New Voices

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Have you ever read a truly excellent student paper and thought to yourself that it was better than a lot of the law review articles you've read recently? "You ought to publish that paper," you tell the student.

Easier said than done.

Students rarely have the time to repackage last semester's research for submission to law reviews. Even if they do, law reviews are loathe to publish work submitted by students. Publication in a peer-reviewed journal is unlikelier still.

continued inside . . .

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Volume 1 • Number 1 • Spring 2014

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INTRODUCING *NEW VOICES*

Suzanna Sherry[†]

Have you ever read a truly excellent student paper and thought to yourself that it was better than a lot of the law review articles you've read recently? "You ought to publish that paper," you tell the student. Easier said than done. Students rarely have the time to repackage last semester's research for submission to law reviews. Even if they do, law reviews are loathe to publish work submitted by students. Publication in a peer-reviewed journal is unlikelier still.

Enter *New Voices*. Our best students are the next generation of scholars, the academic farm team as it were. If we can identify and nurture them early, perhaps they will produce better scholarship down the road. And reading their work can invigorate our own, by allowing us to see things in a fresh new light. There's nothing like a neophyte for pointing out the emperor's lack of clothes or rekindling the wonder of ideas that have begun to seem trite or commonplace. *New Voices* will collect and publish these early gems.

Here's how it works: When you come across a student paper (whether for a seminar, a research project, or whatever) that you think deserves publication, send it, preferably in Word, to the *New Voices* editor(s).[1] Please be sure to get the student's permission first, and include the student's contact information as well as your own. Please also include a few words of your own – anything from a paragraph to a couple of pages – explaining why the piece is worth reading, and, if necessary, any background information you think

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[1] Currently, that's just me: Suzanna Sherry, Vanderbilt University Law School, new.voices @vanderbilt.edu.

valuable to the reader. For examples of both types of explanations, see the first issue, which follows this introduction. We'll let both you and the student know as quickly as possible whether we can publish the paper (along with your explanation as a preface). How quickly depends on how inundated we are with submissions, something that is impossible to predict right now.

Shorter student papers are preferred; if necessary, the *New Voices* editorial team[2] will excerpt the meat of the paper. The editorial team will also edit the paper and the preface (lightly) as needed, subject, of course, to permission of the respective authors.

And there it is. The next time you read a student paper that ought to be published, you can do something about it. Let the submissions begin!

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[2] See note 1, supra. *New Voices* also has one student senior editor. I might add other faculty or students to the team.

WHOSE MAJORITY IS IT ANYWAY?

ELITE SIGNALING AND FUTURE PUBLIC PREFERENCES

Will Marks[†]
with a Preface by Suzanna Sherry[*]

PREFACE

This paper and the two that follow come from a seminar I taught in the fall of 2013 on Judicial Activism. The students read excerpts from books and articles about judicial review, judicial activism, and the role of the courts in a democracy. Each student was required to submit four papers (of at least ten pages each, not more than half of which could be description) in response to the assigned readings. The students were free to choose which weeks they wanted to write, and the papers were due at the beginning of that week's class. Incidentally, I highly recommend this format for a seminar: the papers kept all the students engaged throughout the semester, and the students who wrote for any particular week tended to be particularly active in the discussion.

We spent two weeks, late in the course, discussing Barry Friedman's *The Will of the People* and several commentators on that book. This paper by Will Marks focuses largely on those readings.

Marks criticizes both Friedman's theory that the Court follows popular opinion and the response by Lawrence Baum and Neal Devins that the Court follows elite opinion.[a] Marks argues, using gay rights

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[a] Lawrence Baum & Neal Devins, *Why The Supreme Court Cares About Elites, Not the American*

as an example, that what the Court is *really* doing is trying to divine *future* public opinion – to maximize both the Court's institutional legitimacy and individual justices' historical legacies. Of course, as he points out, predicting the future is a risky business with substantial costs. All in all, Marks first suggests, then descriptively supports, and ultimately normatively criticizes, a novel approach to describing the interaction between the court and popular opinion. A fine addition to the literature, and something that deserves further study.

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I.
INTRODUCTION

Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger*[1] upholding the University of Michigan Law School's race-conscious admissions policy ended with an important proviso. "We expect that 25 years from now," proclaimed Justice O'Connor's "sunset"[2] provision, "the use of racial preferences will no longer be necessary to further the interest approved today."[3]

In one sense, the Court was giving much-needed direction to colleges and universities across the country: "Affirmative action in admissions is acceptable – but only for so long." In another sense, however, one could say that the Court was speaking to Americans of the future: "This opinion is the product of the time in which it was decided and need not be binding upon future generations." In both senses, though, Justice O'Connor appears to have been appealing to popular opinion at some level; a twenty-five-year limit on the Constitution's meaning seems to have no firm foundation in the Constitution itself.[4]

People, 98 GEO. L.J. 1515 (2010).

[1] 539 U.S. 306 (2003).

[2] Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1238 (2004).

[3] *Grutter*, 539 U.S. at 343.

[4] *See generally* Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Duration Limits in* Grutter, 67 OHIO ST. L.J. 83, 134-35 (2006) (arguing that the reading of *Grutter*'s sunset provision as setting up a firm deadline conflicts with judicial precedent interpreting and policy rationales underlying the Equal Protection Clause).

The notion that popular opinion shapes outcomes at the Supreme Court is controversial. In his recent book *The Will of the People*, Professor Barry Friedman argues that the Court's holdings closely align with public majority opinion in important cases.[5] But as many of Friedman's critics have noted, this cannot be the whole story – the Court has been truly counter-majoritarian too many times for things to be so simple.[6]

In a twist on Professor Friedman's thesis, Professors Lawrence Baum and Neal Devins argue the Justices largely follow the opinions of society's elites, rather than popular opinion generally.[7] That, however, seems problematic as well. True, in some major cases involving hotly contested issues in which the Court did not follow popular opinion, "elites" (defined as those having some postgraduate education) tend to support the Court's opinion more than does the overall populace.[8] But the authors' data reveal that, in several seminal cases, not even a majority of elites supported the outcome.[9] Is it simply false to suggest that, as a descriptive matter, the Court considers the policy preferences of *any* lay groups?

This paper defends the thesis that lay opinion influences Supreme Court decision-making while attempting to explain why neither those who claim the Court follows public opinion generally nor those who focus instead on elite opinion fully describe the role of lay opinion in many of the Court's significant decisions. The paper focuses especially on cases whose outcomes do not align with the preferences of *either* a majority of the general public or a strong majority of elites. Both theories have missed the mark, this paper posits, because each fails to acknowledge the particular way in which both types of opin-

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[5] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 374 (2010).

[6] *See, e.g.*, Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 151 (providing some examples of Court striking down, in one decision, the laws of a majority of states); William E. Forbath, *The Will of the People? Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1202-06 (2010) (arguing that the Court's slew of pro-business opinions undermines Friedman's arguments).

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

[8] *Id.* at 1571 (recounting popular and elite opinion on seven seminal civil liberties cases).

[9] *Id.*; *see also infra* note 27 and accompanying text.

ion play an important role in counter-majoritarian cases.

This paper more specifically suggests that the Justices use elite opinion as a signal to identify *future general public preferences*. Just as Justice O'Connor looked to the future in *Grutter*, the Justices often attempt to forecast what future majorities will desire by considering social trends rather current polling numbers. One way in which the Justices do this, the paper will explain, is by assuming that elite opinion precedes and guides general popular opinion. A trend in elite opinion thus likely signals future majority public support. The Justices, accordingly, may use elite opinion to decide difficult cases consistently with their prediction about how the tides of general public opinion will turn.

