery]." 41 U.S. (16 Pet.) 539, 563 (1842). Chief Justice Taney had a different view: "The number [of blacks] that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged." *Dred Scott*, 60 U.S. (19 How.) at 411. In addition to criticizing Taney's history, Justice Curtis relied on learned men to limit slavery to positive law because it was "contrary to natural right," a concept "agreed [to] by all writers on the subject." *Id.* at 624 (Curtis, J., dissenting).

182. BAILYN, *supra* note 57, at 232-46.

183. DAVID H. FISCHER, ALBION'S SEED 601-03 (1989).

184. JEFFERSON, *supra* note 75, at 163.

minority sentiments, even in the North, at the times of the Revolution and Constitutional ratification.

Taney's one-sided history demonstrates the perils judges face in assessing public opinion of any form, at any time. It is hard for Justices to determine the views of the Framers, the mood of the country at the time the relevant text was ratified, or the country's opinion at the time of a decision. Given their tendency to make everything in their opinions converge toward one seemingly inevitable outcome, Justices tend to get nonjudicial facts wrong. Even if Justices do get such facts right, they will (or at least should) rely on existing historiography, which is far from immutable.

Nevertheless, Taney's analysis demonstrates that the Court must determine at least one form of public opinion in every constitutional law case. The Court should determine why the general populace, not just some articulate, vocal Framers, agreed to the constitutional text in question. If the Justices isolate themselves from large segments of history by refusing to determine public consciousness at the time of the ratification of a given text, they eliminate a major constraint and grounding factor that regulates law.

No Justice has claimed that history is so unknowable that it is constitutionally irrelevant. Consequently, any argument against the Court's use of public opinion, based upon judicial ignorance or institutional incompetence, proves too much. Assuming the Court can begin to assess public opinion in 1789, it has a similar ability to discern the current public mood. The Court admittedly has limited competence to assess any form of public opinion, as Chief Justice Rehnquist and Justice Scalia noted in *Casey*, but the Court has even less capacity to determine public beliefs two hundred years ago, particularly the beliefs of the average citizen. Current public opinion may be an inappropriate variable in constitutional adjudication, but the argument against it must extend beyond judicial competence, because that argument also undermines any judicial use of history and tradition, favorite arguments of Chief Justice Rehnquist and Justice Scalia.

Perhaps the Court should only try to ascertain the Framers' views, not public opinion at the time of text's ratification. But that interpretation undermines the fundamental premise that the Constitution reflects the sovereign will of the people, not the Framers. By consulting only the Framers, the Court would be constitutionalizing the elite views of the politi-

cal leadership. The Court is supposed to be an intermediary for the people, not for the drafters. After all, judicial review is partially premised upon the argument that the Court is enforcing the views of the supermajority against, the People, the temporary majority. More practically, the body politic would be very wary of ever committing to a constitutional text if they knew their opinions were going to be completely ignored once the text was put into place.

The Court needs to consult general public opinion to determine the Framers' views. After all, the Framers self-consciously took public opinion into consideration. Thaddeus Stevens, for example, complained about the Joint Resolution that became the Fourteenth Amendment: "This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion."[185] Making such determinations will not be easy. The Supreme Court can learn much about widespread public opinion by consulting such works as Professor Fischer's *Albion's Seed*, which not only captures the everyday life of America before the revolution but also demonstrates that American culture and politics were influenced by four radically different conceptions of liberty.[186]

Fortunately, the *Dred Scott* Court did not have the last word on slavery.[187] Abraham Lincoln, who had earlier glorified the rule of law, became a Humean political analyst, asserting that "[o]ur government rests in public opinion. Whoever can change public opinion, can change the government, practically, just so much."[188] While President, Lincoln justified his ag-

185. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866), *cited in* Oregon v. Mitchell, 400 U.S. 112, 175 (1970) (upholding federal law setting minimum age for federal elections but striking down minimum age for state elections).

186. FISCHER, *supra* note 183, at 782.

187. The subsequent furor over admitting Kansas as a slave state may have been a more divisive event than *Dred Scott*. *See, e.g.*, KENNETH M. STAMPP, AMERICA IN 1857 (1990).

188. Abraham Lincoln, Speech in Chicago, Ill. (Dec. 10, 1856), *in* 2 THE WRITINGS OF ABRAHAM LINCOLN 284 (Arthur B. Lapsey, Constitutional ed. 1923). The Lincoln-Douglas debates, which focused on slavery and *Dred Scott*, reflected the building tensions between law and public opinion concerning slavery. For Douglas, law was supreme, perhaps even to the point of stifling subsequent criticism: "As a lawyer, I feel at liberty to appear before the Court and controvert any principle of law while the question is pending before the tribunal; but when the decision is made, my private opinion, your opinion, all other opinions must yield to the majesty of that authoritative adjudication." Stephen A. Douglas, Douglas at Chicago (July 9, 1858), *in* TIMES, July 11, 1958, *reprinted in* PAUL M. ANGLE, CREATED

gressive tactics against the Southern rebellion, such as jailing hostile Maryland legislators and other dissidents, because the public would retain the last word about the validity of these actions through the electoral and impeachment processes. At critical points, constitutional trust is more important than constitutional law.[189] Ralph Waldo Emerson described with admiration how Lincoln patiently waited for the right moment to free all slaves behind rebel lines:

> The extreme moderation with which the President advanced to his design—his long-avowed expectant policy, as if he chose to be strictly the executive of the best public sentiment of the country, waiting only till it should be unmistakably pronounced—so fair a mind that none ever listened so patiently to such extreme varieties of opinion."[190]

EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 20 (1958).

Lincoln replied that he did not advocate resistance to the actual *Dred Scott* decision; he opposed extending the decision beyond the actual parties. "[Douglas] would make it a rule of political action for the people and all the departments of government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs." Abraham Lincoln, Lincoln at Springfield (July 17, 1858), *in* ILL. ST. J., July 20-21, 1858, *reprinted in* ANGLE, *supra*, at 78. Lincoln observed that "a vast portion of the American people . . . look upon [slavery] as a vast moral evil." Abraham Lincoln, Lincoln at Chicago (July 10, 1858), *in* DAILY DEMOCRAT, July 13, 1858, *reprinted in* ANGLE, *supra*, at 35.

Douglas attacked Lincoln's nonviolent attempt to use public opinion to amend judicial constitutional doctrine: "Why, he is going to appeal to the people to elect a President who will appoint judges who will reverse the *Dred Scott* decision . . . . It is a proposition to make that court the corrupt, unscrupulous tool of a political party." Stephen A. Douglas, Douglas. at Springfield (July 17, 1858), *in* ILL. ST. REG., July 19, 1858, *reprinted in* ANGLE, *supra*, at 57.

Frederick Douglass believed that the existing constitutional text was not an obstacle to manumission:

> I have much confidence in the instincts of the slaveholders. They see that the Constitution will afford slavery no protection when it shall cease to be administered by the slaveholders. They see, moreover, that if there is once a will in the people of America to abolish slavery, there is no word, no syllable in the Constitution to forbid that result.

Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, *in* 2 LIFE AND WRITINGS OF FREDERICK DOUGLASS 478 (P. Foner ed., 1950).

189. "[T]he constitution is different, *in its application* in cases of Rebellion or Invasion, involving the Public Safety, from what it is in times of profound peace and public security . . . ." Letter from Abraham Lincoln to Ohio Democrats (June 29, 1863), *in* POLITICAL THOUGHT OF ABRAHAM LINCOLN 261 (Richard N. Current ed., 1967). According to Garry Wills, Lincoln never tried to grasp more power than was legally available under the Constitution to suppress the Rebellion. GARRY WILLS, LINCOLN AT GETTYSBURG 139-40 (1992).

190. RALPH WALDO EMERSON, *The Emancipation Proclamation* (1862), *in* SELECTED WRITINGS 886, *quoted in* WILLS, *supra* note 189, at 104.

Lincoln's Emancipation Proclamation echoed Jefferson's Declaration of Independence in its plea to all of mankind, to history: "And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind . . . ."[191] Lincoln's eventual triumphs, including the Thirteenth Amendment's elimination of slavery, were high-water marks of Republican participatory politics. Public opinion, combined with public will, had transformed the Constitution into a more centralized form of government with the power to combat all forms of racism.[192] The tree of liberty had been rewatered with patriotic blood. Underneath public opinion lay public will—black and white Northern foot-soldiers' dogged determination.[193]

F. Public Opinion and the Post—Civil War Court: The Domestication of Public Opinion

After the Civil War, the Supreme Court domesticated public opinion. It "scientifically" developed an elaborate, formal set of doctrines that allegedly transcended not only the views of the people but also the personal views of the Justices.[194] For example, the Court held that antitrust laws could not apply to a massive sugar monopoly because the "manufacturing" of sugar was not "interstate commerce."[195] Perhaps such artifices, premised upon a strong conception of individual economic liberty that repudiated slavery, were necessary healing devices.[196] It may have been time for the Court to appear to depo-

---

191. ABRAHAM LINCOLN, THE EMANCIPATION PROCLAMATION (1863). *See generally* MARK E. NEELY JR., THE FATE OF LIBERTY (1991) (evaluating Lincoln's civil liberties record during the Civil War). Not everyone was pleased with Lincoln's assertion of vast power, whether allegedly under the Constitution or not. Former Justice Curtis criticized pro-Lincoln newspaper assertions "that 'nobody cares' whether a great public act of the President of the United States is in conformity with or is subversive of the supreme law of the land." 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS L.L.D. 332 (Benjamin R. Curtis ed., 1879).

192. Conservatives like Justice Scalia would argue that the new Constitutional settlement precludes the use of virtually all racial categories.

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

194. *See* David D. Field, Magnitude and Importance of Legal Science (Address at the opening of the Law School of the University of Chicago, Sept. 21, 1859), *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 517-33 (A.P. Sprague ed., New York, D. Appleton & Co. 1884).

195. United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding antitrust laws not applicable to manufacturing of sugar).

196. ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877-1920 (1967).

liticize the Constitution in particular and the legal system in general, both having been battered by the slavery debate.[197] Hundreds of thousands had been killed to resolve these constitutional disputes, while politicians continued to wave the "Bloody Shirt" even after the War to provoke sectional conflict.[198]

One function of the Supreme Court is the preservation of social order. To achieve this end, the Court must determine the public mood, develop a mode of rhetoric that the public finds acceptable, and make decisions that the public at least tolerates. The postbellum Court's pseudo-scientific jurisprudence apparently fooled, or at least satisfied, enough people so the country could turn from the contentious issue of constitutional interpretation to the far less divisive task of making money. In other words, Langdellian formalistic jurisprudence had some salutary effects for twenty to thirty years after the Civil War.

Supreme Court decisions like *In re Debs*,[199] which permitted the federal courts to fight unions with labor injunctions, and *Lochner v. New York*,[200] which opposed legislative regulation of the market by striking down a state law limiting bakers' working hours, revealed the limits, both conceptually and practically, of the Court's formalistic ideology.

By self-consciously ignoring public opinion, the Court missed a fundamental change in political consciousness. The debate over the *Lochner* jurisprudence dwelled on the appropriate role of public opinion. Dissenters like Justice Brandeis, who opposed economic substantive due process, expressly argued that the Court improperly excluded public opinion. Conversely, when the *Lochner*-style Justices ended up on the losing side during the 1930s, they criticized the new majorities for capitulating to public opinion.

More recently, Justice Scalia seeks an objective Constitution governed by fixed legal principles. He has tried to weed public opinion out of constitutional adjudication, with the exception of public opinion expressed through positive law, in order to form a constitutionally protected "tradition." Although such formalistic interpretations might have satisfied

197. *See* ROBERT M. COVER, JUSTICE ACCUSED (1975).

198. KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION: 1865-1877, at 117 (1967).

199. 158 U.S. 564 (1895).

200. 198 U.S. 45 (1905).

post—Civil War generations who were enamored with scientific metaphors, such interpretations are unlikely to persuade a modern, relativistic America. Perhaps the post—World War II Court should not have resolved as many issues as it did, keeping them instead in the democratic domain. Supreme Court nominations might be less theatrical if the Court were less important, but such an institutional shift can only occur with societal consensus. Since such a consensus seems unlikely to develop, one can only hope that recent domestic conflicts like abortion and racial relations prove to be less polarizing than slavery.[201]

1. Informed public opinion: Determining "cruel and unusual punishment" under the Eighth Amendment

In *Casey*,[202] Justice Scalia and Chief Justice Rehnquist rejected a venerable constitutional tradition when they severed constitutional law from public opinion. For over a hundred years, state and federal courts have explicitly used public opinion to expand the definition of "cruel and unusual punishment." In 1866, the Supreme Court stated, "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another."[203] In 1892, the South Dakota Supreme Court applied severity and proportionality standards, proscribing "very extreme cases, where the punishment proposed is so severe and out of proportion to the offense as to shock public sentiment and violate the judgment of reasonable people."[204] The South Dakota Supreme Court considered two forms of public opinion: the general "public sentiment" and the "judgment of reasonable people,"[205] similar to *Hudson*'s consultation of "public opinion" and "legal men."

In *Weems v. United States*, the Supreme Court struck down

---

201. Tocqueville observed that Americans tend to turn all political questions into legal questions. 2 TOCQUEVILLE, *supra* note **, at 290.

202. 112 S. Ct. 2791 (1992).

203. Mackin v. United States, 117 U.S. 348, 351 (1886) (holding that crime punishable by imprisonment is "infamous crime" under Fifth Amendment); *see also* Medley, Petitioner, 134 U.S. 160, 170 (1890) ("In Great Britain, as in other countries, public sentiment revolted against this severity, and . . . the additional punishment of solitary confinement was repealed.").

204. State v. Becker, 51 N.W. 1018, 1022 (S.D. 1892), *quoted in* Harmelin v. Michigan, 111 S. Ct. 2680, 2696 (1991) (upholding mandatory life sentence for conviction of possessing more than 650 grams of cocaine).

205. *Becker*, 51 N.W. at 1022. Compare this with the approach taken in United States v. Hudson, 11 U.S. (7 Cranch) 32, 32 (1812).

bizarre punishments such as being forced to wear chains while in prison for twelve years and being put under permanent surveillance for making a false entry. The *Weems* Court echoed *Hudson*'s dual conception of public opinion: "The [cruel and unusual punishment] clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[206] The *Weems* decision defined the appropriate form of public opinion as a benign interaction between humane, learned commentators and the general public, a synthesis of the elite and the masses, of Federalism and Republicanism.

Weems quoted Judge Cooley as one of its learned commentators. Cooley had written that states could not "establish the whipping post and the pillory in those States where they were never recognized as instruments of punishment, or in those States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments."[207] As the *Weems* Court noted, Cooley's analysis was not very clear.[208] In the second part of the quote, Cooley only considered public opinion at the time of constitutional ratification. He argued the state constitution had to be revised *after* public opinion changed to justify a particular constitutional limitation. Yet, Cooley also applied a more universal approach—certain punishments could never be introduced if they had not been previously used. In other words, a few states could continue to use the pillory if it had been their practice or could reintroduce the pillory if public opinion had approved of the practice at the time of Constitutional ratification, but the rest of the states could never use the pillory. Although profoundly different in details, Cooley's conception of public opinion foreshadowed, at least in terms of complexity, Justice Souter's theory of public opinion.

The Eighth Amendment did not play a major role again in constitutional adjudication until after the Second World War. When the Court finally returned to the Clause, not only did it embrace the concept of public opinion, but it also flirted with notoriously fickle and unreliable public opinion polls.[209] For

206. 217 U.S. 349, 378 (1910).

207. *Id.* (quoting 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 694 (8th ed. 1927)).

208. *Id.* at 375.