II.
CURRENT THEORIES OF POPULAR OPINION AND JUDICIAL REVIEW

A. Does the Court Follow Today's Public Preferences?

Alexander Bickel's "counter-majoritarian difficulty" – the perceived tension that exists when members of an unelected judiciary invalidate laws enacted by a democratically elected legislature[10] – has long been a primary issue underlying debates over the propriety, scope, and limits of judicial review.[11] Some scholars, however, reject the assumption on which the counter-majoritarian difficulty rests: that the Court *is* counter-majoritarian. In one of the most recent works from this band of academic iconoclasts, Barry Friedman's *The Will of the People* surveys the modern Court and concludes that the Court in fact usually follows the policy preferences

[10] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006) (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1986)).

[11] Solving the counter-majoritarian difficulty seems to be what underlies both empirical analyses of judicial activism, *see, e.g.* Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752 (2007), and many scholars' "grand theories" of constitutional interpretation, *see, e.g.* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002) (deconstructing grand theories).

of the general public.[12] Marshaling a sea of polling data, and focusing on the Rehnquist Court in particular, Friedman argues that, from the *Casey v. Planned Parenthood* opinion upholding *Roe v. Wade*,[13] to the *Lopez v. United States* case striking down the federal Gun-Free School Zones Act on Commerce Clause grounds,[14] to the *Adarand Constructors, Inc. v. Peña* opinion limiting governmental use of affirmative action,[15] the Court's opinions on controversial issues typically follow public desires. The counter-majoritarian difficulty, then, is really no difficulty at all.

But as myriad commentators have responded, a host of significant decisions really do disagree with public opinion. A quick glance at the public response to *Brown v. Board of Education* should alone prove the point.[16] There are, however, many other examples. Decisions that line constitutional-law casebooks, including those on school prayer, flag burning, sodomy, and affirmative action, are all inconsistent with majority preferences.[17] It seems impossible, moreover, to rationally argue that the widely despised *Citizens United v. FEC* decision is consonant with public opinion.[18] It appears, then, that there is still some difficulty left to resolve when it comes to counter-majoritarian judicial review.

B. Does the Court Follow Today's Elite Preferences?

What if the Court follows not *public* preferences, but *elite* preferences? After all, the Justices mostly grew up in the upper echelons of American society, attending some of the nation's most prestigious schools.[19] Perhaps the Justices are most concerned with "self-

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[12] FRIEDMAN, *supra* note 5, at 14-15, 324.

[13] *Id.* at 329-30 (discussing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

[14] *Id.* at 330-31 (discussing United States v. Lopez, 514 U.S. 549 (1995)).

[15] *Id.* at 326-27 (discussing Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)).

[16] *See* L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 866-70 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) and describing the violent, disobedient Southern response to Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[17] *See* Baum & Devins, *supra* note 7, at 1571.

[18] *See generally* Pildes, *supra* note 6, at 111-14 (detailing the public response to Citizens United v. FEC, 558 U.S. 310 (2010)).

[19] Baum & Devins, *supra* note 7, at 1537 ("[T]he Justices are 'sheltered, cosseted,' and

presentation" to similarly elite audiences.[20]

Professors Baum and Devins have argued just that. Employing social psychology, they explain that the Justices "are not single-minded pursuers of their preferred policy positions; instead, they adopt legal policy positions that take account of both their ideological and personal preferences."[21] These personal preferences include a "reluctan[ce] to disappoint [the Justices'] respective reference groups," groups with whom the Justices identify.[22] These reference groups, the authors continue, consist of elites in the legal academy, the news media, and political or judicial interest groups.[23]

The crux of this argument is that the Justices do care about pleasing a majority, but the relevant majority is that of the particular elite groups whose opinions they value and whose esteem they seek.[24] This, Professors Baum and Devins explain, is true whether or not an individual Justice is particularly partisan. More ideological Justices may look to ideological groups – such as the Federalist Society or the American Constitution Society – for guidance.[25] Yet the same is true with moderate or "swing" Justices, although their desire may be to "cultivate reputations of neutrality and amenability to persuasion by groups with disparate ideological positions."[26]

Sometimes, however, the Court's decisions do not align even with elite opinion. Baum and Devins report, for example, that of "elite" public opinion survey participants – those having at least some postgraduate education – only 41.4% supported the Court's school-prayer decision in *Engel v. Vitale*, 44.1% supported the flag-burning decision in *Texas v. Johnson*, and 43.0% supported the *Grut-*

'overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation's more elite universities . . . .'" (quoting RICHARD POSNER, HOW JUDGES THINK 306 (2008) and Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189 (1998))).

[20] *See id.* at 1537-44 (identifying the Court's core elite constituencies).

[21] *Id.* at 1533-34.

[22] *Id.* at 1534.

[23] *Id.* at 1537-44.

[24] *Id.*

[25] *Id.* at 1534-35, 1541-42.

[26] *Id.* at 1536 (discussing the outsized attention on and power of Justices O'Connor and Kennedy).

ter opinion.[27] The Supreme Court, in other words, is often countermajoritarian even with regard to the elites who form the Justices' reference groups.

Why is this so? One possibility is that the Justices' reference groups may be even more elite than those with some postgraduate education, and the Court's decisions in fact align with "über-elite" opinion. This could especially be true with respect to decisions about gender equality, gay rights, free speech, and reproductive rights, since those decisions tend to lean towards the left, and at least with respect to those issues, "people with more education are more likely than other Americans to take positions that are typically identified as liberal."[28] But in some cases, the preference gap between "elites" and "über-elites" would need to be almost ten percent for this explanation to have traction.[29] That is perhaps possible, but such a large swing seems unlikely considering that "elites" (as defined by Baum and Devins) already start at such high levels of educational attainment.

It might seem, then, that the Justices do not care about public opinion at all. That certainly might be true of some,[30] but the Justices are people too, so they probably do consider at some level how the public, their social and professional circles, the academy, the news media, or even the history books will think of them. What we need, then, is an account of how public opinion shapes Supreme Court decision-making that does not require a current majority of either the public or elites to support the Court's decision. This paper now attempts to provide such an account.

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[27] *Id.* at 1571.

[28] *Id.*; *see also Beyond Red vs. Blue Part 3: Demographics, Lifestyle, and News Consumption*, PEW RESEARCH CTR. (May 10, 2005), http://perma.cc/H2U7-RXVG ("Liberals have the highest education level of any typology group – 49% are college graduates and 26% have some postgraduate education.").

[29] *See supra* text accompanying note 27 (revealing the elite-support data for school prayer and affirmative action).

[30] Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (October 6, 2013), http://perma.cc/7JD-XY6H ("I don't know [how I will be regarded in the future]. And, frankly, I don't care. . . . I have never been custodian of my legacy. When I'm dead and gone, I'll either be sublimely happy or terribly unhappy.").

III.
A MIDDLE WAY: CURRENT ELITE OPINION AS A SIGNAL FOR FUTURE PUBLIC OPINION

A. How Does the Signaling Mechanism Work?

In *The Will of the People*, Barry Friedman oscillates between utilizing current polling numbers and speaking of "social trends." Friedman specifically notes, for example, that a more accurate version of his thesis is that "the justices were following *social trends* and by so doing were often deciding cases consistent with public opinion."[31] He later notes that the Rehnquist Court, although it may have broken from the American majority at certain times, was "following *cultural trends* with remarkable steadfastness."[32] "[T]he Court," he says, "looked to be tracking public reaction to rapidly *developing events*."[33] Perhaps, then, what the Rehnquist Court was following was not the state of current public opinion, but the *perceived direction* of the tide of public opinion.

The Justices, however, are not soothsayers; they need some way to discern what public opinion will be years in the future. This is where elite opinion can play a role. Since the 1960s, the American public has become more progressive with respect to many individual rights, especially reproductive rights, racial equality, gender equality, and sexual-orientation equality. And elites, being more liberal than the overall public, generally lead the way. It was liberal elite whites, after all, who supported *Brown*;[34] now the opinion is possibly the most popular of all time. It was liberal elites, too, who supported *Roe v. Wade*;[35] by the time *Casey* was decided, the public had fol-

[31] FRIEDMAN, *supra* note 5, at 354 (emphasis added).
[32] *Id.* at 359 (emphasis added).
[33] *Id.* (emphasis added).
[34] JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 1-2, 9-10 (2001) (conveying the arguments of liberal whites, including President Harry Truman, who sought to end desegregation).
[35] Eric M. Uslaner & Ronald E. Weber, *Public Support for Pro-Choice Abortion Policies in the Nation and States: Changes and Stability After the* Roe *and* Doe *Decisions*, 77 MICH. L. REV. 1772, 1777 (1979) (showing that in December 1972, only 46% of the general public sup-

lowed along.[36] And finally, it is elites who have most championed gay rights,[37] and it seems again that public opinion is following.[38]

Both the public-opinion and elite-opinion scholars may therefore be correct. The Justices often do care about public opinion – not so much what today's majority thinks, but rather what majorities in the future will think. And to determine what those future majorities will think, Justices look to policy groups, members of the media, and academics they respect – all potential vanguards of future policy preferences. This effect, of course, is likely subconscious, just as most social psychological effects are. The Justices may simply interact with the elite and unwittingly envision those elites' opinions as necessarily ahead of the curve. That, however, does not diminish the effect. If the Justices see a social trend that they forecast into to the future, that vision may shape case outcomes.

B. One Example of the Signaling Effect in Action: Windsor *and Gay Marriage*

A 2012 Gallup poll indicated that exactly fifty percent of the population favored legal validation of same-sex marriages.[39] But at the time of *Windsor v. United States*, only twelve states and the District of Columbia permitted such marriages.[40] Thus, despite the Gallup numbers, less than a third of the U.S. population lived in a state

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ported legalizing abortion, as compared to 63% of those with at least a college education).

[36] FRIEDMAN, *supra* note 5, at 329 (showing that, two years before the *Casey* decision, a majority of the population opposed overturning *Roe*).

[37] *See* Baum & Devins, *supra* note 7, at 1571 (indicating that as of 2003, 75.6% of persons polled with at least some postgraduate education thought that private, adult homosexual relations should be legal, compared with a bare majority of people with lower levels of education).

[38] Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What it Means*, N.Y. TIMES FIVETHIRYEIGHT BLOG (Mar. 26, 2013, 10:10 AM), http://perma.cc/9ZVB-GL39 (showing clear trend from mid-1990s of increasing support for same-sex marriage). The trend, indeed, is quite pronounced: Silver's data reveal that the polling numbers for supporters and opponents of same-sex marriage have inverted over the past decade. *See id.*

[39] Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP (May 8, 2012), http://perma.cc/FP7P-M7A2.

[40] 133 S. Ct. 2675, 2689 (2013).

where gay marriage was legal when *Windsor* came down.[41] What the majority of Americans really wanted at that moment is thus unclear, but for argument's sake, let's say the country was split precisely down the middle. The *Windsor* Court could not therefore have been siding with majoritarian opinion – no majority existed on the issue of gay marriage.

It is difficult, moreover, to gather precisely where elite opinion lay. The same Gallup poll cited above explains that fifty-seven percent of college graduates favored gay marriage.[42] The study's margin of error, however, is three percentage points;[43] thus, the elite preference number could have been as low as fifty-four percent of college graduates. So elites do favor gay marriage more than the rest of the population, but not by a lot. It even could be fair to argue that, with the conservative-leaning Roberts Court, the majority of elites in the current Justices' reference groups might fall on the other side of the fifty-percent threshold.

So what did the Court do in *Windsor*? A majority of the Justices, led by Justice Kennedy, struck down the Defense of Marriage Act ("DOMA") as a violation of the equal-protection component of the Fifth Amendment's Due Process Clause because, the majority believed, the Act's passage was based primarily on animus towards gays and lesbians.[44] The Court did not, of course, determine the issue of gay marriage once and for all – it dodged that issue in *Perry v. Hollingsworth*.[45] But at least according to Justice Scalia's dissent,

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[41] I used Google's population data to calculate this figure. Rounding to the nearest 100,000 people, the total U.S. population is 314.0 million. When the Court handed down *Windsor*, twelve states had legalized same-sex marriage. *See* Caitlin Stark & Amy Roberts, *By The Numbers: Same-Sex Marriage*, CNN (Aug. 29, 2012), http://perma.cc/APS4-6R6G (noting that, as of June 2013, twelve states permitted same-sex marriage). The population of all states where gay marriage was then legal, therefore, was approximately 94 million. Thus, roughly thirty percent of the population lived in a gay-marriage state when *Windsor* came down.

[42] Molly Ball, *Poll of the Day: America's Gay-Marriage Evolution*, THE ATLANTIC (May 8, 2012, 12:01 PM), http://perma.cc/YYA2-G7RP.

[43] *See supra* note 39.

[44] *See generally* Windsor v. United States, 133 S. Ct. 2675 (2013).

[45] 133 S. Ct. 2652, 2661-63 (holding that the proponent of a California ballot initiative banning gay marriage in the state did not have standing to appeal a federal district court's invalidation of that initiative).

Justice Kennedy's rationale in *Windsor* could apply directly in a head-on challenge to a state-law gay-marriage ban and might spell such a ban's defeat.[46] This may not turn out to be so. But if the Court was willing to accuse Congress of acting out of animus against homosexuals when passing DOMA despite at least plausible rational bases for enacting the law,[47] then surely it will not hold back when it comes to state laws, which the Court has always invalidated more frequently than federal laws.[48]

Of some significance, too, the *Windsor* Court ignored a long-standing, albeit weak, precedent on the issue of gay marriage. In the 1972 case *Baker v. Nelson*, the Court dismissed in a one-sentence order an appeal seeking to locate a right to gay marriage in the Constitution as lacking a substantial federal question.[49] As one lower court has subsequently recognized, *Windsor*'s refusal to rely on *Baker* amounted to a sub silentio reversal.[50] *Baker*'s unsigned jurisdictional dismissal is obviously not of much precedential significance, but the reversal, at least according to the Court's stare decisis jurisprudence,[51] indicates that something besides mere legal opinion changed between 1972 and 2013.

To summarize: Polls suggest that, when the Court handed down *Windsor*, the populace was split down the middle on the issue of gay marriage. Elites, at least defined as those with college educations,

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[46] *See Windsor*, 133 S. Ct. at 2709-10 (Scalia, J., dissenting) (explaining why, in his opinion, the majority's reasoning will necessarily lead to the invalidation of state-law bans on gay marriage).

[47] *See id.* at 2708 (explaining potential rationales for DOMA rooted in conflict-of-laws issues and desired preservation of the original intent of pre-same-sex-marriage legislation).

[48] *See* Pildes, *supra* note 6, at 149-154 ("Most of the laws the Court invalidates are state laws. By one count, for example, the Burger Court struck down ten times as many state as federal laws; the Warren Court, seven times as many.").

[49] *See* 409 U.S. 810, 810 (1972) (dismissing appeal from Minnesota Supreme Court on issue of gay marriage for "want of a substantial federal question").

[50] *See* Kitchen v. Herbert, 2013 WL 6697874, at *8-9 (D. Utah Dec. 20, 2013) (invalidating Utah's ban on same-sex marriage).

[51] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854-55 (1992) (explaining the Court's stare decisis jurisprudence). *But see id.* at 881-85 (arguably not applying the stare decisis doctrine just announced when overruling City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983) and Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 474 (1986)).

favored gay marriage, but not overwhelmingly so. Still, the Court issued an opinion whose rationale appears to spell doom for gay-marriage bans. In so doing, Justice Kennedy's majority opinion expressly noted the recent public opinion shift regarding gay marriage. And finally, the Court tacitly overruled its own precedent in the process. What gives?