209. In 1968 the Court noted, "It appears that, in 1966, approximately 42% of

some Justices, the Eighth Amendment became very dynamic, requiring "a flexible analysis that recognized that as public opinion changed, the validity of the penalty would have to be re-examined."[210]

Even some of the conservatives who would have upheld the death penalty for murder in *Furman v. Georgia* acknowledged the constitutional significance of polls. Justice Powell wrote: "Public opinion polls, while of little probative relevance, corroborate substantially the conclusion derived from examining legislative activity and jury sentencing—opinion on capital punishment is 'fairly divided.' "[211] Justice Powell had little difficulty ascertaining the public mood, at least with regards to the more visible murder cases: "It could hardly be suggested that in any of these highly publicized murder cases . . . the public has exhibited any signs of 'revulsion' at the thought of executing the convicted murderers. The public outcry, *as we all know*, has been quite to the contrary."[212] In other words, the conservatives developed their own data base—jury sentencing, statutes, and "public outcry"—to determine what constitutes cruel and unusual punishments.[213] From both perspectives, then, public opinion was an appropriate factor.

---

the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided." Witherspoon v. Illinois, 391 U.S. 510, 520 n.16 (1968) (citing 2 POLLS, INTERNATIONAL REVIEW ON PUBLIC OPINION, No. 3, at 84 (1967)). Justice Stewart acknowledged a Gallup poll in Gregg v. Georgia, 428 U.S. 153, 181 n.25 (1976) (plurality opinion).

For a general discussion of the strengths and weaknesses of public opinion polls, see Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 OR. L. REV. 463 (1991).

210. Furman v. Georgia, 408 U.S. 238, 329 n.37 (1972) (Marshall, J., concurring). The *Woodson* plurality cited a House Report "noting that the modification of the federal capital statutes to make the death penalty discretionary was in harmony with 'a growing public sentiment.' " Woodson v. North Carolina, 428 U.S. 280, 293 n.27 (1976) (plurality opinion) (citing H.R. REP. NO. 108, 54th Cong., 1st Sess. 2 (1896) (quoting H.R. REP. NO. 545, 53d Cong., 2d Sess. 1 (1894))) (finding mandatory death penalty unconstitutional).

211. 408 U.S. at 441 n.36 (Powell, J., dissenting) (quoting Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring)).

212. *Id.* at 445 (emphasis added).

213. The legislative branches also have a duty to interpret the Constitution. For example, Congress will initially determine which crimes are "infamous": "The cases arising under the first Clause of the Fifth Amendment recognize that what may be considered an 'infamous crime' within the meaning of that Clause may be affected by changes of public opinion from one age to another." Ullmann v. United States, 350 U.S. 422, 451 n.5 (1956) (Douglas, J., dissenting) (requiring testimony before grand jury).

In the past twenty years, some Justices questioned the constitutionalization of public opinion polls. In his concurrence in *Furman v. Georgia*, Justice Thurgood Marshall found polls of limited value: "While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great."[214] Despite what he said above, Justice Powell's dissent in *Furman* also chastised the majority for relying too heavily on public opinion: "[H]owever one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function."[215] In subsequent years, public opinion polls played an increasingly unimportant role.[216]

More importantly, recent liberal and conservative Justices have found any conception of public opinion to be constitutionally insignificant. Justice Marshall argued in *Furman*: "Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it."[217] Not surprisingly,

---

214. 408 U.S. at 361 (Marshall, J., concurring) (footnote omitted).

215. *Id.* at 443 (Powell, J., dissenting).

216. The judicial battle against the use of public opinion, and public opinion polls in particular, began quickly. Chief Justice Burger was disturbed by the majority's search for public opinion in various statutes, polls, and jury decisions to determine if a state could execute a rapist: "If the Court is to rely on some 'public opinion' process, does this not suggest the beginning of a 'trend'?" Coker v. Georgia, 433 U.S. 584, 613 (1977) (Burger, C.J., dissenting) (striking down death penalty for rape). In *Penry v. Lynaugh*, Justice O'Connor was unimpressed by "several public opinion surveys that indicate strong public opposition to execution of the retarded." Penry v. Lynaugh, 492 U.S. 302, 334 (1989) (upholding execution of mentally retarded murderer).

A law review article which challenged the validity and accuracy of public opinion polls, Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974), was cited in Woodson v. North Carolina, 428 U.S. 280, 298 n.34 (1976) (plurality opinion), and Roberts v. Louisiana, 428 U.S. 325, 352 n.5 (1976) (White, J., dissenting) (holding that mandatory death penalty violates Eighth Amendment).

217. Furman v. Georgia, 408 U.S. 238, 330 (1972) (Marshall, J., concurring). In *Furman*, Justice Marshall also argued that informed public opinion would agree with him that the death penalty was unconstitutional, particularly after the public learned that the death penalty did not deter. *Id.* at 361-63 (Marshall, J., concurring). Although it is easy to characterize Justice Marshall's informed opinion as opinion that agrees with him, it is important to distinguish between public opinion that has thought about an issue in contrast to immediate public reactions. *See* Gregory A. Mark & Christopher L. Eisgruber, *Introduction: Law and Political Cul-*

Justice Scalia dismissed "public opinion polls, the views of interest groups, and the positions . . . [of] professional associations" as too uncertain a foundation for constitutional law.[218]

2. The mixed role of public opinion in determining procedural fairness for criminal trials

The Supreme Court has expressed some of its strongest views about public opinion in criminal cases, which often involve high stakes and provoke powerful public reactions. Public fury is often completely understandable, e.g.: "[L]ittle Marsha Brill was dragged from her bicycle on one of the public thoroughfares . . . and there stabbed to death. The impact of . . . two similar crimes upon the public mind was terrific . . . . Not only were they outraged but they were terrified."[219]

The Court has periodically characterized the public as a dangerous mob swayed by "public passion." Justices did not always hide their contempt for fellow citizens. In 1851, in the context of a scandal over an adulterous woman who went abroad to have her baby and then accused her husband of a crime, the Court observed: "The early times, and the unintelligent condition of much of the population of New Orleans at that day, must account for this absurd public opinion, and the proceedings founded on it."[220] The Supreme Court reversed the Scottsboro boys' conviction, requiring counsel in all capital cases, because of "hostile and excited public sentiment" and an

---

ture, 55 U. CHI. L. REV. 413, 426 (1988) (discussing reflective public opinion).

218. Stanford v. Kentucky, 492 U.S. 361, 377 (1989) (opinion of Scalia, J.) (upholding death penalty for seventeen-year-old juvenile). Although contemporary conservative Justices claimed to distance themselves from public opinion, not everyone was convinced, even on the Court. Justice Stevens complained that "the 'hydraulic pressure' of public opinion that Justice Holmes once described—and that properly influences the deliberations of democratic legislatures—has played a role not only in the Court's decision to hear this case . . . but even in its resolution of the constitutional issue involved." Payne v. Tennessee, 111 S. Ct. 2597, 2631 (1991) (Stevens, J., dissenting) (permitting prosecutor to discuss effects of murder on family members) (footnotes omitted). Stevens also accused Justice Scalia of applying the views of the " 'victims' rights' movement." *Id.*

219. Maryland v. Baltimore Radio Show, 338 U.S. 912, 912 (1950) (Frankfurter, J., dissenting) (denying certiorari to review state court order finding radio broadcasters in contempt).

220. Gaines v. Relf, 53 U.S. (12 How.) 472, 527 (1851) (discussing controversy surrounding adulterous wife who had baby abroad and then misled innocent husband); *see also Ex parte* Wall, 107 U.S. 265, 287 (1882) (approving striking attorney from roll for encouraging mob to lynch suspect); Kennon v. Gilmer, 131 U.S. 22, 23 (1889) (basing decision not to review change of venue upon court's assessment of state of public opinion).

atmosphere of public passion.[221] For instance, the defense counsel was threatened and the trial court feared mob violence.[222] Later, the Court took judicial notice of the Red Scare in determining what amount is excessive bail under the Eighth Amendment: "But the protest charges, and the defect in the proceedings below appears to be, that, provoked by the flight of certain Communists after conviction, the Government demands and public opinion supports a use of the bail power to keep Communist defendants in jail before conviction."[223]

Over the years, the Court has created a set of rules to resolve such cases:[224] "[A] trial judge must often be the bulwark of the legal system when presented with unpopular causes and adverse public opinion."[225] Juries were instructed to ignore public opinion: "When you do this you have responded to the high responsibilities which rest upon you as jurors. It matters not whether your verdict accords with public sentiment or not."[226]

---

221. Powell v. Alabama, 287 U.S. 45, 51, 58 (1932) (requiring paid counsel for all indigents in death penalty cases).

222. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 223-25 (1979).

223. Stack v. Boyle, 342 U.S. 1, 10 (1951) (opinion of Jackson, J.) (requiring proper methods for setting bail for defendants indicted under Smith Act).

224. Trial judges must determine if local public opinion was so enraged that a defendant could not receive a fair trial: "[T]he refusal to grant a change of venue on the mere affidavit of the defendants' agent to the state of public opinion in the county clearly involves matter of fact and discretion, and is not a ruling upon a mere question of law." Kennon v. Gilmer, 131 U.S. 22, 24-25 (1889); *see also* United States v. Shipp, 214 U.S. 386, 431 (1909) (Peckham, J., dissenting) ("The men who testified that there was no apprehension of mob violence were men who were specially cognizant of the state of public opinion at that time.").

225. Beck v. Alabama, 447 U.S. 625, 645 n.22 (1980) (quoting Jacobs v. State, 361 So. 2d 640, 650-57 (Ala. 1978) (Jones, J., dissenting)) (not permitting death penalty when jury was precluded from considering lesser included offense). Justice Jackson wrote: "The judge was put in a position in which he either must appear to yield his judgment to public clamor or to defy public sentiment." Craig v. Harney, 331 U.S. 367, 395 (1947) (Jackson, J., dissenting) (upholding contempt for unfairly publishing events in case pending before a state judge); *see also* Frank v. Mangum, 237 U.S. 309, 336 (1915) (holding that lower courts adequately considered defendant's due process claim that trial was unfairly influenced by mob).

226. Taylor v. Kentucky, 436 U.S. 478, 489 n.18 (1978) (quoting trial court instructions). The Supreme Court has periodically wrestled with the relationship between juries and public opinion. The Court upheld the following jury instruction: "[I]n this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling." McGautha v. California, 402 U.S. 183, 189 (1971) (holding that jury cannot impose death penalty without having been given standards); *accord*

In addition to keeping the adjudications immune from undue influence by public opinion, the Supreme Court considered how public opinion directly affects the choice of appropriate criminal and civil procedures. Justices have used public opinion to justify administrative searches,[227] the enlargement of "admiralty forms and jurisdiction,"[228] the scope of the right to jury under the Seventh Amendment,[229] the right to a public hearing before extradition,[230] the limited scope of the state's defense of sovereign immunity,[231] the liability of cities for damages caused by riot,[232] and the absence of televisions in the courtroom.[233] In *Georgia v. McCollum*, the Court held that a defendant could not use peremptory strikes to eliminate all members of a particular race, noting "two trials in Miami, Fla., in which all African-American jurors were peremptorily struck by white defendants accused of racial beating, and the public outrage and riots that followed the defendants' acquittal."[234]

California v. Brown, 479 U.S. 538, 539 (1987) (upholding similar jury instruction).

Judicial notice of public ignorance helped determine proper jury instructions: "The importance of a no-inference instruction is underscored by a recent national public opinion survey conducted for the National Center for State Courts, revealing that 37% of those interviewed believed that it is the responsibility of the accused to prove his innocence." Carter v. Kentucky, 450 U.S. 288, 303 n.21 (1981) (holding that defendant had right to jury instruction explaining significance of defendant's refusing to testify); *see also* Groppi v. Wisconsin, 400 U.S. 505, 511 n.12 (1971) (quoting Crocker v. Justices of the Superior Court, 94 N.E. 369, 376-77 (Mass. 1911)) (holding that statute preventing change of venue, despite prejudice, on sole ground that the charge is a misdemeanor, violates 14th Amendment); Estes v. Texas, 381 U.S. 532, 549 (1965) (excessive publicity prejudicial to defendant). The Supreme Court has also acknowledged that juries bring a form of public opinion into the courtroom, ensuring that the defendant is found in violation of community mores as well as the law. Thus defense counsel could conduct a broad voir dire. Maryland v. Baltimore Radio Show, 338 U.S. 912, 914 (1950) (opinion of Frankfurter, J.) (denying certiorari).

227. Frank v. Maryland, 359 U.S. 360, 372 (1959) (upholding health inspection of house without search warrant).

228. Waring v. Clarke, 46 U.S. (5 How.) 441, 493 (1847) (Woodbury, J., dissenting) (admiralty case involving collision between two steamboats).

229. Fenn v. Holme, 62 U.S. (21 How.) 481, 486 (1858) (holding that plaintiff in ejectment must always prove personal legal title).

230. *In re* Kaine, 55 U.S. (14 How.) 103, 112 (1852) (holding that magistrate must participate in extradition proceeding).

231. Davis v. Pringle, 268 U.S. 315, 318-19 (1925) (establishing priorities under bankruptcy law), *quoted in* National City Bank v. Republic of China, 348 U.S. 356, 359 (1955) (reversing dismissal of counterclaim by bank against Republic of China).

232. City of Chicago v. Sturges, 222 U.S. 313, 324 (1911) (state can make county liable for mob damage).

233. Estes v. Texas, 381 U.S. 532, 535 (1965).

234. 112 S. Ct. 2348, 2354 (1992) (criminal defendant cannot use peremptory

Even in criminal trials, public opinion has a benign side: "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power . . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."[235] Although trials must be conducted in public,[236] pretrial litigation can take place behind closed doors. "Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial."[237] An examination of the Court's references to public opinion in criminal cases reveals that the Court has had several different publics in mind. The public can be dangerous, ignorant, a source of guidance, or a benign check on judicial abuse.

3. *Public opinion as ward of the Court: The First Amendment*

Progressive public opinion served as a consultant in most Eighth Amendment cases, while public passion was viewed as a threat in many criminal cases. In the First Amendment context, public opinion played a different role, as a ward of the Court. The Supreme Court has generally interpreted the First Amendment to protect "public opinion" from inappropriate governmental regulation. As early as 1855, dissenting Justice Daniel equated the suppression of public opinion with tyranny, "a power absolute and irresponsible enough to repress opposition, or to silence the expression of public sentiment."[238] In 1889, the Court explained the importance of public debate:

---

challenges to exclude on the basis of race) (citing Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 195-96 (1989)). The entire Rodney King affair offers a compelling example of how public opinion interacts with the judicial system.

235. *In re* Oliver, 333 U.S. 257, 270-71 (1948) (reversing contempt based upon secret proceedings), *quoted in* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennen, J., concurring in judgment) (protecting newspapers' right to be present during criminal trial proceedings); *see* Gentile v. State Bar, 111 S. Ct. 2720 (1991) (protecting defense attorney statements at press conference concerning pending adjudication).

236. *Oliver*, 333 U.S. at 270.

237. Gannet Co. v. DePasquale, 443 U.S. 368, 378 (1979).

238. The Steamer Oregon v. Rocca, 59 U.S. 570, 576 (1855) (Daniel, J., dissenting) (federal court has jurisdiction over maritime accident).

"Public opinion thus enlightened [by debate], brought to bear upon legislation, will do more than all other causes to prevent abuses."[239] To facilitate such informed debate, the Court had to protect the media from inappropriate governmental interference.[240] Justice Brandeis considered public opinion to be "the life of the nation."[241]

---

239. The Chinese Exclusion Case, 130 U.S. 581, 603 (1889) (upholding federal law preventing Chinese worker from returning to United States). In several dissents, Justice Black elaborated on the Court's duty to defend unpopular political opinions. He took judicial notice of the excesses of the Red Scare. Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting) (upholding convictions of Communist leaders under Smith Act). Justice Black analogized the Subversive Activities Review Board's registration requirements to William Pitt's attempt to protect the "public mind" from perverted factions by requiring all writers to sign their works. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 153 (1961) (Black, J., dissenting) (upholding Board's finding that American Communist Party was a "Communist-action organization").