The elite-signaling thesis explains the story. Regardless of the ambivalence of public opinion polls, the direction of popular preference appears to be decidedly pro-gay rights. As Justice Kennedy explained in *Windsor*, "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[52] He continued to explain that while some were outraged by this challenge to traditional social mores, "others, however, came [to] the beginnings of a new perspective, a new insight."[53]

The cultural trend, in other words, is towards legalizing gay marriage, even if at the time of *Windsor* it lacked majority support. This comports with the change from *Baker* to *Windsor*: the issue of gay marriage did not even warrant federal jurisdiction forty years ago; now, the Court concluded that a law prohibiting federal benefits to married gay couples was based on nothing but animus. In the meantime, when *Lawrence v. Texas* was decided, roughly half of the country thought homosexual relations between consenting adults should be legal, as did three-fourths of elites.[54] At bottom, then, the social *trend* of gay rights is not split fifty-fifty, despite current polling numbers.[55]

What Justice Kennedy did, one could thus argue, was look at the trend, realize (whether consciously or not) that elite opinion has led the way, and conclude that future majorities would support his opinion on DOMA even if a current majority did not now. In light

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[52] *Windsor*, 133 S. Ct. at 2689.

[53] *Id.*

[54] Baum & Devins, *supra* note 7, at 1571-72 & n.319.

[55] *See* Silver, *supra* note 38.

of his reputation for concern about his public image,[56] it is possible to surmise that Justice Kennedy went beyond current public (or even elite) opinion and looked to elite opinion to foreshadow future public policy preferences.

Obviously, the gay-marriage example only considers one Justice on one discrete issue. Teasing the elite-signaling thesis out of other case examples is unfortunately beyond this paper's scope. I believe, however, that the Justices have likely used elite opinion to anticipate future public opinion in myriad cases, including *Lawrence v. Texas*,[57] *Roe v. Wade*,[58] *Griswold v. Connecticut*,[59] and *Brown v. Board of Education*.[60] The thesis does not work in all cases, however: elites support physician-assisted suicide, as does a small majority of the general public,[61] but the Court declined to follow along in *Washington v. Glucksburg*.[62]

IV.
RATIONALES AND IMPLICATIONS

A. Why Would Justices Want to Follow Future Public Opinion?

Three main rationales might account for why the Justices may at times appeal to future public opinion: (1) institutional legitimacy, (2) personal historical status, and (3) recognition of a constitutional decision's duration. This paper will consider the first two together before turning to the third.

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[56] *See, e.g.*, Michael Klarman, Op-Ed., *Gay Rights May Get its* Brown v. Board of Education, N.Y. TIMES (Oct. 11, 2012), http://perma.cc/P2G6-UE7G ("Justice Kennedy's opinions often suggest that he wants to be on the right side of history, which matters greatly here because the future of gay marriage in America is so clear.").

[57] 539 U.S. 558 (2003).

[58] 410 U.S. 113 (1973).

[59] 381 U.S. 479 (1965).

[60] 347 U.S. 483 (1954).

[61] Joseph Carroll, *Public Continues to Support Right-to-Die for Terminally Ill Patients*, GALLUP (June 19, 2006), http://perma.cc/JE33-5GRE (finding that fifty-eight percent of all respondents and seventy percent of college graduates "support doctor assisting patient to commit suicide").

[62] 521 U.S. 702 (1997).

1. Institutional Legitimacy and Personal Historical Status

"Institutional legitimacy" refers to the public's willingness to defer to the Supreme Court's interpretation of the Constitution. Presumably, the more out of sync the Court is with societal norms, the less legitimate the Court will be in the public's eyes.[63] "Personal historical status" refers to how positively or negatively future generations view a public official. This status falls on a spectrum from being elevated to the status of a mythical hero, as George Washington, to being widely despised as an utter failure, as Warren Harding.

If Baum and Devins are correct that the Justices are normal people to whom the basic insights of social psychology apply,[64] then the Justices would naturally wish to maximize both the Supreme Court's legitimacy and their own personal historical status. By making the Supreme Court more legitimate, the value of a Justice's service increases in the Justice's own eyes, his or her reference group's eyes, and, ultimately, the nation's eyes. And maximizing personal historical status is a Justice's way of controlling his or her legacy while still alive.

The drive to increase institutional legitimacy and personal historical status is reinforced by "right side of history"[65] arguments, which praise or condemn individuals based on whether their actions are viewed by later generations as correct. In the judicial sphere, these arguments stem from a handful of cases, two of which are most significant: *Dred Scott v. Sandford*[66] and *Brown v. Board of Education*.[67] In the 1856 *Dred Scott* decision, Chief Justice Taney felt that he was smoothing over the battle between slave and free states by leading a majority of Justices to rule that no slave could ever be a citizen.

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[63] *Cf.* Larry D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 247-48 (2004) (arguing for the removal or severe limiting of the Supreme Court's role in interpreting the Constitution as a reaction against perceived illegitimate decisionmaking of the Rehnquist Court).

[64] *See* Baum & Devins, *supra* note 7, at 1532-33 (applying universal social psychology concepts to the Justices).

[65] *See, e.g.*, Barack Obama, Press Briefing (June 23, 2009), *available at* http://perma.cc/6MQ2-6GW7 ("[T]hose who stand up for justice are always on the right side of history").

[66] 60 U.S. 393 (1856).

[67] 347 U.S. 483 (1954).

Many now regard this as one of the worst cases in American legal history.[68] *Brown*, on the other hand, in which Chief Justice Earl Warren led a unanimous Court to rule that segregated public schools violated the Fourteenth Amendment, is so lauded that its outcome is now invoked as a litmus test for the validity of any jurisprudential theory.[69] Justices almost certainly want to avoid dragging the Court (and the country) through another *Dred Scott*, and they want to write the next generation's *Brown*.

One way the Justices can avoid becoming the next Chief Justice Taney is by considering how a future America will evaluate their decisions in landmark cases. Over the past seventy years, the liberal elites have generally ended up on the "right side of history," at least in the sense that they have generally foreshadowed future public opinion. By using elite opinion as a signal for future public opinion, a Justice can take a small amount of comfort that the history books will not teach future generations about his or her judicial misdeeds.

2. Duration of Constitutional Decisionmaking

One other possibility is that the Justices consider future public preferences because most Supreme Court interpretations of the Constitution endure for many decades, even centuries. Considering the general difficulty of the amendment process and the relative infrequency of the Court overruling its own constitutional precedent, the Justices may take special care to ensure that any decision rendered today will still garner support in the future. This rationale is tied to the institutional legitimacy rationale in a way: ensuring that

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[68] *See, e.g.*, OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 889 (Kermit L. Hall, ed., 2d ed. 2005) ("American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court."); Mark S. Brodin, Bush v. Gore: *The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563, 563 (2012) (labeling Bush v. Gore, 531 U.S. 98 (2000), and *Dred Scott* as the two worst Supreme Court decisions in history); *Four Worst Supreme Court Decision of All Time*, POLICYMIC (Mar. 9, 2013), http://perma.cc/6Z58-AXV2 (listing *Dred Scott* in the number-one slot).

[69] *See* William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1261-64 (2011) (explaining why *Brown* is a benchmark against which jurisprudential theories should be measured).

future generations will respect and value a longstanding Supreme Court precedent cements the Court's legitimacy.