240. The Court has been ambivalent about the media. On the one hand, governmental suppression of the media indicates tyranny: "The tragic history of recent years demonstrates far too well how despotic governments may interfere with the press and other means of communication in their efforts to corrupt public opinion and to destroy individual freedom." Associated Press v. United States, 326 U.S. 1, 51-52 (1945) (Murphy, J., dissenting) (upholding governmental antitrust action against news media). Consequently, the Court must protect the media: "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 620 (1973) (Douglas, J., dissenting) (upholding ban on political solicitations of coworkers under state merit system); Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940) (striking down state law outlawing loitering and picketing near a business).

On the other hand, the Court has also expressed fears over the media's capacity to manipulate popular opinion. *See* Watkins v. United States, 354 U.S. 178, 202 (1957). It has acknowledged how a few private individuals have accumulated vast power. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249-50 (1974) (nevertheless invalidating statute forcing newspaper to print replies to editorials). That power is largely unaccountable because the media is not forced to disclose information, while the government "may be coerced by public opinion to disclose what they might prefer to conceal." Houchins v. KQED, Inc., 438 U.S. 1, 14 (1978) (opinion of Burger, C.J.) (denying media right of access to jail). Such concerns helped legitimate the affirmative action plan in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 565-71 n.16 (1990) (quoting Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1252 (1949)) (upholding federal affirmative action plan to achieve broadcast diversity). The Court's media anxieties explained why it was initially unwilling to let television into the courtroom. Estes v. Texas, 381 U.S. 532, 548 (1965).

Perhaps the most pathetic example of the Court's use of public opinion occurred in 1915, when it concluded that movies should not receive First Amendment protection because films were only entertainment and could not affect public opinion. Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244-45 (1915). Whether one considers that case a "watershed" case or not, it was overruled almost forty years later. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

241. Gilbert v. Minnesota, 254 U.S. 325, 340 n.1 (1920) (Brandeis, J., dissenting) (quoting John Lord O'Brian, *Civil Liberty in War Time*, 42 REP. N.Y. ST. B.

To justify its doctrine favoring free speech, the Court has frequently cited leading lawyers such as John Adams[242] or Lord Erskine, who defended Thomas Paine in a libel action over *Common Sense*.[243] The Court has cited Thomas Jefferson, who had a broad conception of free speech (except when he was President):[244] "[T]he opinions of men are not the object of civil government, nor under its jurisdiction."[245] The Court has also quoted Justice Story:

> So long as known and open responsibility is valuable as a check or an incentive among the representatives of a free people, so long a journal of their proceedings and their votes, published in the face of the world, will continue to enjoy public favor and be demanded by public opinion.[246]

The Court twice used the following quotation from Judge Cooley:

> [The First Amendment includes the need] to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exer-

---

ASS'N 308 (n.d.)) (upholding conviction under state law for teaching or advocating resistance to war effort). Justice Jackson believed that protecting public opinion was the goal of the First Amendment: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind." Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (voiding state law requiring labor organizers to register before soliciting members).

242. "[James] Otis' protest [that Writs of Assistance should require a showing of probable cause] was eloquent; but he lost the case. His speech, however, rallied public opinion. 'Then and there,' wrote John Adams, 'the child Independence was born.' " Draper v. United States, 358 U.S. 307, 317 (1959) (Douglas, J., dissenting) (quoting 10 THE WORKS OF JOHN ADAMS 248 (1856)) (permitting search based upon reliable informant).

243. Herbert v. Lando, 441 U.S. 153, 185 n.4 (1979) (Brennan, J., dissenting in part); Grosjean v. American Press Co., 297 U.S. 233, 247-48 (1936) (quoting 1 SPEECHES OF LORD ERSKINE 524-25 (James C. High ed., 1876)); *see also* LLOYD P. STRYKER, FOR THE DEFENSE 210-16 (1947) (relating the trial of Thomas Paine).

244. *See generally* LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE (1963) (examining Jefferson's beliefs and actions throughout his years in public office).

245. Thomas Jefferson, A Bill for Establishing Religious Freedom, *in* 2 THE JEFFERSONIAN CYCLOPEDIA app. 976 (John P. Fowler ed., 1967), *quoted in* Schneider v. Smith, 390 U.S. 17, 25 (1968) (proscribing presidential security screening program of merchant mariners).

246. Field v. Clark, 143 U.S. 649, 671 (1892) (quoting 1 STORY, CONSTITUTION § 841) (upholding delegation of import duty powers to President).

> cise of the authority which the people have conferred upon them.[247]

There should be little surprise that the Court has frequently cited famous thinkers, politicians, and treatise writers in constitutional adjudication. The *Federalist Papers* is the most prominent example.[248] Every modern Justice has considered such authorities. Even Chief Justice Rehnquist, who asserted in *Casey* that the Court should not listen to any form of public opinion, cited John Locke as an authority in a constitutional opinion.[249] Justice Scalia cited with approval an article by Professor Epstein in *Lucas v. South Carolina Coastal Council*.[250] Such citations provide additional authority allowing the Justices to consult "informed public opinion," to interact with the legal scholars who struggle with difficult jurisprudential problems. The real debate is not over consulting public opinion, it is over whose public opinions should be considered.

The Court's duty to protect politically unpopular opinions[251] puts the Court in a difficult balancing act. Both major-

---

247. 2 THOMAS L. COOLEY, CONSTITUTIONAL LIMITATIONS 885 (Walter Carrington ed., 8th ed. 1927), *quoted in* Wood v. Georgia, 370 U.S. 375, 392 (1962) (reversing judicial contempt).

248. Wilson, *supra* note 80.

249. Justice Rehnquist favorably referred to John Locke in Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring in judgment) (striking down OSHA regulation concerning exposure to benzene).

250. 112 S. Ct. 2886, 2893 (1992) (citing Richard Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1).

251. At some point, however, political dissent becomes constitutionally unprotected violence: "It seems to me most important that the courts should distinguish between the two with particular care in these days, when officials under the pressure of events and public opinion are tempted to blur the distinction." Norton v. Discipline Comm. of E. Tenn. State Univ., 399 U.S. 906, 909 (1970) (Marshall, J., dissenting from denial of certiorari) (allowing no remedy for students suspended for distributing leaflets criticizing university administration). The distinction is not easy to find.

Judge Learned Hand claimed to protect "public opinion" but excluded the counselling of legal disobedience:

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.

Masses Publishing Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917).

In *Thornhill v. Alabama*, Justice Murphy made access to the "market of public opinion" the constitutional lodestone that separates permissible from unprotected political speech: "Abridgment of the liberty of such discussion can be justified only

ities and minorities have the right to express themselves: "Because a subject is legally arguable, however, does not mean that public sentiment will be patient of its advocacy at all times and in all manners."[252] To protect minorities from majority abuses of their free speech rights, the Court must determine the climate of opinion at the time[253] of a particular constitutional controversy: "People were threatened in *N.A.A.C.P.* and *Bates*. But while an *angry public opinion, and the evils which it may spawn, are relevant considerations in adjudging*, in light of the totality of relevant considerations, . . . the existence of an ugly public temper does not, as such and without more, incapacitate government."[254]

When it makes such factual determinations, the Court

---

where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of the ideas by competition for acceptance in the market of public opinion." 310 U.S. 88, 104-05 (1940). In other words, certain categories of speech are unprotected because they short-circuit public discourse, preventing public opinion from having the last word. First Amendment doctrine therefore incorporates public opinion both as an end and as a doctrinal litmus test.

252. Terminiello v. Chicago, 337 U.S. 1, 33 (1949) (Jackson, J., dissenting) (statute prohibiting any breach of peace could not be applied with the First Amendment to person making controversial speech).

253. The Court has defended particularly virulent speech during elections. Buckley v. Valeo, 424 U.S. 1, 43 (1976) (per curiam) (striking down various limits on campaign spending). As early as 1852, a dissenting Justice tried to constitutionalize the public's earlier rejection of the Alien and Sedition Act of 1798. The Passenger Cases, 48 U.S. (7 How.) 283, 514 (1849) (Daniel, J., dissenting) (voiding state tax upon alien passengers). Consequently, political campaigns can be very ugly affairs, constrained only by public opinion.

Justice Scalia let his disgust overwhelm his judgment when he stated:

> I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption, that is, calibrating political speech to the degree of public opinion that supports it, is even a *desirable* objective, much less one that is important enough to qualify as a compelling state interest. Those Founders designed, of course, a system in which popular ideas would ultimately prevail.

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652, 693 (1990) (Scalia, J., dissenting) (majority upheld state law prohibiting corporations from using general treasury funds in election); *see also* Beauharnais v. Illinois, 343 U.S. 250, 261 n.16 (1952) (quoting David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 728 (1942)) (upholding statute outlawing group defamation). It is easy to become appalled by politicians, political campaigns, the media, the electorate, the average citizen, even democracy itself. The American experiment may fail, but it would more likely collapse should a petulant Court withdraw constitutional protection from basic democratic processes, tawdry though they sometimes are. The Court must accept the glitter and manipulation as existing costs and characteristics of American democratization.

254. Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 102 (1961) (emphasis added).

should not be very deferential to the elected branches[255] nor to the juries who decide "constitutional facts" that can undermine free speech rights. The Court was correct in closely scrutinizing a jury decision that civil rights leader Medgar Evers caused recompensable damage for leading an economic boycott during the Civil Rights movement.[256] The subtle relationship between law and public opinion permeates this area of constitutional law. The Court's determinations of which "facts" a jury must decide and what "standards" a jury must apply, such as "clear and present danger" for seditious speech, "malice" for libel against a public figure, or "prevailing community standards" for obscenity,[257] invariably reflect the Court's underlying view of how and how much local public opinion should constrain various categories of speech.[258]

---

255. [W]e are cautioned that state legislatures must be left free to 'experiment' and to make 'legislative' judgments. We are told that mistakes may be made during the legislative process of curbing public opinion. In such event the Court fortunately does not leave those mistakenly curbed, or any of us for that matter, unadvised.

Beauharnais, 343 U.S. at 270 (Black, J., dissenting).

256. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932-34 (1982).

257. Manual Enters., Inc. v. Day, 370 U.S. 478, 488 (1962) (opinion of Harlan, J.) (post office could not ban magazines which were not obscene). Dissenting in an obscenity case, Justice Douglas complained that the unelected judiciary should not set strict obscenity standards because that would bend "the popular mind to new norms of conformity." United States v. 12 200-ft Reels of Super 8mm. Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting) (Congress may ban obscene material under Commerce Clause).

258. No history of public opinion in constitutional interpretation would be complete without noting the Court's tendency to provide less protection to political dissent during wartime, when the majority popular opinion is often the most cohesive and self-righteous. Only one of the World War I speech cases overtly discussed public opinion, but they all reflected it. According to the dissent in *Schaefer*, the First Amendment does not protect "willfully untrue statements or reports of military operations which might mislead public opinion as to the competency of the army or navy or its leaders." Schaefer v. United States, 251 U.S. 466, 492-93 (1920) (Brandeis, J., dissenting) (evidence sufficient to convict several defendants under Espionage Act). The *Schaefer* Court actually created a "malice" standard of "willfully untrue statements" that is not all that different from the acclaimed malice standard in New York Times v. Sullivan, 376 U.S. 254 (1964) (striking down jury verdict for libel against public figures for lack of malice). Consequently, the real problem with many cases is neither the principles nor the doctrines, it is the application of those principles and doctrines.

On the other hand, the general goal of encouraging debate so public opinion can be better informed has led to Justices' arguing for a generous reading of the Speech and Debate Clause. *See* Gravel v. United States, 408 U.S. 606 (1972) (holding that Speech and Debate Clause immunity extends to Senator's aide). The Court has to battle governmental secrecy: "By using devices of secrecy, the government attains the power to 'manage' the news and through it to manipulate public

4. Public opinion triumphant: Economic and social legislation

a. The Lochner *era.* After the Civil War, the Court created a more formalistic, pseudo-scientific jurisprudence, which was gradually undermined by internal contradictions, Legal Realism, and the Depression.[259] The *Lochner* era attempted to create objective, principled doctrinal limits that would permit the Justices to distinguish between unconstitutional interferences and legitimate exercises of the police power, as well as between law and policy. The quest was futile because doctrine will always have an element of incoherence due to irreconcilable political goals and beliefs. The legal system, particularly in its leading cases, invariably reflects society's most pressing tensions. After all, the "felt necessities of the time" influence plaintiffs even more than courts. The nine Justices are torn between competing interests and ideologies which have a claim to some power and constitutional protection.

---

opinion." *Id.* at 640-41 (Douglas, J., dissenting) (quoting *Secrecy in a Free Society*, 213 NATION 254, 256 (1971)); *see also* Field v. Clark, 143 U.S. 649, 671 (1892) (upholding congressional delegation of power); The Chinese Exclusion Case, 130 U.S. 581, 603 (1889). Free speech within Congress was particularly important: "The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons." Wilson v. New, 243 U.S. 332, 366 (1917) (Day, J., dissenting) (quoting Hurtado v. California, 110 U.S. 516, 531 (1884)) (Congress has power to set eight-hour-day work limits but not wages for interstate carriers).

Justices have noted the link between informed public opinion and free speech while deciding to be wary of censorship, Times Film Corp. v. City of Chicago, 365 U.S. 43, 68-69 (1961) (Warren, C.J., dissenting) (permitting city to require film be presented to it prior to granting of permit); to require full dissemination of information about labor disputes, Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (striking down statute prohibiting picketing near businesses); to disclose allegedly improper business practices, Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 305 (1941) (Black, J., dissenting); to guarantee free speech rights of civil servants, Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (proscribing loyalty oath for civil servants); and to insure the separation of church and state, Lee v. Weisman, 112 S. Ct. 2649, 2674-75 (1992) (Souter, J., concurring) (public school could not have nonsectarian prayer at graduation ceremony). In a similar vein, an attorney told the Court in 1866: "[W]henever the people are told, as they have been in this case, that the indefeasible right to worship God according to the dictates of conscience is about to be invaded, the public mind at once arouses itself to repel the invasion." Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 304 (1866) (argument of State counsel) (prohibiting State from requiring clerics and priests to take oath that they never assisted Confederacy).

259. Professor Horwitz has described how American law evolved from a Blackstonian, quasi-feudalism to an explicitly developmental system and next to a "formalist" approach. HORWITZ, TRANSFORMATION 1780-1860, *supra* note 162, at 166. Horwitz's second book describes how formalism collapsed under legal realism's assault. HORWITZ, TRANSFORMATION 1870-1960, *supra* note 44.

In his famous dissent in *Lochner*, Justice Holmes reminded the nation of the Court's limits. The *Lochner* majority did not only err because they constitutionalized their own economic ideology. They also ignored the public's views: "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a *dominant opinion* . . . ."[260] Such relativism undercuts both the *Casey* joint opinion and Justice Scalia's dissent. On a doctrinal level, Justice Holmes advised against an expansive judicial reading of substantive due process. But more generally, he was wary of any rigid theory, such as Justice Scalia's originalism, which can isolate the Court from the polity. The rest of that same sentence in his *Lochner* dissent demonstrates that Holmes' skepticism still mandated limited judicial review: "[Whenever] it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[261] Even this scope of judicial review is contextual; the Court must protect American traditions and American law, not jurisprudential abstractions.

Another problem with *Lochner*-style substantive due process was the Court's inconsistency. The Supreme Court has continually fluctuated between perceiving the public and public opinion as perverse, wise, and sovereign, even during the pro-capital eras of vested rights and *Lochner* formalism. Sometimes the post—Civil War Court denigrated the general populace's wisdom, noting, for example, "the well-known mania of the people to run in debt for public improvements."[262] Thus, private corporations had to be protected from public venality to avoid "the monstrous injustice of thus placing the large investments of complainant, made under the stimulus of the inducement held out by the act of 1858, at the absolute

---

260. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). For further discussion of this passage from *Lochner*, see Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32, 79-82 (1993).

Holmes' common law tradition remains a more formidable obstacle, with a lengthy historical pedigree, to Justice Scalia's "originalism" than the "noninterpretivism" that Justice Scalia has castigated. Scalia has explicitly rejected the common law perspective. Antonin Scalia, *Essay: The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

261. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

262. Ritchie v. Franklin County, 89 U.S. 67, 75 (1874) (state can collect special tax to pay interest on bonds).

mercy of an irresponsible public sentiment, or of public cupidity."[263] Indeed, the people would not have ratified the Constitution if there was "the possibility of a government usurping the ordinary business of individuals, driving them out of the market."[264] The Constitution limited state power in the marketplace: "It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that, in one of the sudden changes of public opinion to which all municipalities are more or less subject, the city might resolve to enter the field itself."[265]

Nevertheless, that same formalistic Court often deferred to the public. In 1876, the Court applied the malleable law-policy distinction to uphold the purchase of stock by local communities to construct a toll road: "Whether the policy was a wise one or not is not now the question. It was in accordance with the public sentiment of that period."[266] Through the legislature, the public could determine the means of economic development: "[T]he legislature, reflecting the public sentiment, [can] decide that this general benefit is better promoted by [railroads'] construction through individuals or corporations than by the State itself."[267] Because corporations were state creatures, the government could limit their powers and regulate their abuses. Legislatures could define and proscribe monopolies based upon public sentiment:[268] "[T]he general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against the attempt of one road to control all traffic between terminal points."[269] Public opinion, op-

263. Spring Valley Water Works v. Schottler, 110 U.S. 347, 367 (1884) (Field, J., dissenting) (quoting a United States district court case from California) (states can require utilities to supply goods at fixed prices).

264. South Carolina v. United States, 199 U.S. 437, 457 (1905) (state agents liable for federal liquor tax).

265. Walla Walla City v. Walla Walla Water Co., 172 U.S. 1, 17-18 (1898) (holding city can not erect water works in violation of contractual noncompetition clause).

266. County of Scotland v. Thomas, 94 U.S. 682, 693 (1876) (holding county can issue bonds).

267. Cherokee Nation v. Southern Kan. Ry., 135 U.S. 641, 658 (1890) (quoting 1 COOLEY, *supra* note 247, at 537) (holding that Congress has power to grant railroad right of way through Indian Territory).

268. "It is certainly the conception of a large body of public opinion that the control of prices through combinations tends to restraint of trade and to monopoly, and is evil." National Cotton Oil Co. v. Texas, 197 U.S. 115, 129 (1905) (holding state antitrust laws do not violate due process).

269. Pearsall v. Great N. Ry., 161 U.S. 646, 676-77 (1896) (state can amend

erating through the legislature, could be the basis for amending corporate charters: "[H]ence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion."[270] The states could also use their police power to regulate some markets, or in the case of lotteries and intoxicating liquors,[271] even ban the sale of previously legal goods.[272] Most importantly, the Court ignored Taney's interpretive technique in *Dred Scott*, upholding paper money even though the "public mind" at the time of constitu-

---

corporate charter if right to amend in original incorporation). "The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition." *Id.* at 677.

270. *Id.* at 666. The states first had to put a savings clause in the charter to allow future legislative amendments. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 708 (1819) (Story, J., concurring).

271. For some years after the Civil War, leading dissenters to the *Lochner* jurisprudence made explicit references to public opinion. The first Justice Harlan asserted in *Pollock* that public opinion, not the Court, should determine income tax rates:

> But the remedy for such abuses is to be found at the ballot-box, and in a wholesome public opinion which the representatives of the people will not long, if at all, disregard, and not in the disregard by the judiciary of powers that have been committed to another branch of the government.

Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 680 (1895) (Harlan, J., dissenting) (finding federal income tax to be unconstitutional direct tax).

Justice Holmes held public opinion in little regard: "I loathe the thick-fingered clowns we call the people." Letter from Oliver W. Holmes (Nov. 16, 1862), *in* TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY 71 (Mark D. Howe ed., 1946), *quoted in* HORWITZ, TRANSFORMATION 1870-1960, *supra* note 44, at 123. Nevertheless, he concluded the public could abuse many constitutional powers without legal recourse:

> The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it . . . . Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end.

Tyson & Bro. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) (arguing state can enforce criminal prohibition against reselling tickets at higher prices). A lawyer appearing before the Supreme Court anticipated Holmes in 1847: "But there was no occasion to multiply proofs of public opinion, for intemperance was everywhere deprecated and lamented, and had almost everywhere fallen under the condemnation of legal restraint, by enactments for that purpose, or by taxation." Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 520-21 (1847) (argument of State counsel).

272. Holden v. Hardy, 169 U.S. 366, 392 (1898) (refusing to grant habeas corpus petition to individual charged with violating maximum hour limitations for miners).

tional ratification opposed such inflationary, pro-debtor means.[273]

Lawyers quickly seized upon such internal contradictions. Overtly influenced by Brandeis' famous brief, the Supreme Court in *Muller v. Oregon* created a loophole to reconcile the tension between perpetually changing public opinion and a fixed, written Constitution:

> The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, *yet they are significant of a widespread belief* that woman's physical structure . . . justify special legislati[ve] restrict[ions] . . . . Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking.[274]

The *Muller* Court attempted to reconcile the fixed text with fluid public opinion by asserting that public opinion does not "settle" constitutional cases. Public opinion, however, could influence constitutional determinations. The *Muller* Court technically decided the case by labelling the shift in public opinion a question of "fact":

> At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.[275]

Justices frequently employed the fact-law distinction to shift away from existing doctrinal formalism, recharacterizing questions of law as questions of fact. Not surprisingly, Justice Brandeis, author of the famed *Muller* brief, was a leader in the

---

273. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 654 (1870) (Field, J., dissenting) (quoting Mr. Ellsworth in 3 MADISON PAPERS 1345 (Henry D. Gilpin ed., 1842)) (upholding congressional power to print paper money); *see also* Hepburn v. Griswold, 75 U.S. (8 Wall.) 603, 633 (1869) (Miller, J., dissenting) (invalidating statute permitting paper money to satisfy debts).

274. Muller v. Oregon, 208 U.S. 412, 420 (1908) (emphasis added) (upholding ten-hour day for women workers).

275. *Id.* at 420-21.

use of this technique. Justice Brandeis wrote that both Congress and the public legitimately could consider the "evidential fact" of changes in the cost of living.[276] In an earlier dissent, Justice McKenna noted that public opinion had changed about unions: "We know things are in change—have changed—and a mark of it is that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employee."[277] In short, the constitutionality of a statute depended on five Justices' determination that a certain variable had become a social, legislative "fact."[278] Eventually, public opinion, by itself, became a constitutionally relevant "fact" for Brandeis:

> Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation.[279]

These interpretations resemble Justice Souter's argument in *Casey* that the Court should consider overruling watershed cases when there is widespread belief that the facts have changed. Once the Court permits public opinion to redetermine such legislative/constitutional "facts" as women's vulnerability in *Muller* or black schoolchildren's injuries in *Brown*, public opinion will have the capacity to transform most constitutional doctrines. The constitutional text remains the same, but its meaning becomes fluid.[280]

---

276. St. Louis & O'Fallon Ry. v. United States, 279 U.S. 461, 496 (1929) (Brandeis, J., dissenting) (ICC can issue recaption order requiring railroads to place excess income in a reserve fund and not to keep interest there).

277. Arizona Employers' Liab. Cases, 250 U.S. 400, 438 (1919) (McKenna, J., dissenting) (upholding state employers' liability law for inherently hazardous employments).

278. *See* HORWITZ, TRANSFORMATION 1870-1960, *supra* note 44, at 189, 198.

279. Truax v. Corrigan, 257 U.S. 312, 357 (1921) (Brandeis, J., dissenting) (footnote omitted) (state cannot immunize union leaders from civil liabilities).

280. Although he lost the case, the Solicitor General advocating enforcement of child labor laws combined public opinion with existing caselaw upholding state police powers: "It cannot be denied that a change in public opinion regarding child labor has occurred like that in relation to lottery tickets." Hammer v. Dagenhart, 247 U.S. 251, 253 (1918) (argument of Solicitor General) (Congress cannot regulate child labor).

b. The death of economic substantive due process. Although a judicial revolution occurred in 1937, the first shift took place three years earlier. Taking judicial notice of the Depression, the Court upheld a state law limiting creditors' remedies against defaulting mortgage holders in *Home Building & Loan Ass'n v. Blaisdell.*[281] The majority disregarded the history of the impairment of Contract Clause, which indicated the Framers had created the Clause to preclude exactly the kind of legislation involved in *Blaisdell.*[282] Dissenting Justice Sutherland not only condemned the majority's dismissal of history but also claimed the Court reinterpreted the Constitution because of a change in public opinion:

> Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty.[283]

Justice Sutherland's fears were more than amply realized. In 1936, Justice Cardozo quoted in a dissent Professor Warren, who observed that numerous constitutional objections concerning the Bankruptcy Clause, "so hotly and frequently asserted from period to period, were overcome either by public opinion or by the Court."[284] In 1937, the Court began systematically to overrule economic substantive due process cases. Chief Jus-

---

281. 290 U.S. 398 (1934).

282. *See* CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 39-51 (1969). *See generally* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

283. Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398, 452 (1934) (Sutherland, J., dissenting) (quoting 1 COOLEY, *supra* note 247, at 124) (state can establish mortgage relief during Depression). Justice Sutherland quoted Judge Cooley extensively:

> A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law.

Id.

284. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 10 (1935), *quoted in* Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U.S. 513, 536 n.6 (1936) (Cardozo, J., dissenting) (state water district can issue bonds, levy and collect taxes, sue and be sued).

tice Burger later expressed the prevailing view: "The means chosen to effectuate legitimate governmental interests are not for this Court to select. 'These are matters for the legislative judgment controlled by public opinion.' "[285] The last word on this struggle belongs to retired Justice Roberts, the "switching" Justice who "saved Nine": "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."[286]

IV. WHAT ROLE OUGHT PUBLIC OPINION PLAY IN CONSTITUTIONAL ADJUDICATION?

This section will argue that several conceptions of public opinion ought to be part of constitutional adjudication. It will start with a relatively non-controversial example: the Court's continuing duty to eradicate state-sponsored racism, a particularly odious form of public opinion. This section will then examine several "structural" issues to demonstrate how public opinion, reflected through the legislative process, has and ought to have the last word on many important constitutional questions. The article will then return to the *Casey* controversy, evalu-

---

285. Metromedia, Inc., v. City of San Diego, 453 U.S. 490, 561 (1981) (Burger, C.J., dissenting) (quoting Kovacs v. Cooper, 336 U.S. 77, 96-97 (1949) (Frankfurter, J., concurring)) (invalidating city's general ban of billboards carrying noncommercial advertising).

286. OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 61 (1951). Seven years earlier, Justice Roberts had been more committed to *stare decisis*:

> It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

Smith v. Allwright, 321 U.S. 649, 670 (1944) (Roberts, J., dissenting) (states cannot abridge right to vote in federal elections on the basis of race).

The modern Court has conceded that public opinion, directly and indirectly via legislation, is a major factor in regulating the economy. Tigner v. Texas, 310 U.S. 141, 149 (1940) (legislature can refuse to extend antitrust laws to farmers and stockmen). The Court has also deferred to congressional regulation of the business-labor relationship. American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538, 545 (1949) (Frankfurter, J., concurring) (state can pass "right to work" law); United States v. United Mine Workers, 330 U.S. 258, 349-50 (1947) (Rutledge, J., dissenting) (court has authority under federal law to issue national labor injunction); *see also* ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW xiii, xv, xvii, 25 (2d ed. 1976).

ating the three relevant opinions in light of what has been presented. That discussion leads in turn to an inquiry about the relationship between "principles" and "public opinion."

A. Weeding Out Venal Public Opinion: Equal Protection and Race

Nowhere has the Supreme Court's uneasy relationship with reality been more evident than in its race cases. The battle against racism, after all, is an effort to eradicate a vile, unenlightened form of public opinion.[287] Putting the issue more generally, the Court cannot determine which traits deserve additional constitutional protection as "suspect classifications" without consulting history, particularly the history of public "irrational prejudice."[288] For example, Justices Murphy and Rutledge looked at California's "public mind" to argue that the California Alien Land Law was racist and unconstitutional.[289]

Chief Justice Taney's *Dred Scott* opinion demonstrates the Court's selective use of public opinion. Taney inaccurately described the state of public opinion at the time of the Constitution's ratification and expressly ignored existing opinion at the time of his decision.[290] On the other hand, Taney properly observed that colonial racial laws, such as the proscription against racial intermarriage, were stigmatic proof of the blacks' lack of equal citizenship rights.[291]

---

287. I do not mean to imply that the First Amendment leaves racist speech completely unprotected. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (invalidating statute criminalizing burning of cross under a viewpoint discriminatory approach).

288. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 450 (1985) (invalidating city's refusal to permit a group home for mentally retarded).

289. Oyama v. California, 332 U.S. 633, 650-62 (1948) (Murphy, J., concurring) (holding state cannot pass discriminatory alien land law).

290. *See* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407-09 (1856).

291. *Id.* at 409. The Fourteenth Amendment overruled *Dred Scott*. The Supreme Court later reflected: "It is sufficient to say that the country did not acquiesce in the opinion, and that the civil war, which shortly thereafter followed, produced such changes in judicial, as well as public sentiment, as to seriously impair the authority of this case." Downes v. Bidwell, 182 U.S. 244, 274 (1901) (Congress and President can permit Puerto Rico to set different customs and duties than rest of country).

Yet there were limits to that momentarily enlightened public sentiment. The drafters initially did not include an explicit right to vote in the Fourteenth Amendment because they feared public opinion. Oregon v. Mitchell, 400 U.S. 112, 180 n.42 (1970) (Harlan, J., concurring in part, dissenting in part) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2532 (1866)).

The Supreme Court firmly put its racial blinders on when it upheld the "separate but equal" doctrine in *Plessy v. Ferguson*.[292] Ignoring Taney's argument in *Dred Scott*, the majority did not find segregation to be stigmatic. They considered any injuries to be mere fantasies of the black minority. In his dissent, Justice Harlan openly discussed the pernicious influence of Southern racism on the laws and customs in question:

> [Earlier state judicial decisions] were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land.[293]

In a variety of ways, Chief Justice Warren demonstrated his political astuteness when desegregating public schools in *Brown v. Board of Education*,[294] overruling *Plessy* in the process. He knew *Brown* had to satisfy world opinion: "The federal government prepared an amicus brief that explained in great detail the harmful effects of American segregation on the foreign policy of the executive branch."[295] He lobbied Justice Reed for months to join the opinion to create a unanimous vote.[296] Chief Justice Warren then wrote a short, nonjudgmental opinion, designed to be accessible to the average citizen.[297] He criticized neither the South nor the *Plessy* Court, gently distinguishing *Plessy* by citing leading social scientists who had recently "discovered" that segregation injures black children. The *Brown II* remedy also reflected deference[298] to the Southern white public, both in terms of timing

---

292. 163 U.S. 537 (1896). Chief Justice Shaw created the doctrine. LEVY, *supra* note 171, at 109-17.

293. *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting).

294. 349 U.S. 294 (1955) (*Brown II*).

295. FISHER, *supra* note **, at 18. The Government's brief noted: "Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith." 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 121 (Philip B. Kurland & Gerhard Casper eds., 1975).