Another line of reasoning under this rationale considers the pure self-interest of the Justices. The average Supreme Court Justice sits for about eighteen years.[70] The average tenure thus spans at least three different presidential administrations and may sweep across vast changes in American culture or world history. Some justices sit much longer – Justice Douglas sat for thirty-six years[71] and Justice Stevens for thirty-four.[72] Attempts to predict how future majorities might respond to an opinion could be motivated by a desire to avoid future criticism if the Justice sits long enough to witness major societal changes.

B. What Does This Mean for the Counter-Majoritarian Difficulty?

There are some clear benefits to the Court anticipating public opinion, as long as it predicts correctly. First, doing so in the civil rights realm ensures that disadvantaged groups gain protected status, and thus avoid discrimination, more quickly than they would if progress were tied solely to the generally slow movement of popular opinion. If a Justice is convinced that the tide is changing anyway, then protecting individual liberties sooner might be desirable. Second, this approach might improve the Court's legitimacy and create public confidence in the Constitution and the rule of law. Many look back on *Dred Scott* and question the Supreme Court's moral compass, but if they look to *Brown*, they might trust that good eventually prevails under our system. Finally, this approach allows the Court to lead society into the future without being completely counter-majoritarian: popular opinion plays a significant role, just not a direct one. We need not worry so much about the counter-majoritarian problem if the people are going to end up agreeing with the Court all the same.

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[70] Pildes, *supra* note 6, at 118.

[71] *William O. Douglas*, OYEZ, http://perma.cc/S3MD-Z2KC (archived Jan. 26, 2014).

[72] *John Paul Stevens*, OYEZ, http://perma.cc/VD6N-22VM (archived Jan. 26, 2014).

There are costs, though, too. Most obviously, the Justices do not always predict correctly. Remember, Chief Justice Taney thought he was doing the nation a great favor in *Dred Scott*. Additionally, if the Court uses elite opinion as a signal for future public opinion, it will usually lock in increasingly liberal cultural norms. It seems to me that we are still, at least in some ways, in the liberal wake of the 1960s. Whether there will be a future conservative cultural shift as strong as the sixties remains to be seen. Hitching future public majorities to current elite trends in opinion, however, may thwart a strong future change in the political and cultural winds.

And even if the Justices do generally guess correctly, there are still substantial costs. Having the Justices decide what the people want before the people actually reach their own conclusions will strike many as both paternalistic and deterministic. Once the Justices have constitutionalized an issue, there is almost no going back. Further, the process of working out contentious issues through the democratic process may provide a sense of resolution and closure that society desperately needs.[73] Constitutionalizing an issue based on anticipated future public preferences stops the swinging pendulum that our society may need to settle on an ultimate resting place. Public opinion may move strongly in one direction for a while but may come swinging back even further in the future. The judiciary correctly anticipating the first wave and settling public opinion with a constitutional decision might erroneously forestall the next wave.

In the end, the popular constitutionalist movement may provide a valuable insight. The Founders believed that the aim of government is to help the people create a society that protects core rights but operates primarily democratically.[74] The Constitution and the

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[73] *Cf. Justice Ruth Bader Ginsburg Offers Critique of* Roe v. Wade *During Law School Visit*, U. CHI. L. SCH. (May 15, 2013), http://perma.cc/LC2Z-WL45 ("'My criticism of Roe is that it seemed to have stopped the momentum on the side of change,' Ginsburg said. She would've preferred that abortion rights be secured more gradually, in a process that included state legislatures and the courts, she added.").

[74] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[A]ll men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their powers from the consent of the governed . . . .").

American government ultimately belong to the people, and it is for the people to determine how they wish to protect their fundamental rights. But the more the government stands in the way of the people's changing social and cultural mores, the less legitimate and less useful government becomes. Perhaps, then, there are some times when the Court should anticipate future public opinion and use it as a guide to solving some of our society's most significant issues. Unfortunately, constructing a method for deciding exactly when that anticipation is appropriate seems challenging, to put it lightly. In the end, whether that fact alone leads to the rejection of consideration of anticipated future public preference is a decision that each jurisprudential thinker must decide for himself or herself.

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THE PEOPLE OR THE COURT

WHO REIGNS SUPREME, HOW, AND WHY?

Matthew P. Downer[†]
with a Preface by Suzanna Sherry[*]

PREFACE

Matt Downer's paper comes from the same seminar[a] as that of Will Marks, and also focuses partly on Barry Friedman's *The Will of the People*. But Downer considers Friedman's work together with Larry Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review*. He finds intriguing similarities and differences between the two, and he criticizes both for their failure to be specific about who "The People" are and whether there are any limits on what they can do. Downer ultimately identifies what he calls a "fundamental flaw" in each book. Kramer, he argues, doesn't really trust the people after all. And Friedman's most arresting claims are either unconvincing or, if true, essentially trivial. Downer's paper is an excellent critical review of two celebrated and influential recent scholarly books, more interesting than some of the previously published reviews.

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[†] Vanderbilt J.D. expected May 2014. The copyright for this essay belongs to Matthew P. Downer. For permission to copy or distribute it, please contact him at matthew.downer@gmail.com.

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[a] For a description of the seminar, see Suzanna Sherry, *Preface* to Will Marks, *Whose Majority Is It Anyway? Elite Signaling and Future Public Preferences*, 4 J.L. (1 NEW VOICES) 13, 13 (2014).

I.
INTRODUCTION

In his book, Barry Friedman argues that since our founding the Supreme Court has increasingly aligned itself with *The Will of the People*.[1] While this view seems to directly contradict Larry Kramer's central thesis – that *The People Themselves*[2] initially directed the Court but have since abdicated that role – the two theories share key elements, assertions, and flaws. Both advance a normative view of The People as arbiters of constitutional meaning and directors of Supreme Court decisions. Because their descriptive narratives conflict, however, their prescriptive recommendations predictably diverge as well. Their frameworks also share similar bouts of vagueness and lack of constraint: 1) neither sufficiently defines *who* constitutes The People, and 2) neither adequately describes what, if anything, constrains the substance of popular will – are *any* interpretations permitted, no matter how implausible or rights-endangering? Finally, two foundational – and equally surprising – flaws undermine their primary contributions: upon close scrutiny, Kramer lacks faith in The People after all and Friedman's most celebrated conclusions prove either unsurprising or unconvincing.

II.
ALONG THE SAME LINE, BUT IN OPPOSITE DIRECTIONS

Like Kramer,[3] Friedman purports to describe both how things are as well as how they should be.[4] Normatively, they both ad-

[1] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).
[2] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).
[3] *See id.* at 227 ("Americans in the past always came to the same conclusion: that it was their right, and their responsibility, as republican citizens to say finally what the Constitution means.").
[4] *See, e.g.*, FRIEDMAN, *supra* note 1, at 16 ("This, then, is the function of judicial review in the modern era: to serve as a catalyst, to force public debate, and ultimately to ratify the

vance very similar proposals: The People *should* assume primary responsibility for interpreting constitutional meaning. Descriptively, they almost directly contradict each other. Kramer argues that The People once embraced – and have since abdicated – their role as constitutional arbiters. Friedman, by contrast, suggests that The People had to – and did – grow into their current authority to direct the Court's trajectory and have maintained it to varying degrees ever since. Unsurprisingly, their conflicting narratives produce conflicting prescriptions. Kramer urges The People to seize back their abdicated role whereas Friedman seems content to stay the course.

A. Normative Alignment

While Kramer explicitly idealizes The People's role as "the final authority on the meaning and interpretation of the Constitution,"[5] Friedman proves far more circumspect. He initially seems to maintain careful objectivity, focusing primarily on his view of the historical reality, rather than his ideal. Upon closer scrutiny, however, his normative view shines through, both in the slightly broader context of these careful statements and in the passion of his ostensibly objective prose.

Friedman's language is a far cry from Kramer's forceful advocacy. As eloquently described by commentators, Kramer challenges the Supreme Court's usurpation of constitutional interpretive authority[6] and seeks to "[b]ring[] the people back as the protagonists of American constitutional history."[7] Friedman, by contrast, carefully neutralizes his use of "should" and "ought" with sharply conditioned language: "To say that the Supreme Court follows popular opinion," he writes, "or even that it *should*, is hardly to say that the Court *ought* to be responsive to every passing fancy . . . of the American

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American people's considered views.").

[5] L.A. Powe, Jr., *Are "The People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 855-56 (2005).

[6] *Id.* at 855.

[7] Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 655 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)).

people."[8] But in context, it seems that he means only that the Court should divine the enduring will of The People rather than follow popular whim.[9] He quickly follows his disclaimer with ringing endorsements from Woodrow Wilson and Theodore Roosevelt of judges who will "follow" the "permanent popular will" rather than the "popular opinion at the moment."[10] If invoking revered American figures falls short of revealing his inclination, his next move lays it bare. Friedman cites *Korematsu v. United States*[11] – one of the most reviled opinions in Supreme Court history[12] – to illustrate the danger of judges following the "popular opinion at the moment" rather than the "permanent popular will."[13]

If juxtaposing Wilson and Roosevelt with the justices who decided *Korematsu* does not indicate Friedman's normative views, the passion with which he closes his book seems to settle the question: "Judicial review is our invention; we created it and have chosen to retain it. Judicial Review has . . . forc[ed] us to . . . interpret[] our Constitution ourselves. In the final analysis, when it comes to the Constitution, we are the highest court in the land."[14] While couched in descriptive terms, it is hard to mistake Friedman's normative view: that The People are – and *should* be – "the highest court in the land."[15]

Despite differences in how explicitly they acknowledge their normative commitments, Kramer's and Friedman's normative visions of the relationship between The People and the Court seem closely aligned.

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[8] FRIEDMAN, *supra* note 1, at 382 (emphasis added).

[9] *See id.* (noting the long-standing distinction between "the passions of the moment and some deeper sense of the popular will").

[10] *See id.*

[11] 323 U.S. 214 (1944).

[12] Suzanna Sherry, *Why We Need More Judicial Activism* in CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT 14 (Giorgi Areshidze, Paul Carrese, and Suzanna Sherry eds., forthcoming 2014), *available at* http://ssrn.com/abstract=2213372 (including *Korematsu* as one of the six most "universally condemned [Supreme Court] cases").

[13] FRIEDMAN, *supra* note 1, at 382; *see also id.* ("Decisions like *Korematsu* indicate the difficulty with putting one's faith in the notion that judges will be able to perceive the difference between what is momentarily popular opinion and what is ultimately right . . . .").

[14] *Id.* at 385.

[15] *Id.*

B. Descriptive Conflict

Because both authors focus on the shifting degree to which The People – rather than the Court – direct constitutional interpretation, we might expect similar descriptive narratives. But Kramer views The People's influence as sharply declining whereas Friedman sees a steady increase. Even more striking, Kramer views the Court as the current supreme arbiter of constitutional meaning – in practice if not by right – and Friedman views the Court as firmly under The People's collective thumb. Kramer sees popular abdication; Friedman sees popular conquest.

Kramer cites numerous examples of The People controlling constitutional interpretation from early American history, including the 1795 protests against the Jay Treaty of New York[16] and the constitutional debates preceding the election of 1800.[17] He argues that the colonists, framers, and early Americans all viewed constitutional meaning as subject to popular interpretation.[18] Since then, however, The People have steadily abdicated their authority to the courts.[19]

Friedman views the shift in control over constitutional interpretation as flowing in the other direction. In his view, the period immediately following independence saw the "remarkably quick acceptance of judicial review."[20] But before long, The People "saw the danger of unaccountable judges."[21] Though sometimes marked by ebbs and flows, this recognition initiated the shift toward constitutional interpretation by The People.[22]

More notable than their conflicting views of the shift's direction, Kramer and Friedman also fundamentally disagree about the current

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[16] KRAMER, *supra* note 2, at 4.
[17] *Id.* at 49.
[18] *See generally id.* at 4-21.
[19] *See id.* at 7 ("Time and again, the Founding generation and its successors responded to evolving social, political, and cultural conditions by improvising institutional and intellectual solutions to preserve popular control over the course of constitutional law – a kind of control we seem to have lost, or surrendered, today.").
[20] FRIEDMAN, *supra* note 1, at 12.
[21] *See id.*
[22] *See id.* at 12-16 (surveying the "four critical periods in the American people's changing relationship with judicial review and the Supreme Court").

balance of power. Kramer explicitly suggests that "[w]e the People have – apparently of our own volition – handed control of our fundamental law over to" the courts.[23] He then frames much of the book as urging The People to reclaim "the full responsibilities of self-government."[24] Friedman, on the other hand, dedicates the bulk of his six-hundred-page book to demonstrating that The People's will has constrained and still constrains the Court's behavior. He acknowledges that the Court "exercises more power than it once did" but quickly argues that it does so with the permission – and under the watchful eye – of The People.[25]

Perhaps most strikingly, Kramer's and Friedman's views of how The People came to occupy their current roles directly contradict each other. Kramer cites The People's volitional abdication of interpretive authority as the cause of the current balance of power.[26] Friedman depicts a more rocky transition of power. He notes "the fragility of [the Court's] position"[27] and suggests that The People's supremacy was hard won by "disciplining the Court," sometimes causing "violent upheaval."[28] Indeed, Friedman argues that such "violen[ce] . . . is no longer necessary" because the Court now "underst[ands]" its place.[29] When the Court merely contemplates overstepping its delegated authority, The People need only "raise a finger" for "the Court . . . to get the message" and shrink back into its corner to avoid "retribution."[30] Friedman suggests that the relationship between The People and the Court is like "any other marriage,"[31] but such a – seemingly abusive – "marriage" is a far cry from Kramer's characterization of the Court as aggressive and The People as acquiescent.

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[23] KRAMER, *supra* note 2, at 233-34 (internal quotation marks omitted).
[24] *See id.* at 247.
[25] *See* FRIEDMAN, *supra* note 1, at 12, 14, 376 ("The Court has [more] power only because, over time, the American people have decided to cede it to the justices.").
[26] KRAMER, *supra* note 2, at 233-34.
[27] FRIEDMAN, *supra* note 1, at 14.
[28] *Id.* at 376.
[29] *Id.*
[30] *Id.*
[31] *Id.*

C. Prescriptive Divergence

Unsurprisingly, Kramer prescribes far more drastic action than Friedman finds necessary. Given their common normative ideal, their conflicting narratives result in conflicting prescriptions. Kramer urges The People to seize back their abdicated role whereas Friedman seems to support staying the course of popular control.[32] Although Kramer's book can fairly be characterized as a call to arms urging The People to "assume once again the full responsibilities of self-government,"[33] Friedman can afford more complacency. To the extent that The People have, in Friedman's view, already achieved his normative ideal, staying the course makes perfect sense. Perhaps his contentment with the current state of affairs also helps to explain his willingness to leave his normative view implied.[34] Regardless, if "we" – The People – already constitute "the highest court in the land," foregoing a forceful call to arms seems quite reasonable.[35]

III.
COMMON SHORTCOMINGS: EXCESSIVE VAGUENESS AND INSUFFICIENT CONSTRAINTS

Comprehensive theories of judicial review often suffer from excessive vagueness and insufficient constraints. Kramer's and Friedman's books are no exceptions. Specifically, neither Kramer nor Friedman sufficiently defines *who* constitutes The People and both fail to adequately describe what, if anything, constrains the substance of popular will. These two critiques could be interpreted to overlap. For example, a higher standard for who constitutes The People would necessarily constrain popular will. As explained be-

[32] *Compare* KRAMER, *supra* note 2, at 8 ("[I]n charting how the[] [Founding Fathers tried] to explain and preserve the active sovereignty of the people over the Constitution[][,] perhaps, we may find some reasons to reawaken our own seemingly deadened sensibilities in this respect.") *with* FRIEDMAN, *supra* note 1, at 376 ("Now that the justices and the public understand how things work, the system tends to rest in a relatively quiet equilibrium. . . . [T]here is every indication the American people and the justices want this [relationship] to [continue].").
[33] *Id.* at 247.
[34] *See supra* Part II.A.
[35] FRIEDMAN, *supra* note 1, at 385.

low,[36] I use "constraint" narrowly to reflect limits on the *substance* of The People's constitutional interpretations.