296. RICHARD KLUGER, SIMPLE JUSTICE 698 (1975).

297. "The genius of the Warren opinion . . . was that it was so simple and unobtrusive." *Id.* at 697 (quoting Barret Prettyman).

298. "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

("all deliberate speed") and implementation (by lower federal courts).[299] In short, a variety of public opinions, regional, national, and international, permeated those all-important decisions.

After the South became intransigent, the Warren Court turned more judgmental.[300] The Court found local school desegregation plans to be inadequate because they were compromised by hostile public opinion.[301] The Court knowingly forced its decrees upon an unwilling white majority: "[T]he vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[302] Justice Brennan described the South's dismal racial history:

> The real evil in the southern States you will find in the baffled pro-slavery tendency prevailing there; in *a diseased public sentiment* which partly vents itself in violent acts, partly winks at them, and partly permits itself to be overawed by them. That public sentiment is not only terrorizing timid people, but it is corrupting the jury-box, it is overawing the witness-stand, and it is thus obstructing the functions of justice.[303]

More recently, the Court has returned to a more formal conception of equality, levelling the playing field without evaluating the condition of the players. The actual state of public

---

Brown v. Board of Educ., 349 U.S. 294, 300 (1955) (requiring desegregation of schools with all deliberate speed) (*Brown II*).

299. KLUGER, *supra* note 296, at 698.

300. In 1968, the Court relied upon legislative history to outlaw racially discriminatory housing: "[T]he Senator's concern . . . was that Negroes might be 'oppressed and in fact deprived of their freedom' not only by hostile laws but also by 'prevailing public sentiment.' " Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432 n.54 (1968) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 77 (1866)) (holding that African-Americans have right to sue private home sellers for racial discrimination).

301. Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (rejecting freedom of choice plan as insufficient to accomplish elimination of dual school system). The district court in *Dowell v. Board of Education* criticized desegregation plans: "[The Board] rationalize[d] its intransigence on the constitutionally unsound basis that public opinion [was] opposed to any further desegregation." 338 F. Supp. 1256, 1270 (W.D. Okla.), *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972).

302. Monroe v. Board of Comm'rs, 391 U.S. 450, 459 (1968) (holding that "free transfer plan" is insufficient to eliminate dual school system) (quoting *Brown II*, 349 U.S. at 300).

303. Adickes v. S.H. Kress & Co., 398 U.S. 144, 218-19 (1970) (Brennan, J., concurring in part, dissenting in part) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 687 (1872) (remarks of Senator Schurz)) (emphasis added) (holding that white plaintiff failed to prove conspiracy under civil rights law).

opinion, particularly the overall extent and effects of racism, has become constitutionally insignificant. Justice O'Connor struck down Richmond's affirmative action plan in *City of Richmond v. J.A. Croson Co.* partially on the technical ground that there were insufficient findings of racism in the local construction industry.[304] On one level, that legalistic argument borders on the absurd. There is and has been widespread, damaging racism in Richmond, Virginia that has impaired black entrepreneurs for centuries. Richmond, after all, was the capital of the Confederacy. There may be reasons not to have affirmative action, but insufficient evidence of racism and racism's insidious effects is not one of them.

In his *Casey* dissent, Chief Justice Rehnquist used *Brown* to demonstrate how his jurisprudence was grounded on abstraction, not racial realities: "The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial."[305] Somewhat ironically, Chief Justice Rehnquist was confirming an earlier liberal complaint that the *Brown* opinion was too contextual because it is largely premised upon unstable social science findings of injury. There are times to be formalistic[306] and to ignore public opinion, but there are other times to take such realities into consideration. Many liberals will use formal doctrine to immunize *Brown*'s core holding proscribing legal segregation from changes in social views or social science, yet they also want the Court to be aware of the actual state of racial relations in affirmative action cases.[307] The judicial choice is over when to use the public opinion argument, expressly or not, not whether to use it at all.

B. Public Opinion as Constitutional Decisionmaker and the Constitutional Structure

In a recent article, this author wrote that the American

---

304. 488 U.S. 469, 485, 499 (1989).

305. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2865 (1992) (Rehnquist, C.J., concurring in the judgement in part, dissenting in part).

306. *See* James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985).

307. Of course, Justice Souter's hedged opinion may satisfy public opinion more than Justice Scalia's more rigid approach or the liberals' more absolutist protections.

constitutional system cannot be adequately understood without importing the English concept of "constitutional conventions."[308] Constitutional conventions are allocations and regulations of constitutional power that the judiciary cannot effectively determine and/or enforce. Conventions are formed by circumstance and are ratified by practice and public opinion. Examples include impeachment standards and proceedings, the obligation of the electors in the electoral college to vote for the presidential nominee who received the most votes in the electors' state, and most internal workings of Congress.

Although it has never conceptualized such issues as "constitutional conventions," the Supreme Court has cordoned off certain constitutional disputes from meaningful judicial review. The factor of public opinion helps justify protection of the core structural doctrines of federalism[309] and separation of powers: "Probably of more importance is the public reaction engendered by any attempt of one branch to dominate or harass another. Even traditional political attempts to establish dominance have met with little success owing to contrary public sentiment."[310]

---

308. *See* James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645 (1992).

309. When the Warren Court was constitutionalizing numerous criminal procedures, Justice Frankfurter partially justified such actions for their educative value, Stein v. New York, 346 U.S. 156, 202 (1953) (Frankfurter, J., dissenting) (upholding admission of allegedly coerced confession); *see also* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992).

Indeed, the Court explained how public opinion created different state and federal rights:

> There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country.

Wolf v. Colorado, 338 U.S. 25, 32-33 (1949) (exclusionary rule does not apply to unreasonable search and seizure in state court); *see also* Linkletter v. Walker, 381 U.S. 618, 630-31 (1965) (refusing to give retroactive application of exclusionary rule to the states). Less activist Justices were less charitable, believing federal court interventions led to the "growing denigration of the state courts and their functions in the public mind." Schneckloth v. Bustamonte, 412 U.S. 218, 264 (1973) (Powell, J., concurring) (quoting Judge Paul C. Reardon, Address at the ABA section of Judicial Administration annual dinner (Aug. 14, 1972)) (state need not prove that defendant knew he had right not to consent to search).

310. United States v. Brewster, 408 U.S. 501, 523 (1972) (bribery not protected by Speech and Debate Clause).

For example, the Supreme Court recently refused to review Federal District Judge Walter Nixon's procedural challenges to his impeachment because Nixon raised a "political question."[311] Congress alone will initially determine when, why, and how someone should be impeached. The public remains the only meaningful constraint. Because the Court cannot effectively regulate either the process or substance of impeachments, the rest of us need to develop precise constitutional conventions to control the politicians' congressional discretion. For instance, we should continue to support the convention, established by the failure to impeach Justice Chase, of not impeaching Justices for their political views. Nevertheless, impeachment, a legislative weapon that can only be effectively regulated by public opinion,[312] remains the final safeguard against judicial abuses.[313]

1. Congressional committee investigations: A case study of law and convention

Over a period of years, Congress has developed a set of conventions to prevent constitutional abuses: "It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion."[314] Examples include limiting the Supreme Court to nine Justices and refusing to use congressional power over federal jurisdiction to strip the federal courts of the power to adjudicate constitutional claims. Congress is another interpreter and protector of the Constitution.[315]

---

311. Nixon v. United States, 113 S. Ct. 732 (1993).

312. Wilson, *supra* note 308, at 699-701.

313. In two different opinions, seven Justices held that Judge Nixon's claim was a nonjusticiable political question. *Nixon*, 113 S. Ct. at 732. For an argument favoring judicial review in the *Nixon* case, see Rose Auslander, Note, *Impeaching the Senate's Use of Trial Committees*, 67 N.Y.U. L. REV. 68 (1992).

314. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 232 (1821) (Sergeant at Arms of House has defense to assault and battery and false imprisonment for arresting a Member held in contempt).

315. Justice Daniel reminded the Court that it had to coexist with public opinion expressed through the legislative branches:

> [T]o whatever extent, therefore, the opinions of this tribunal may be recognized, (and by no one will they within their proper bounds be maintained with truer loyalty than by myself,) yet when challenged to obedience to those opinions, I am bound to remember that the constitution is

The investigatory powers of congressional committees present problems that can best be resolved by a mixture of law and convention. The Supreme Court has properly created legal rights that even congressional committees must respect. For

---

above all and over all, and that public opinion conveyed through its legitimate channel, the legislation of the country, will cause itself to be heard and respected.

The Steamer Oregon v. Rocca, 59 U.S. (18 How.) 570, 576 (1855) (Daniel, J., dissenting) (Supreme Court has jurisdiction to try case involving boat collision).

Such an allocation of power is not as disturbing as it might seem. Another nineteenth-century court observed that public opinion joins the judiciary in protecting constitutional rights:

> [N]o serious invasion of constitutional guarantees by the legislature could withstand for a long time the searching influence of public opinion, which was sure to come sooner or later to the side of law, order and justice, however it might have been swayed for a time by passion or prejudice, or whatever aberrations might have marked its course.

Budd v. New York, 143 U.S. 517, 534 (1892) (holding states can regulate fees charged by grain elevators).

In *McCulloch v. Maryland*, Chief Justice Marshall concluded the Court should defer to legislative determinations of the need for a particular means to fulfill a particular constitutional end. 17 U.S. (4 Wheat.) 316, 412-24 (1819). The *Lochner* era demonstrated that such judicial deference was not always forthcoming. Because the public-legislative assessments of necessity vary over the years, legislators can change many constitutional arrangements:

> The question before us is not one of policy but of power, and while public opinion had gradually brought all the States as matter of fact to the pursuit of a uniform system of popular election by general ticket, that fact does not tend to weaken the force of contemporaneous and long continued previous practice when and as different views of expediency prevailed.

McPherson v. Blacker, 146 U.S. 1, 35-36 (1892) (holding states can determine how members of electoral college are selected but cannot set different election date). Congress is the best forum to "modify the law to reflect such changes in popular attitudes." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting) (poll tax unconstitutional).

Committing many constitutional disputes to the Legislature does not undermine the Constitution. "To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people." Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940) (states can require school students to take Pledge of Allegiance). In 1821, the Court explained how public opinion helps develop constitutional practices:

> That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire . . . .

Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228-29 (1821).

example, it held that the Self-Incrimination Clause prevents Congress from forcing individuals to testify without immunity.[316]

Congress, however, is free to interrogate whomever it wants, both to develop policy and to attempt to modify behavior. The primary check on congressional investigations is public opinion.[317] It is permissible to attempt to mobilize the public to eliminate the House Un-American Activities Committee, but such attempts do not immunize HUAC critics from HUAC investigations.[318] The Court cannot stop all constitutional wrongs; it cannot protect those who are being investigated from the injury caused to their public reputations by being investigated.[319] Consequently, the country needs to develop additional constitutional conventions to balance Congress' "need to know" against important individual rights and interests. For example, the Senate recently created[320] an important, desirable convention. Senators from both parties who were investigating the leak of Anita Hill's affidavit decided not to force testimony from the reporters who first wrote about the leak of

316. One witness noted in *Sweezy v. New Hampshire* that the right against self-incrimination becomes somewhat illusory when the public is enraged: "My own reason for rejecting it is that, with public opinion in its present state, the exercise of the privilege is almost certain to be widely misinterpreted." 354 U.S. 234, 241 n.6 (1957) (plurality opinion) (state cannot conduct investigations under the vague phrase of "subversive persons"); *see also* Marshall v. Gordon, 243 U.S. 521, 546 (1917) (House has no express power to punish contempt aside from its own members).

317. "When the powers of legislative inquiry are abused, the remedy does not lie in noncooperation or defiance; it is to be sought through the normal channels of informed public opinion." Slochower v. Board of Higher Educ., 350 U.S. 551, 564 n.6 (1956) (Reed, J., dissenting) (quoting 3 THE RIGHTS AND RESPONSIBILITIES OF UNIVERSITIES AND THEIR FACULTIES, ASSOCIATION OF AMERICAN UNIVERSITIES (1953)) (state cannot dismiss employee for refusing to testify).

318. Wilkinson v. United States, 365 U.S. 399, 414 (1961) (upholding House contempt for refusing to testify on First Amendment grounds). In a prior dissent, Justice Douglas argued that such legislative investigations were unconstitutional because they constituted "infamy." Ullmann v. United States, 350 U.S. 422, 448-54 (1956) (Douglas, J., dissenting) (person can be forced to testify before Committee after being granted immunity).

319. *See* Hannah v. Larche, 363 U.S. 420, 500-01 (1960) (Douglas, J., dissenting) (upholding Civil Rights Commission's power to investigate without permitting cross examination); Beilan v. Board of Pub. Educ., 357 U.S. 399, 421-23 (1958) (Brennan, J., dissenting) (upholding discharge of employee for refusing to answer questions about Communist affiliations); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 128-29 (1951) (holding Attorney General can not designate certain groups as Communist without having a hearing).

320. Constitutional conventions can be created or modified by a single episode. K.C. WHEARE, MODERN CONSTITUTIONS 180 (1951).

Professor Hill's allegation that she was sexually harassed by future Justice Thomas.[321]

2. *Public opinion, war, and peace*

In *Marbury v. Madison*,[322] Chief Justice Marshall limited the vast scope of judicial review to legal questions. For instance, the Court has little authority over such political problems as foreign policy decisions.[323] In 1823, Chief Justice Marshall explained how only public opinion could regulate territorial conquest.[324] Justice Reed later argued that "methods for maintenance of Army discipline should be subject to public opinion as expressed through Congress."[325] Another Justice concluded that only military tribunals and public opinion could stop "wanton cruelty" during wartime.[326] Immediate public opinion and carefully crafted conventions remain the primary regulators of these all-important powers.

Of all the modern Supreme Court Justices, Justice Jackson has been the most attuned to the complex, contextual relationships linking constitutional law with constitutional politics. When the Court upheld the internment of Japanese-Americans during World War II in *Korematsu*,[327] Jackson dissented. He concluded that the federal district court did not have the power to punish a Japanese-American defendant violating a camp curfew because the federal judiciary has no jurisdiction over such an issue. The only effective constitutional constraints were nonjudicial:

> I would not lead people to rely on this Court for a review that seems to me wholly delusive . . . . The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judg-

321. TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES 431-33 (1992).

322. 5 U.S. (1 Cranch) 137 (1803).

323. *Id.* at 165-66.

324. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589-90 (1823) (holding United States courts cannot recognize title of land granted from Indian tribes to individuals).

325. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 43 (1955) (Reed, J., dissenting) (ex-serviceman could not be subjected to trial by court-martial).

326. Dow v. Johnson, 100 U.S. 158, 166 (1879) (army officer not liable for injuries resulting from military actions or orders in Southern states under martial law).

327. Korematsu v. United States, 323 U.S. 214 (1944).

ments of history.[328]

Eight years later, Jackson apparently limited his judicial deference to armed conflicts immediately threatening the nation's existence. He decided that President Truman acted unconstitutionally by seizing the country's steel mills during the Korean War.[329] This time, the rule of law, expressed through congressional legislation, congressional inaction, and judicial decisions, prevailed over executive prerogative powers. What had been unreviewable in World War II had become unconstitutional. Jackson saw the President's unique relationship with the body politic not as just a constraint but also as a threat:

> No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.[330]

Jackson's opinions demonstrate that many constitutional issues should not be reduced to convention; we need a proper mix of law and convention.[331] For example, the Court properly protected the *New York Times* in the watershed *Pentagon Papers* case, because a free press is needed to inform public

---

328. *Id.* at 248 (Jackson, J., dissenting). Jackson's arguments supporting the Nuremberg trials were very different. He argued that international law was needed to punish the major Nazi leaders who had engaged in evil acts of war. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 53 (1992). The British had initially wanted to execute the leaders without trial. *Id.* at 29.

329. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (preventing President from seizing and running steel mills during wartime).

330. *Id.* at 653-54.

331. Prosecutorial and administrative discretion temper the rule of law with political considerations. Except in the rarest situations, the Court does not review the exercise of prosecutorial discretion, particularly in criminal cases. Consequently, the control of administrative discretion takes place largely outside the courtroom. *Yick Wo* is the exception that proves the rule. That case held that the San Francisco Board of Supervisors violated the Equal Protection Clause by giving laundry licenses to virtually all white applicants but no Chinese applicants. Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886) (striking down racist administration of laundry licenses). However, the Court noted: "[I]n many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage." *Id.* at 370.

opinion about foreign affairs and military conflicts.[332] The public, after all, cannot create and enforce conventions to prevent abuses abroad if the public does not know what is happening abroad.

3. *Public opinion and the judiciary*

Justice Souter's argument that the Supreme Court needs the support of the body politic is not original. A lawyer told the Court in 1849 in *The Passenger Cases*: "It is desirable [that the unelected judges] should secure the affections of the people."[333] Judges write opinions, containing their reasoning, to persuade public opinion:

> [A]s long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice.[334]

Over the decades, the judiciary and public opinion combine to determine which judicial outcomes, which judicial reasons, and which judicial modes of argument are constitutionally legitimate.

Like impeachment, the judicial power to punish contempt is a governmental power, arising under the law, that cannot effectively be regulated by law alone: "The power to punish for

---

332. In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (permitting newspapers to print stolen, classified Pentagon Papers during Vietnam War).

333. Smith v. Turner, 48 U.S. (7 How.) 283, 379 (1849) (argument of defense counsel) (invalidating state laws imposing taxes on foreign ship passengers).

334. Sparf & Hansen v. United States, 156 U.S. 51, 107 (1895) (quoting United States v. Morris, 26 F. Cas. 1323, 1336 (C.C.D. Mass. 1851) (No. 15,815). The open judicial process serves as a cathartic vehicle to absorb community anger after a violent crime has taken place. Richmond Newspapers v. Virginia, 448 U.S. 555, 571-72 (1980) (plurality opinion) (criminal trial cannot be closed to media).

contempt is always open to abuse. The persons injured are judges in their own case. The only safeguard, *outside of public opinion*, lies in the character of the persons intrusted with this power."[335] The power will sometimes be abused by the entire judiciary, as in *In re Debs*.[336] In the first volume of the *United States Reports* the Pennsylvania Supreme Court upheld a contempt of court because the defendant's speech "prejudic[ed] the public (a part of whom must hereafter be summoned as jurors) with respect to the merits of a cause depending in this court, and of corrupting the administration of justice."[337]

Just as there are costs and risks in creating discretionary powers, there are also benefits. The Court has praised judges who resist local pressures: "A judge who is part of such a dramatic episode can hardly help but know that his decision is apt to be unpopular. But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion."[338] Certainly Judge Frank M. Johnson, Jr., who battled Southern segregation for decades, is a judicial hero.[339] The public should closely scrutinize judicial behavior and feel free, protected by the First Amendment,[340] to criticize the ju-

---

335. United States v. Barnett, 376 U.S. 681, 723-24 (1964) (appendix) (quoting ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 174 (1930)) (emphasis added).

336. 158 U.S. 564 (1895).

337. Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 326 (1788) (opinion of the Supreme Court of Pennsylvania) (interpreting the Pennsylvania Constitution to uphold libel action against newspaper article criticizing judge); *see also* Toledo Newspaper Co. v. United States, 247 U.S. 402, 415 (1918) (newspaper can be held in contempt for writing article calling judge's integrity into question). *But see* Craig v. Harney, 331 U.S. 367 (1947) (reversing contempt for publishing newspaper articles critical of state trial judge).

338. *Craig*, 331 U.S. at 376.

339. *See generally* TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA (1981) (examining Judge Johnson's career up to his appointment to the Fifth Circuit); Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979).

340. "The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." Bridges v. California, 314 U.S. 252, 270 (1941) (footnote omitted) (state judges can only punish contempt if there is "clear and present danger"). *But see* Pennekamp v. Florida, 328 U.S. 331 (1946) (holding that trial court could not find critical newspaper articles to be in contempt of court). "Courts cannot function in a free country when the atmosphere is charged with the effusions of a press designed to poison the mind of the public against the presiding judges rather than to clarify the issues and propagate the truth about them . . . ." *Id.* at 344 n.6 (quoting Pennekamp v. State, 22 So. 2d 875, 885 (Fla. 1945)).

diciary. Judges, on the other hand, should not be intimidated by the public. Two conflicting fears reside at the heart of this problem. But there is no contradiction in distrusting both the judiciary and the public; there is only common sense. Every group has the capacity to abuse its power. Ultimately, the public retains the last word. Not only can the public complain about judges, but it also can pressure Congress to impeach.[341]

C. *The Judicial Tradition Opposing the Use of Public Opinion in Constitutional Adjudication*

This survey has revealed that Justices tend to refer expressly to public opinion in the most contentious cases: *Dred Scott*, the debate over the *Lochner* jurisprudence, *Blaisdale*, the *Pentagon Papers* case, and *Casey*. Overt judicial discussion of public opinion is a symptom of major judicial conflict.

As seen in the initial section of *Casey*, public opinion analysis has influenced modern substantive due process cases.[342] Justice Harlan incorporated public opinion into his determination of "ordered liberty" in the first contraception case, *Poe v. Ullman*.[343] Public opinion of one era created the anti-contraception statute: "The so-called Comstock Law may be regarded as characteristic of the attitude of a large segment of public opinion on this matter through the end of last century."[344] That public opinion became dated: "Indeed the criticism of these measures assumes that they represented

---

There were limits to this principle; courts could bar pickets near the courthouse because the state had the power to protect the judicial process from being misjudged in the minds of the public. Cox v. Louisiana, 379 U.S. 559, 564 (1965) (reversing conviction for picketing "near" a courthouse).

341. In 1866, an attorney in *Ex parte Milligan* explained: "For any wilful or corrupt violation of their duty, they are liable to be impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce." 71 U.S. (4 Wall.) 2, 64 (1866) (defense counsel argument) (military courts do not have jurisdiction over civilians when civil courts are still available).

342. In her concurrence in *Cruzan*, Justice O'Connor cited an AMA poll: "56% of those surveyed had told family members their wishes concerning the use of life-sustaining treatment if they entered an irreversible coma." Cruzan v. Director Mo. Dep't of Health, 497 U.S. 261, 289 n.1 (1990) (O'Connor, J., concurring) (citing AMERICAN MEDICAL ASSOCIATION, SURVEYS OF PHYSICIAN AND PUBLIC OPINION ON HEALTH CARE ISSUES 29-30 (1988)) (holding that state can require clear and convincing evidence that person in coma wanted termination of life-support systems).

343. 367 U.S. 497 (1961).

344. *Id.* at 546 n.12 (Harlan, J., dissenting) (citation omitted).

general public opinion, though of a bygone day."[345] As noted in the Introduction, Justice Blackmun in *Roe v. Wade* partially relied on leading "professional" public opinion, discussing the views of the American Medical Association, the American Bar Association, and the American Public Health Association.[346]

Justice Souter's *Casey* opinion attempted to reconcile the ancient tension between the Federalists and the Republicans by incorporating both perspectives, much as Justice Johnson had done in *Hudson*.[347] According to Justice Souter, the Court must be committed to "principle" in order to have continued public respect and support. The Court must ignore momentary swings in public sentiment, particularly those generated by furious partisans. However, when a large percentage of the public comes to believe that a watershed constitutional decision was wrongly decided, as was the eventual fate of *Plessy* and *Lochner*, the Court can and should change the basic constitutional doctrine to incorporate that transformation in public opinion. In such cases, the Court should also consider the views of leading legal thinkers, such as Professor Charles Black. In other words, constitutional "principles" are not immutable but are contingent creatures.

In one of the most honest judicial opinions ever written, Justice Souter has sought to combine the stability of principle and stare decisis with the inevitable constitutional revolutions that sweep this country. Some constitutional thinkers, including some of his colleagues, will not like this fluid vision of the Constitution, but I think it accurately describes how the Constitution has operated over the past two centuries.[348] All law is permanently in flux. The only question is the rate of change.

By the same token, the rejection of public opinion by Justice Scalia and Chief Justice Rehnquist in *Casey* does not make them constitutional revolutionaries.[349] They can turn to a

345. *Id.* at 547 n.12.

346. 410 U.S. 113, 141-47 (1973). Justice Blackmun's opinion is overly deferential to the medical profession; *Roe* sometimes reads more like a right to practice medicine case than a privacy case.

347. 11 U.S. (7 Cranch) 32 (1812).

348. In addition, Justice Souter's approach is consistent with the views of many constitutional thinkers, on and off the Court.

349. Justice Thomas cited a book arguing that the judiciary's insularity makes it attractive to leftist lawyers. Graham v. Collins, 113 S. Ct. 892, 905 n.4 (1993) (Thomas, J., concurring) (quoting MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 25 (1973)) (defendant barred in collateral review from raising new constitutional rule challenging death sentence).

smaller group of cases to formulate a different judicial tradition. Unless one wants to transform the Constitution into a purely majoritarian document, the Court must protect some "core" rights from prevailing public opinion. Justice Jackson's *Barnette* opinion eloquently stated the Court's obligation:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[350]

In 1827, Justice Johnson, author of the *Hudson* opinion, equated "public opinion" with the politics side of the law/politics distinction: "[Acquiescing to unfounded doctrines and dicta] affords facilities for giving an undue bias to public opinion, and, I will add, of interpolating doctrines which belong not to the law."[351] Recall that Justice Story also separated "principle" from "popular appeal" in *Dartmouth College*. We have already seen how Chief Justice Taney's opinion in *Dred Scott* explicitly repudiated current public opinion: "Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."[352]

In the 1880s, members of the formalistic Supreme Court isolated themselves from public opinion: "The truth is, that public opinion is oftentimes like a pendulum, swinging backward and forward to extreme lengths."[353] They praised Eng-

---

350. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (state cannot require schoolchildren to take Pledge of Allegiance). Justice Jackson added:

> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

Id. at 641.

351. Ramsay v. Allegre, 25 U.S. (12 Wheat.) 611, 614 (1827) (Johnson, J., concurring).

352. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 426 (1856).

353. *Ex parte* Curtis, 106 U.S. 371, 377-78 (1882) (Bradley, J., dissenting)

lish judges for their capacity to transcend their fellow citizens.[354] Such judicial arrogance helped set the stage for the *Lochner* era, in which the Court ignored, at great cost to the country, radical changes in the economy, technology, and public opinion.[355] In addition to quoting favorably the above statement from *Dred Scott*, in *Home Building & Loan Ass'n v. Blaisdell* Justice Sutherland argued: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now."[356]

Justice Souter's *Casey* opinion could also be criticized on the ground that no Supreme Court had ever applied his particular conception of public opinion. Furthermore, many Justices have separated the judicial domain, excluding public opinion, from the political domain, where public opinion reigns supreme. In other words, Justice Scalia might argue that Justice Souter has not properly adhered to the Supreme Court's "tradition." Justice Souter's argument, however, resembles the *Hudson* decision: he consults both the public and leading legal scholars like Professor Charles Black to determine whether or not a watershed case should be overruled. Justice Scalia's tradition of pure judicial autonomy from public opinion, based upon *Osborn*, *Dred Scott*, and Sutherland's *Blaisdell* dissent, proves, at best, that at least two competing "traditions" can be teased out of the cases.

The historical record is rich, not easily susceptible to a single interpretation. It is notoriously difficult to "prove" any-

---

(upholding law prohibiting federal officials from giving or receiving anything from any other officer for political reasons). Justice McClean's dissent in *Dred Scott* condemned the pro-slavery change in state law caused by "some new light" or "excited public opinion." *Dred Scott*, 60 U.S. (19 How.) at 563 (McClean, J., dissenting) (quoting Pease v. Peck, 59 U.S. (18 How.) 595, 599 (1855)) (published version of law prevails over unpublished version). In *Pease v. Peck*, the Court rejected a then recent precedent because it reflected excited public opinion:

> When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions,—and [sic] much more is this the case, where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent.

59 U.S. at 599.

354. Sparf & Hansen v. United States, 156 U.S. 51, 140 (1895) (Gray, J., dissenting).

355. For a contrary view, see Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991).

356. 290 U.S. 398, 450 (1934) (Sutherland, J., dissenting) (quoting South Carolina v. United States, 199 U.S. 437, 448 (1905)).

thing in constitutional law, particularly what is or is not a "tradition." Those observations contain an additional problem for Justice Scalia. The characterization of a constitutionally valid tradition involves another subjective choice between competing definitions. Justice Scalia, however, has tried to use the tradition argument to formulate "objective" law. In other words, Justice Scalia endorses arguments that he believes will eliminate indeterminacy and subjective choice. The historical record presented in this Article demonstrates the futility of such a quest, whether in determining a "tradition" or defining "public opinion."[357]

Interpretive irony colors Justice Scalia's approach. At the end of *Casey*, he graphically describes the sullen portrait of Chief Justice Taney, painted after *Dred Scott*, in Harvard Law School's library. Justice Scalia noted that Chief Justice Taney's opinion failed to reunite the country and predicted that Justice Souter's opinion will probably meet a similar fate. Yet, Justice Scalia's constitutional methodology reproduces Chief Justice Taney's rigid commitment to text and ratification history. In addition, Chief Justice Taney's ruthless twisting of the Territories Clause, finding that Congress had no power to regulate slavery in any new territories under that Clause,[358] neither persuaded much of the country nor removed the Court from political controversy. Over a hundred years ago, Chief Justice Taney's decision demonstrated that an explicit, exclusive appeal to text and history, combined with express repudiation of existing public opinion, is not invariably the best mode of constitutional interpretation. The Court's ultimate decisions tend to drag it into political controversy far more than its choice of interpretive techniques.

A Scalian might retort that Justice Scalia never banished public opinion from the constitutional universe. One of the goals of objectifying the law is to separate law from politics, principle from policy. That distinction cannot be made without being aware of what is on the other side, namely, public opinion. Public opinion is something that takes place outside the courtroom. Sometimes it is to be feared and other times to be protected.

---

357. *See* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

358. *Dred Scott*, 60 U.S. (19 How.) at 432-51.

Justice Scalia, of course, does not completely keep public opinion out of the adjudicatory process. An "originalist," he consults text and history to determine what the populace thought when they ratified a particular part of the Constitution. Furthermore, Justice Scalia accepts more contemporary public opinion expressed through legislation, which transforms otherwise suspect opinion into constitutional tradition: "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely."[359]

Justice Scalia has not only dismissed the long-standing judicial tradition of expressly incorporating public opinion into constitutional analysis in a variety of ways, but he also has created a model that is internally inconsistent. How can Justice Scalia ignore public opinion when he counts statutes and practices to determine what is or is not a constitutionally protected "tradition"? Despite the myriad imperfections of our democratic system, statutes are reflections of dominant public opinion. Is not the "legislative mind" similar to the "public mind"? In *Furman* Justice Powell noted the powerful link between legislation and public opinion: "In a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."[360]

Justice Scalia aspires to create an objective constitutional jurisprudence that precludes the Court from imposing any subjective values on the electorate. That goal is impossible because the subjective/objective distinction cannot resolve constitutional questions, which require inherently normative/subjective choices between competing conceptions of the Good.[361] Nevertheless, we need to determine the appropriate scope of judicial review. Few of us want the Court to become too idiosyncratic, too unaware of the rest of the country. Justice Scalia's "tradition" argument limits judicial discretion by linking it more closely with the views of the general public as expressed through statutes. Tradition, thus, becomes a legitimate, but not an "objective," technique. But that interpretation forces the Court to weigh public opinion, not exclude it or give it determinate force. The questions are whose public opinion

359. Penry v. Lynaugh, 492 U.S. 302, 335 (1989).
360. Furman v. Georgia, 408 U.S. 238, 436-37 (1972) (Powell, J., dissenting).
361. *See* HORWITZ, TRANSFORMATION 1870-1960, *supra* note 44, at 139.

counts—the legislators', the commentators', and/or the average citizens'—and how much that opinion should count in a particular case, not whether public opinion is relevant at all.