A. Who Are The People?

A theory that subjects the Supreme Court's interpretive authority to the will of The People would seem to depend upon a clear definition of exactly who constitutes The People. And yet, Kramer and Friedman both fail to provide one. One way to approach the question is to divide it into two: who can be counted as among The People and how do we know when a group is speaking as (or for) The People?

1. Who Can Be Counted As Among The People?

Although this inquiry may seem unnecessary, Kramer highlights the question by discussing at some length the constitutional interpretation performed by pre-Declaration colonists.[37] Daniel Hulsebosch further suggests that "Kramer's ordinary people are not necessarily citizens" and that immigrants of questionable political status have constituted an "enduring problem[]" for definitions of The People since the 1790s.[38] Friedman, meanwhile, avoids introducing similar doubts by leaving the question entirely open. He begins his narrative after the Declaration and does not seem to contemplate non-citizens getting a say.[39] Nevertheless, to the extent that Friedman fails to address who can count as The People, he fails to resolve this ambiguity.

2. How Do We Know When a Group is Speaking as (or For) The People?

Kramer struggles to illustrate exactly when and how The People speak. He cites examples of The People speaking through their elected officials, but not every act by the President or Congress is

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[36] *See infra* Part III.B.
[37] *See* KRAMER, *supra* note 2, at 4-21.
[38] Hulsebosch, *supra* note 7, at 692.
[39] *See* FRIEDMAN, *supra* note 1, at 12 (beginning historical analysis "from the time of independence").

necessarily endorsed by The People.[40] Kramer offers no mechanism to distinguish which actions by elected officials represent The People and which do not. Ironically, his omission empowers the Court to decide.

If efforts by the Congress and the President prove troublesome, we can turn to Kramer's discussion of The People acting even more directly. Citing precedent from Grotius, Pufendorf, Locke, and the Boston Tea Party, Kramer commends "mob or crowd" action as a "respectabl[e]" and "direct expression of popular sovereignty."[41] As an example of this expression, Kramer highlights the 1795 protests against the Jay Treaty in New York City. Alexander Hamilton led a group of "hastily assembled" Federalist merchants to disrupt a 5,000-person protest against the treaty. Hamilton argued that whether to ratify the treaty was, constitutionally, a question for the Senate and the President.[42] The protesters "hiss[ed,] cough[ed,] and hoot[ed]," eventually "explod[ing] in fury" and driving Hamilton and his supporters away, allegedly throwing a rock or two for good measure.[43] How should Kramer's ideal Supreme Court interpret such an episode? Should it make a difference if, instead of merely 5,000 protestors, there had been "similar scenes . . . repeated around the country"?[44] How many protestors would be enough to justify the Court inferring the popular will? Should the Court con-

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[40] Kramer cites the 1800 election of Thomas Jefferson as an exercise of The People's "interpretive authority." Because "the great controversies of the 1790s had been *constitutional* controversies," he argues, "the fiercely contested election of 1800" served as "an extended national referendum on whose views of the Constitution were correct." KRAMER, *supra* note 2, at 49. But unless we conclude that *all* of Jefferson's constitutional interpretations represented The People's will, a court would have to decide which issues were contested with sufficient ferocity. Kramer's example thus ironically empowers the Court to decide which constitutional interpretations earned The People's endorsement. This method of resolving constitutional disputes superficially resembles Bruce Ackerman's idea of constitutional moments, with a key difference. Whereas Ackerman's framework incorporates multiple factors in the attempt to constrain the inquiry, Kramer provides none at all. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE (1991).

[41] *See, e.g.*, KRAMER, *supra* note 2, at 27 (internal quotation marks omitted).

[42] *See id.* at 4.

[43] *Id.*

[44] *Id.*

sider the centrality of the constitutional question at issue?[45]

Friedman is equally guilty of proposing an inadequate method to determine when The People have spoken.[46] If Friedman wants the Supreme Court to subject its constitutional interpretations to the will of The People, he should provide some mechanism that allows the Court to do so. To ascertain the popular will, Friedman variously looks to opinion polls,[47] opinion editorials,[48] political commentators,[49] and newspaper accounts of outraged letters to the Court.[50] If we rely on Friedman's suggested indications of The People's will, a judge's opportunity to scan the crowd for friendly faces seems even greater in the quest for popular will than in the search through legislative history for definitive statutory meaning.[51]

Compounding this uncertainty, Friedman uses the term "majoritarian" throughout his book, but never defines it. Can a plurality constitute the popular will? The barest of majorities? What about a majority of the popularly elected House of Representatives? The less proportionate Senate? The President? Like Kramer, Friedman never tells us. He entrusts the authority to interpret the Constitution to The People, but then never tells us how to know when a group actually speaks for them.

Friedman introduces even more uncertainty than Kramer does by suggesting that the Court should distinguish between the "permanent popular will" and the "popular opinion at the moment."[52] Friedman acknowledges the "problem" that judges might not "be able to perceive the difference" but then argues that "[t]he magic of

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[45] For a modern example raising these sorts of questions, see Powe, *supra* note 5, at 884 (citing protests against the World Trade Organization).

[46] In a later work, Professor Friedman appears to recognize the problem, but does not satisfactorily resolve it. *See* Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1240-44 (2010).

[47] *See, e.g.*, FRIEDMAN, *supra* note 1, at 373.

[48] *See, e.g., id.* at 336.

[49] *See, e.g., id.*

[50] *See, e.g., id.*

[51] *Cf.* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is . . . akin to 'looking over a crowd and picking out your friends.' ").

[52] FRIEDMAN, *supra* note 1, at 382.

. . . [this] system . . . is that it works whether the judges rule properly or not – precisely because everything important happens after they render their decision."[53] The Court can get a case wrong, he explains, reflect upon the public reaction, and then correct its course as needed.[54] To illustrate this "magic," Friedman cites *Roe v. Wade*.[55] There, he argues, the Court accurately predicted the popular opinion *trend* but the decision still only received "plurality support in the polls."[56] Thus, when *Planned Parenthood v. Casey*[57] came along, the Court had the opportunity to converge on a position that "was remarkably in line with popular opinion."[58]

Friedman's assurances, however, ring hollow for two primary reasons. First, public opinion can prove fickle and difficult to predict. Abortion seems a likely candidate for an issue on which public opinion would remain steady. Yet, a 2012 Pew study concluded that support for legalized abortion fell 10% between 1995 and 2001.[59] From 2004 to 2013, opposition to gay marriage fell 17%,[60] while support for gun control fell 21% between 2000 and 2012.[61] In all three cases, the shift reversed the majority and minority positions. Are these trends or fluctuations? The Court would be hard pressed to decide. Indeed, the support for legalized abortion had rebounded 4% by 2012, with a majority again supporting "legalized abortion in all or most cases."[62]

Second, Friedman's safety mechanism creates an inverse relationship between the certainty the Court reaches before acting and the speed with which it can correct errors. Distinguishing between permanent and momentary public opinion – that is, between trends and fluctuations – seems to require a substantial waiting period be-