Unlike many other methods of ascertaining public opinion, Justice Scalia's technique does not have many methodological problems. After all, he only consults constitutional text, historical writings, and written statutes. But, he still has the problem of subjectively interpreting the objective statutory survey of the statutes in question. One can never be certain what the Court will do when it has completed its arithmetic. For example, the Court ignored the absence of statutory authority in *Powell v. Alabama*,[362] requiring all the states to provide free lawyers to indigent defendants facing the death penalty. In *Coker v. Georgia*,[363] the Court struck down the death penalty for rape as disproportionate, partially because only a few states authorized the penalty. In 1981, the Court deferred to a mixture of legislative procedures regulating the termination of parental rights, although the majority of states were moving in the direction of providing counsel: "[S]ignificantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise."[364] Perhaps Justice Scalia is saying that the Court will only provide constitutional protection when all the legislatures have consistently protected a right. But under such a model, he has created an elaborate, unnecessary, confusing fiction. What plaintiff need bring a constitutional action if all the states already acknowledge that plaintiff's rights on other grounds?

Justice Scalia has not consistently excluded public opinion from his formulation of constitutional doctrine. Dissenting in *FW/PBS v. Dallas*,[365] he wrote that the Supreme Court's obscenity standards, which protect erotic material, have "met with general public acceptance,"[366] but the application of those standards has "most certainly not [been] approved."[367]

362. 287 U.S. 45 (1932).

363. 433 U.S. 584, 593-96 (1977) (plurality opinion).

364. Lassiter v. Department of Social Servs., 452 U.S. 18, 34 (1981) (not requiring court-appointed counsel in termination of parental rights cases).

365. 493 U.S. 215 (1990).

366. *Id.* at 251 (Scalia, J., concurring in part, dissenting in part).

367. *Id.*

He pointed to continuing efforts to combat "sexually oriented businesses" to prevent "the erosion of public morality" through techniques such as zoning ordinances.[368] Justice Scalia tried to resolve this public reaction by allowing communities to proscribe businesses that distribute vast amounts of sexually oriented material as engaged in "the sordid business of pandering," even though those communities could not ban any single work.[369] Whether his creative doctrine should have become constitutional law or not, Justice Scalia's methodology sits uneasily with his complaints in *Casey* about Justice Souter's use of public opinion. It is very difficult, not to mention undesirable, to exclude a valuable form of constitutional interpretation from all decisions.

Some of Justice Scalia's goals become less objectionable after removing the distracting adjective "objective." The Court needs to have a dual conception of constitutional power, separating the political from the legal, public opinion from legal rights. This Article has attempted to show that the two categories have never been, and should not, be mutually exclusive. Some overlap is inevitable, even desirable.

Eventually public opinion will have its way,[370] expressly amending the Constitution or forcing the Court to respond to the "felt necessities of the time[s]."[371] The most obvious example was the repudiation of economic substantive due process during the Depression. In 1992, a large segment of the public validated the right of privacy as applied to abortion when it overwhelmingly voted for the two pro-choice candidates, Clinton and Perot.[372] That election helps explain how judicial

---

368. *Id.* at 251-52.

369. *Id.* at 260. In formulating this standard, Justice Scalia quoted a prior statement by Justice Stevens on the limits of principle: "We learned long ago that broad statements of principle, no matter how correct in context they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." American Mini Theaters v. Young, 427 U.S. 50, 65 (1976), *quoted in FW/PBS*, 493 U.S. at 263.

370. Robert Goldwin observed that "public opinion and popular taste rule, ultimately, on everything." Robert A. Goldwin, *Of Men and Angels: A Search for Morality in the Constitution, in* THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 15 (Robert H. Horwitz ed., 2d ed. 1979).

371. OLIVER W. HOLMES, THE COMMON LAW 5 (Mark D. Howe ed., 1963) (1881).

372. Some political scientists have concluded that the abortion controversy played a major role in the 1992 presidential election. David S. Broder, *Lasting Effects of Perot, Religious Right Debated; Each Likely to Remain a Force, Scholars Say*, WASH. POST, Sept. 9, 1993, at A6. In a famous passage, Ely applied modern

review in general, and the doctrine of substantive due process in particular, can legitimately exist in our form of democratic government. To paraphrase Tocqueville, the people have continued to permit the Court to engage in substantive due process review.[373] Former Judge Bork learned the price of defying public opinion when he argued that the Fourteenth Amendment did not outlaw sex discrimination because that issue was not on the Framers' minds. The seating on the Supreme Court of Justice Ginsburg, a leading early advocate of gender equality, confirms the public's power to participate in the perpetual reinterpretation of the Constitution.

D. A Matter of Principles

One way to narrow most of the cases discussed above is to assert that the Court has usually considered public opinion as something outside the courtroom. The Court has seen public opinion as a threat in many criminal cases, something to be protected in First Amendment cases, or an independent adjudicator of some structural issues. The acutely controversial problem is whether or not the Court should sometimes let public opinion "inside" its doctrine, allowing public opinion to influence directly the types of constitutional rights and powers that the Court has traditionally determined. In other words, should public opinion help shape the contours of fundamental rights and/or compelling state interests? The Court has consulted public opinion to expand the definition of "cruel and unusual punishments"; can the Court also use public opinion to limit the scope of constitutional rights and principles? To begin to answer those questions, we need to consider the relationship between politics and principles.

Many legal scholars have criticized Herbert Wechsler's famous article on "neutral principles,"[374] both as a general idea

---

political philosophy to constitutional adjudication: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated." ELY, *supra* note 9, at 58. Ely will not be much more pleased with a crude reduction of this Article's argument: "Anti-abortionist President Bush won only 37% of the popular vote in 1992 against two pro-choice candidates. We win, 5-4. *Roe* affirmed. Statute upheld under undue burden test."

For discussions of the Court's relationship to electoral politics, see David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790; Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975).

373. TOCQUEVILLE, *supra* note **, at 100.

374. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73

and as applied to criticize *Brown v. Board of Education*.[375] There were both substantive and methodological problems. How and why should the Court limit itself to "neutral" principles, and how the Court could determine which principles are "neutral"? In short, who knows what the adjective "neutral" means?[376]

The word "principle" presents a related set of problems.[377] Are "principles" anything more than "values," dressed up in academically and legally acceptable language, that courts ought to take seriously, applying them consistently until they collide with other principles?[378] Such a query has its own tradition. In 1882, Jevons wrote in the context of legislation: "It is futile to attempt to uphold in regard to social legislation any theory of eternal fixed principles or abstract rights."[379] Yet, a

---

HARV. L. REV. 1 (1959); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

375. 347 U.S. 483 (1954).

376. *See* HORWITZ, TRANSFORMATION 1870-1960, *supra* note 44, at 170; Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1 (1992).

377. Such doubts have a tradition: "Radical neo-realism seems to deny that there are rules or principles or conceptions or doctrines at all." Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 707 (1931). Although some thought he overreacted, Pound's complaint had substance:

> Some Progressive critics (who came to include the 'Legal Realists' of the 1920's and 30's) delighted not only in showing the class bias of Liberal legalisms, but in exploding its aspirations to technical coherence: The famous 'principles' were exposed as empty formulae that could lead by logical manipulation, to totally contradictory results.

PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 362 (3d ed. 1992). Professor Brest nevertheless has proposed a different set of principles as essential parts of the judicial function: "[W]here the very authority of the judiciary is based on its ability to expound and apply general principles, it cannot act on such an ad hoc basis [as a school board]." Paul Brest, *Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 47 (1976); *see also* Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992) (arguing that the distinction between enumerated and unenumerated rights is "bogus"). Morton Horwitz noted that the search for "underlying universal principles" is a relatively new one, "virtually unknown" to the common law for over the previous 500 years. HORWITZ, TRANSFORMATION 1870-1960, *supra* note 44, at 201.

378. "The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other . . . ." HOLMES, *supra* note 371, at 32.

379. W. STANELY JEVONS, THE STATE IN RELATION TO LABOUR 16 (3d ed.

powerful tradition exists that perceives the Court as principled. Alexander Bickel characterized the Court as an institution dedicated to principle.[380] Justice Powell wrote: "Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law."[381]

The word "principle" loses some of its import because it often is used simply as another word for "doctrine." Even Langdell did not make a clear distinction: "Law, considered as a science, consists of certain principles or doctrines."[382] The Supreme Court has often equated "principle" with modifiable doctrine.[383]

How can public opinion coexist with legal principles inside constitutional doctrine? The short answer may be that some fundamental rights are more fundamental than others. The Court has always created an hierarchy of rights, determining which interests are "fundamental."[384] There is, and ought to be, a small set of "core" fundamental rights that the Court should isolate from public opinion, particularly majori-

---

1894), *quoted in* DICEY, *supra* note 43, at 446. Dicey extended Jevon's analysis beyond social legislation to judicial decision-making. More recently, Mark Tushnet has criticized neutral principles because they are open to substantial manipulation. MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 46-47 (1988); *see also* Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561 (1988); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

380. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962). Even Bickel concedes that the word "principle" is ambiguous, partially aspirational. *Id.* at 199-200; *see also* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

381. Fullilove v. Klutznick, 448 U.S. 448, 502 (1980) (Powell, J., concurring) (upholding minority set-asides for federal construction contracts). Chief Justice Warren wrote: "[P]articularly in the Supreme Court, the basic ingredient of decision is principle, and it should not be compromised and parceled out." EARL WARREN, THE MEMOIRS OF EARL WARREN 6 (1977); *see also* Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837 (arguing that "result-oriented" decision-making is unprincipled).

382. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

383. For a judicial example, see the Supreme Court's claim in *Addyston Pipe & Steel Co. v. United States* that it complied with *E.C. Knight*'s "principle" that the manufacturing of sugar was not interstate commerce, even though the *Addyston* Court held that manufacturing steel pipes was interstate commerce. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 246-48 (1899) (distinguishing United States v. E.C. Knight Co., 156 U.S. 1 (1895)).

384. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230).

ty/legislative opinion. The Court, for instance, should be particularly anti-majoritarian when formulating First Amendment rights.[385] The Court needs to protect both minority viewpoints and the processes that lead to informed public opinion from suppression by passionate public opinion, be it in the form of an elected official, an agency, a statutory act, or an angry mob. We will, of course, disagree over which rights are "core" rights. There are, however, a few such "core" rights that most of us believe are non-negotiable: the right to free speech, the right to a basically equal vote in state elections, and the right not to be expressly, maliciously discriminated against on the basis of race, gender, ethnicity, or religion. In those situations, the Court should prefer formal rules, elevating those "principles" over politics. Most other issues are murkier, more contextual, more amenable to compromise. In other words, we can use the word "principle" so long as we don't take it too seriously.

Constitutional law, like all law, frequently involves the allocation of inevitable suffering. The Court creates formalistic doctrine that accepts ongoing injury, whether that injury be Jerry Falwell's anguish at seeing his mother's reputation dragged through the mud,[386] or black contractors having to contend against societal racial discrimination after *City of Richmond v. J.A. Croson Co.*[387] When determining which party should bear the burden, the Court must sift among several modes of argument that do not always favor one side over another: text, history, precedent, tradition, policy, morality, and structure. Public opinion simply is another variable. Sometimes the Court should consider public opinion to be irrelevant or even threatening; but, at other times, the Court ought to tailor its decisions to the country's prevailing mood.

The task will not be easy. There are institutional and methodological difficulties in determining any form of public opinion. Justices do not face the electorate or have frequent

385. Skepticism can coexist with a hierarchy of principles: "To have doubted one's own first principles is the mark of a civilized man." Oliver W. Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 3 (1915). The trick is not to confuse operating principles that one pretends are absolute with the notion of immutable absolutes. *See, e.g.*, GORE VIDAL, *Novelists* and *Critics of the 1940's*, *in* UNITED STATES: ESSAYS 1952-1992, at 12-13 (1993) (discussing the lack of absolutes in literary criticism). In other words relativism and existentialism need not lead to nihilism.

386. Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (First Amendment protects offensive parody of public figure).

387. 488 U.S. 469 (1989).

contacts with lobbyists. Polls are unreliable and fickle, while intuitive assessments of public opinion often are little more than projections of the Justice's personal beliefs. One of the Court's more awkward moments arose when it seemed to resolve a sex discrimination case on the assumed passage of the Equal Rights Amendment.[388] Assuming the Court will consider public opinion in a particular case, the Court next has the difficult task of choosing between the many forms of public opinion.[389] Even if the Court can determine when and what public opinion is relevant, it then must decide how much weight that particular kind of public opinion should receive. For instance, Justice Souter's approach forces him to determine when a watershed decision has been accepted, merely disputed, or so rejected by such a substantial majority that it should be overruled.

Because all of us have different rankings of constitutional norms, the best way for me to demonstrate the influence of public opinion on constitutional analysis is to discuss several cases in which the courts made "unprincipled" compromises that I initially disagreed with. The tests of time and public opinion however, have given those decisions more validity.[390]

Affirmative action recently has been one of the country's more divisive issues. Both factions have powerful arguments. Opponents favor the "color blind" Constitution over proponents'

---

388. "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration." Frontiero v. Richardson, 411 U.S. 677, 687-88 (1973) (plurality opinion) (army must provide same benefits to men and women).

389. This Article demonstrates that many definitions of public opinion have permeated constitutional theory and doctrine. Theorists and judges have used Zeitgeist, reputation, honor, approbation, elite public opinion, public opinion of the masses, reasoned public opinion, passionate public opinion, mob, views of partisans, perspective of the body politic, enlightened, lawyers, reflective and informed reactions, judgment of history, world opinion, views of the Framers, views of the populace at the time of any constitutional ratification, prevailing views, statutory law, tradition, a threat to liberty, and a guarantor of liberty.

390. I have long believed that the Supreme Court should interpret the Constitution to do more for the poor. *See* James Wilson, *Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children*, 38 CLEV. ST. L. REV. 391 (1990). However, no powerful faction is clamoring for such a jurisprudence. Public domestic discourse presently swirls around race and sex more than class. Perhaps the Court is wise in leaving to the elected branches the resolution of the systematic abuse and neglect of poor young children during the late twentieth century. But such wisdom is paltry, providing no honor either to the Court or to the people it serves.

pleas for equal opportunity and just compensation for past injustices.[391] Many people criticized Justice Powell's controlling, solo opinion in *Bakke*[392] for prohibiting racial quotas while holding that universities could consider race as a factor to achieve "diversity." In his concurrence, Justice Brennan chided Justice Powell for allowing universities to reach the same end of more minorities in the classroom under the rubric of "diversity" instead of "social discrimination," but only through less candid means of factors instead of quotas. In the 1990s, Justice Scalia has sought to eliminate all affirmative action except "where . . . [it] is necessary [for the states] to eliminate their own maintenance of a system of unlawful racial classification."[393] As a matter of principle, both Justice Brennan and Justice Scalia offer more coherent doctrine. Either the Court should find virtually all affirmative action plans to be unconstitutional, or it should generally defer to the majoritarian process.

What is the practical difference between a quota and making race a factor? Justice Powell seems to have constitutionalized hypocrisy in *Bakke*. Yet, Justice Powell's opinion has withstood the test of time, within the Court and in the court of public opinion. Both political sides currently use Justice Powell's rhetoric. Affirmative action critics attack "quotas," while advocates praise "diversity." Justice Powell's awkward compromise better reflects the country's ambivalence about the issue than Justices Brennan's and Scalia's purer conceptions of constitutional rights. Affirmative action was bound to strain the country's political and social fabric. Justice Powell's compromise has allowed a diluted form of affirmative action to exist for almost twenty years, providing many educational opportunities for minorities without alienating the rest of America from the Court. Critical Legal scholars like Roberto Unger might see Justice Powell's decision as proof of antimonies that reduce liberalism to incoherence and contradiction.[394] I see his opinion as a prime example of liberalism's capacity to compromise.

---

391. Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

392. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

393. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 524 (1989) (Scalia, J., concurring in judgment).

394. *See, e.g.*, ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975).

In *Milliken v. Bradley*, the Court refused to extend busing from the inner cities into the suburbs.[395] *Milliken* undercut *Brown v. Board of Education*'s commitments to equal opportunity, equal education, and reduction of psychological injury to black children.[396] The constitutional text does not distinguish, as the Court did, between states and local governments formed by the states. As a matter of policy, inner-city busing increased middle-class flight.[397] Doctrinally, the Court easily could have extended desegregation into the suburbs. The Court previously had found that violations within a school district tainted the entire district,[398] but it refused in *Milliken* to find that similar violations could cross municipal boundaries within the same urban community.

The conservatives' claim in *Milliken* that the State was not responsible for city boundaries is inaccurate because municipalities are creatures of the state. The conservatives themselves quickly jettisoned that argument when it no longer suited them. In *Washington v. Seattle School District No. 1*, Justice Powell, who was part of the *Milliken* majority, wrote, "The Constitution does not dictate to the States a particular division of authority . . . between state and local governing bodies."[399] In other words, the state has ultimate responsibility for all education decisions. It would seem that proof of intentional discrimination in one part of the state's system, Detroit, should spill over to the rest of the state's system, the suburbs, just as proof of segregation in part of a school district polluted the entire district in *Keyes*. More realistically, it is commonly believed that many people fled to the suburbs to isolate themselves from blacks and the poor. The legal fictions of "intent" and local boundaries prevailed over the inner-city schoolchildren's need for a quality, equal education, cleansed of state-facilitated racism. The Court completed its defense of the suburbs by protecting them from racial housing integration in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[400] and from equal school subsidies in *San Antonio*

395. 418 U.S. 717 (1974).

396. Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954); *see* Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285 (1992).

397. *See generally* J. ANTHONY LUKAS, COMMON GROUND (1985).

398. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

399. 458 U.S. 457, 492-93 (1982) (Powell, J., dissenting). The liberals, of course, also flip-flopped. The state-local distinction was irrelevant in *Milliken* but became crucial in *Washington*.

400. 429 U.S. 252 (1977) (holding that respondents failed to show racially dis-

Independent School District v. Rodriguez.[401] Overall, the conservatives reflected the powerful suburban wish to be isolated from the anguish of the inner city.

In terms of precedent, immediate policy, morality, principle, and even text,[402] I believe the Court grossly erred in cases like *Milliken*. On the other hand, the best justification for *Milliken* is the mood of the predominantly white suburbs, which expressed their views at the time of *Milliken* by electing Richard Nixon to the Presidency. If the Court had tried to integrate the suburbs by itself, a powerful part of the citizenry would have become enraged. At the very least, many suburbanites would have pulled their children out of the suburban public schools, undercutting the goals and benefits of racial and economic integration. Legislatures would engage in a variety of subterfuges, entangling the federal courts in ugly, perpetual conflicts.[403] We want constitutional law to reflect and appeal to our better sides, but the Court is also committed to maintain social stability and harmony. It must balance moral aspirations against societal constraints. It must practice realpolitik, trying to determine how particular groups will react to its decisions. Political reality, a major policy variable, may justify an otherwise unjustifiable decision.[404]

Although I express these depressing arguments reluctantly, there is a slight glimmer of hope within them. Perhaps one day the country will be more willing to share its pains and benefits, giving the Court the leeway to mandate a more egalitarian, racially just, educational system that provides equal opportunity to all. The Court could start with more equal funding, not more disruptive, counterproductive busing. Recent state court efforts to require equal funding for all public schools may provide some answers. However, based upon the 1993

---

criminatory intent in challenged rezoning decision).

401. 411 U.S. 1 (1973). *Milliken* might have been less damaging if the Court had decided *Rodriguez* the other way. The dual system *Rodriguez* tolerated has been fiercely criticized. *See* JONATHAN KOZOL, SAVAGE INEQUALITIES 214-19 (1991).

402. As has been written many other places, the text of "equal protection" is open to many meanings. For example, Ronald Dworkin distinguished between the Framers' particular conception of a text and the text's broader "concept." RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-37 (1977).

403. For a recent example of adverse public reaction, see Sam H. Verhovek, *Texans Reject Sharing School Wealth*, N.Y. TIMES, May 3, 1993, at A12.

404. This Article provides a way to distinguish and limit opinions like *Milliken*, a way to overcome them as precedent, while also giving them more short-term legitimacy.

Texas vote not to equalize school funding, there is little reason for short-term optimism.[405]

Public opinion analysis reminds us of the intimate relationship between rights and remedies. The Court may be unwilling, or unable, to fully protect a "right" because any meaningful remedy would be ineffective, even counterproductive. The right, abstractly expressed, might not seem too controversial until the Court considers the range of viable remedies. Few will argue in the abstract against "equal educational opportunity." But, equalizing public school payments could lead to more rich and middle-class flight out of the entire public school system, thereby increasing electoral opposition to increased funding of any public schools. Like it or not, the Court has sacrificed *Brown*'s broadest aspirations of equal, non-injurious education for African-Americans to the suburban public opinion. Only the "core" right of not being forced by the state to attend racially segregated public schools remains untouched.

While it is easy to criticize such opinions, liberals should be aware of the political costs of constitutionalizing their entire political agenda. Conservatives can develop a broader political coalition, combining social/religious conservatives, who are particularly irked by decisions like *Roe v. Wade*[406] and those banning prayers in schools,[407] with libertarians and free marketeers, who know their social rights will not be affected so long as the Court does not become too conservative or deferential. Although there seems little doubt that the American economy was the determinative factor,[408] William Jefferson Clinton might not have become President if the Court had not decided against homosexuals[409] in *Bowers v. Hardwick*,[410]

405. *See* Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489 (Tex. 1992) (striking down school financing legislation as imposing unconstitutional ad valorem tax); *see also* Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93 (1989). *But see* Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (striking down finance provision of state education act for insufficient provision for poorer school districts).

406. 410 U.S. 113 (1973).

407. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

408. *But see* Charles R. Morris, *"It's Not the Economy, Stupid,"* ATLANTIC MONTHLY, July 1993, at 49 (arguing that it is unrealistic to expect the President to have much influence over the economy).

409. *See generally* Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES, Oct. 18, 1992 (Magazine), at 18 (discussing the rising power of the gay electorate).

410. 478 U.S. 186 (1986).

threatened abortion rights in *Webster v. Reproductive Health Services*,[411] and gagged doctors in *Rust v. Sullivan*.[412] Many wealthy homosexuals and corporate feminists prefer the economic policies of the Republicans and the social politics of the Democrats. In the crucial electoral state of California, homosexuals make up an important part of the voting electorate.[413] A liberal, activist Supreme Court, with a firm majority, allows such swing voters to have it both ways. In other words, the Brennan-Marshall constitutional jurisprudence certainly made political sense to many, including this author. But if those two Justices had succeeded, they might have created a formidable conservative coalition that would dominate the country today. One of the ironies of the modern American system is that one of the political conservatives' best friends is an activist, liberal court.[414]

V. CONCLUSION

The primary question this Article has sought to answer is the role of public opinion in constitutional adjudications, theories, and controversies. This Article concludes that Justice Souter's *Casey* opinion is somewhat more consistent with American constitutional tradition than the views of Justice Scalia and Chief Justice Rehnquist, whose interpretive techniques echo Chief Justice Taney and Justice Sutherland in completely refusing to consider contemporary public opinion. It should not be very surprising that the Court has paid so much attention to public opinion over the years; our democratic system is premised upon popular sovereignty and public participation.

This Article has not offered any easy method, any three-prong test, to determine which definitions of public opinion should be admitted into constitutional adjudication and how much weight those definitions should be given. The Article only argues that public opinion does and should enter the multi-factored, balancing equation that is also known as constitutional law. I am certainly not recommending that the Court jettison all precedent and "principle," consulting only Gallup

411. 492 U.S. 490 (1989).

412. 111 S. Ct. 1759 (1991).

413. *See* Schmalz, *supra* note 409.

414. It is possible that there is some deep structure within the Constitution that tends to drive political issues back to the center, towards a political equilibrium.

polls. The Court must decide which "core" rights are largely immunized from public will. Public opinion, however defined, can lead to deadly outcomes.[415]

The Supreme Court is caught in a dilemma when engaging in crowd control.[416] If the Court refuses to consider public opinion, it can quickly generate opinions like *Dred Scott*, *Lochner* and even *Roe v. Wade*.[417] Even the two *Brown* decisions, which refused to let racist regional sentiment determine fundamental constitutional rights, compromised with those sentiments by implementing desegregation at "all deliberate speed."[418] Many of us do not want anyone to push their principles to logical extremes, ignoring external realities. More generally, it is doubtful that there are any absolute rights or absolute powers.[419] Yet, if the Court frequently includes elaborate assessments of the public mood in its opinions, the law becomes ever more indeterminate, a potentially thin shield against majority tyranny.

Part of the answer to this Polonius-like waffling lies in rhetoric. The Court writes opinions in part to convince the rest of us of the correctness of its decision.[420] There are many rea-

---

415. Gore Vidal recalled "in 1935 when the Nazis solemnly determined that anything is punishable if it was deserving of punishment according 'to the fundamental conceptions of penal law and sound popular feeling.' " *Gore Vidal, Sex and the Law, in* UNITED STATES: ESSAYS 1952-1992, at 530 (1993). Vidal also recounts "In response to public opinion, the Emperor Justinian made homosexuality a criminal offense of the grounds that buggery, as everyone knew, was the chief cause of earthquakes." *Id.* at 531. This leads him to conclude: "At any given moment, public opinion is a chaos of superstition, mis-information, and prejudice. Even if one could accurately interpret it, would that be a reason for basing the law upon a consensus?" *Id.* at 536.

416. For those of us who work in offices and work with words, preferring briefs to bombs, "public opinion" is frequently a polite metaphor for the mob: never completely knowable, always unpredictable, and potentially dangerous. "Public opinion" is the Other, the crowd that we lawyers try to control.

417. One of the risks of the plastic doctrine of substantive due process, whether practiced by the *Lochner* Court or the *Roe* Court, is that the Court can be tempted by early successes to miscalculate. For example, public acceptance of *Griswold*'s protection of contraception among married couples led the Court to believe the Country was also indifferent about abortion. The subsequent fury over *Roe* may help explain why the Court was later unwilling to protect homosexuals in *Bowers*.

418. Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*).

419. "For one thing, no principles of law, or of anything else, can be guaranteed good past the next revolution." GRANT GILMORE, THE DEATH OF CONTRACT 68 (1974).

420. "On every case which lawfully invokes the action of these powers, this Court, I trust, will not hesitate to exert it, that it will, by so doing, 'plant' itself in public opinion and confidence, on an 'impregnable position.' " Holmes v. Jennison,

sons why a Justice will reach a particular decision, but some are not rhetorically acceptable. Justice Blackmun may have reached his decision in *Roe* partially because he had been general counsel for the Mayo Clinic. Justice Scalia's hostility to *Roe* may reflect his Catholicism. Justice Kennedy allegedly changed his mind in *Casey* because of letters from a pro-choice nun.[421] The Justices need not always put such "reasons" into opinions.[422] The Court has a duty to tell the truth about the reasons it chooses, but it need not tell the whole truth.[423] The Court must present arguments that the public will accept, reasons that almost certainly will change over the decades. Justice Souter's remarkable degree of candor should be seen as an exception to the rules of constitutional discourse.

Ironically, the American people seem to prefer a Court that does not expressly ground its opinions on public opinion, at least most of the time. The public wants its Constitution and Court to be both predictable and largely immune from momentary public passions. However, the public expects its Constitution to respond to fundamental shifts in cultural consciousness. Consequently, the Court needs to be aware of the public mood but should not try to calibrate its opinions too finely. The Court takes a longer-term view of the political process, sometimes forcing the majority to develop a supermajority through the amendment process to overrule judicial decision or at least to develop a political coalition that can eventually transform the Court through presidential appointments. The additional time and energy needed to accomplish such goals may generate enough reflection to prevent the creation of odious constitutional text or doctrine.[424]

Whether American lawyers like it or not, we live in a culture that is saturated by many forms of public opinion.[425] The

---

39 U.S. (14 Pet.) 540, 632-33 (1840) (Baldwin, J., concurring) (appendix II).

421. David G. Savage, *The Court's Rescue of* Roe vs. Wade, L.A. TIMES, Dec. 13, 1992, at A1, A22.

422. It is both hard and undesirable to weed all doctrinal formalism out of constitutional adjudication. *See* Wilson, *supra* note 306.

423. *But see* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

424. *See* Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895) (invalidating federal tax on real and personal property as unconstitutional unapportioned direct tax).

425. The role of public opinion helps answer Professor Bobbit's argument that constitutional judging can be reduced to judicial "conscience," PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION (1991), and Professor Tushnet's emphasis on charac-

public will eventually repudiate or constrain unpopular judicial developments. Examples range from *Lochner*'s substantive due process, to Justices Brennan's and Marshall's attempts to constitutionalize liberal social policy, to anger by doctors, feminists, and libertarians over the Rehnquist Court's unwillingness to protect abortion rights by permitting the federal government to "gag" abortion speech in federally funded clinics in *Rust v. Sullivan*.[426]

Denial is not the answer. Better to admit that constitutional adjudication is a difficult process that involves both compromise and guesswork. The Court needs to decide which issues, if any, should be influenced by public opinion. It then needs to define which "public opinion" it is considering, to determine what that public believes, to establish the weight to be given such opinion, and to conclude whether it should expressly discuss public opinion at all. Adding these questions to all the other factors the Court must consider demonstrates the complex process that lies behind the phrase "constitutional interpretation."

All of which brings us full circle to Justice Souter's *Casey* opinion. Using a balancing approach, the "undue burden" test, he closely analyzed Pennsylvania's statutory constraints on abortion rights, upholding an informed consent provision[427] but striking down a spousal notification section.[428] Such compromises will not satisfy those who believe that a woman's autonomy or bodily integrity generates an absolute right to abortion.[429] Abortion opponents will be even more distraught

---

ter, Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992). Admittedly, character and conscience are very important: "The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work." Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951). But public opinion constrains the choice of judicial arguments and judicial outcomes. Judges who stray face reversals if they sit on lower courts, derision on and off the bench, declining influence over future cases caused by lack of respect and cooperation, and even impeachment in extreme situations.

426. 111 S. Ct. 1759 (1991). One of President Clinton's first decisions was to eliminate the regulation establishing the gag rule. Robin Toner, *Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES, Jan. 23, 1993, § 1, at 1.

427. *Casey*, 112 S. Ct. at 2824-26. The joint opinion also upheld a record-keeping requirement. *Id.* at 2832-33.

428. *Id.* at 2826-31.

429. *Casey* states: "Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand." *Id.* at 2826.

because the states must permit most abortions. Legal purists can condemn the decision for being "unprincipled," arguing that either the woman has the right or the state has the power. But just as Justice Powell forged a doctrine that satisfied, at least for a while, much of the country in *Bakke*, so Justice Souter may have created a solution that will defuse the abortion controversy. If so, his opinion will have been, at least for some of us, a triumph.