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[53] *Id.*
[54] *Id.*
[55] 410 U.S. 113 (1973).
[56] FRIEDMAN, *supra* note 1, at 382.
[57] 505 U.S. 833 (1992).
[58] FRIEDMAN, *supra* note 1, at 382.
[59] *Pew Research: Gun rights, abortion, gay marriage views over time*, JOURNALIST'S RESOURCE (May 16, 2012), http://perma.cc/8HES-R3RK.
[60] *Id.*
[61] *Id.*
[62] *Id.*

fore a Court feels confident in overturning a previous holding. Doing so, however, prolongs the error. Returning to Friedman's example, nineteen years passed between *Roe* and *Casey*. Fifty-eight years passed between *Plessy v. Ferguson*[63] and *Brown v. Board of Education*.[64]

B. What Constrains The People's Constitutional Interpretations?

Both Kramer and Friedman base their theories on the idea that the popular will limits – or even dictates – the behavior of the Supreme Court. But neither author identifies what – if anything – constrains the assortment of constitutional interpretations available to The People. Are they limited to choosing between *reasonable* constructions of an ambiguous provision? If not, does their ability to embrace *un*reasonable constructions essentially replace Article 5 as the mechanism by which we actually *amend* – rather than merely interpret – the Constitution?

Such an amendment-by-popular-acclamation seems within Friedman's grandest descriptions of The People's authority – "[W]e are the highest court in the land"[65] – but it seems to exceed his more modest explanations that "[t]he people . . . have had the ability all along to assert pressure on the judges."[66] The former seems similar in nature to Bruce Ackerman's theory that sufficiently salient "constitutional moments" can *amend* the constitution.[67] As I noted previously, Ackerman's framework at least maintains a relatively high standard for when such a moment exists.[68] Neither Kramer nor Friedman provides any such standard.

If The People are limited to choosing among reasonable constructions of ambiguous constitutional provisions, who decides which constructions are reasonable? If The People decide, we are back to amendments-by-acclamation. If the Court decides, then it is hard to determine how exactly The People "are the highest court in

[63] 163 U.S. 537 (1896).
[64] 347 U.S. 483 (1954).
[65] FRIEDMAN, *supra* note 1, at 385.
[66] *Id.* at 370.
[67] *See* ACKERMAN, *supra* note 40.
[68] *See id*.

the land."[69] Kramer never addresses the question at all. Friedman seems to avoid directly confronting it by describing the interaction between The People and the Court as a "dialogic process" of "popular response" and "judicial re-decision."[70] But truly resolving the quandary would require a clear delineation of authority. And if the resolution allows the Court to play a role, even one that allows for a popular outrage forcing a judicial reversal, that seems at odds with Friedman's basic and explicit premise that "[u]ltimately, it is the people (and the people alone) who must decide what the Constitution means."[71]

Neither Friedman nor Kramer sufficiently specifies how the relationship between the Court and The People should maintain (Friedman) or revive (Kramer) The People's authority. But each also suffers from a central flaw, to which I turn in the next section.

IV.
THE FLAWS AT THE CENTER OF THE ARGUMENTS

The final similarity between Kramer and Friedman is that each of their arguments contains a central flaw. Kramer's argument suffers from an inherent contradiction: it simultaneously depends upon but fails to embrace faith in The People's decisions. Friedman's flaw lies in his basic description that the Court avoids substantial deviation from popular will because of The People's threat of violent discipline: the parts of his description that are accurate are unsurprising and the parts that would be surprising he fails to persuasively demonstrate as accurate.

A. Kramer Doesn't Trust The People After All

Kramer ties the outcome of the struggle between The People and the Court to a simple question: "[W]hether [Americans] share [a] lack of faith in themselves and their fellow citizens."[72] If The

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[69] FRIEDMAN, *supra* note 1, at 385.
[70] *Id.* at 382.
[71] *Id.* at 367.
[72] KRAMER, *supra* note 2, at 247.

People *lack* faith in each other, he writes, they will "hand[] their Constitution over to the" courts.[73] But if they *have* faith in each other, they will "assume once again the full responsibilities of self-government."[74] Kramer acknowledges that "the choice is ours to make, necessarily and unavoidably."[75] Neither the Constitution, history, nor tradition "make[s] it for us."[76] In advocating his popular constitutionalism, Kramer claims to possess this faith in The People. But he also seems to acknowledge that The People have already chosen to cede their authority to the courts.[77] Kramer argues that The People should have faith in each other and abandon this decision. Perhaps instead he should trust the choice they have already made to delegate some of their authority to the courts. He attributes the abdication to The People's lack of faith in each other.[78] But his refusal to accept The People's decision seems to reflect his own lack of faith instead.

Friedman avoids this mistake. He recognizes that "the Court has this [interpretive] power only because, over time, the American people have decided to cede it to the justices."[79] But, unlike Kramer, Friedman treats that choice with respect, acknowledging that "there is every indication the American people" want "the relationship to continue."[80]

B. Friedman's Fundamental Descriptive Conclusions Prove Either Unsurprising or Unconvincing

Friedman's most notable descriptive conclusion is that the Court is majoritarian after all. While he concedes that the Court defies popular will on occasion, he argues that it does so rarely and not by

[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *See id.* at 233-34 ("We the people have – apparently of our own volition – handed control of our fundamental law over to [the courts]".).
[78] *Id.* at 247.
[79] FRIEDMAN, *supra* note 1, at 14.
[80] *Id.* at 376.

much.[81] Perhaps more notably, Friedman claims that the Court *tries* not to deviate from popular will to avoid The People's discipline.[82] But both of these conclusions prove disappointing.

1. The Unsurprisingly Majoritarian Court

Friedman's argument that the Court acts in a manner *largely* consistent with the popular will introduces a few new details in the long scholarly debate about the counter-majoritarian difficulty. But his broader position – that the Court hews more closely to the popular will than some assume – is not entirely new.[83] More importantly, it should be completely unsurprising because of our constitutional structure.

Structurally, we should not be surprised that the Supreme Court largely acts within an "accept[able]" range of the popular will.[84] After all, the Justices are appointed by a popularly elected President and confirmed by at least half of the popularly elected Senate.[85] How far, then, should we expect Justices to stray from the will of those who popularly elected the President and the Senate?

The People also retain the Article V right to amend the Constitution, an additional structural constraint that limits the degree to which the Court can stray from popular will. This does not prevent all deviations, of course, but it imposes an outside limit. Friedman might respond that Article V requires such a high degree of consensus that amending the Constitution proves an unrealistic check on judicial defiance. To the extent this is true, Friedman should also consider the implications for his own theory. If the constitutionally

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[81] *See id.* at 381-84 (describing the "democratic constitution").

[82] *See id.* at 376 ("[I]t has taken the Court and the public some time to learn how their relationship might work; now that it is understood, violent upheaval is no longer necessary.").

[83] *See, e.g.*, Powe, *supra* note 5, at 890 ("If the Court were countermajoritarian, then popular constitutionalism would offer a functional solution, but given the realities of modern judicial review, that solution does not seem necessary.").

[84] FRIEDMAN, *supra* note 1, at 13.

[85] Though Senate confirmation only requires fifty votes, overcoming a filibuster has long required sixty votes. The Senate recently removed the ability to filibuster all but Supreme Court nominees. *See* Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), http://perma.cc/7LXD-AG2P.

sanctioned process for amendments requires such a high degree of consensus, then extra-constitutional processes for "amendments" – including at least those of Ackerman, Kramer, and Friedman himself – seem increasingly suspect as legitimate exercises of constitutional authority.

2. The Unconvincing Description of the Court's Motivation

Friedman also argues that the Court conforms to the popular will deliberately in order to avoid The People's threats of "disciplin[e]" and "violent upheaval."[86] Specifically, Friedman enumerates some of the "weapons [available] to control the justices": Court packing, impeachment, and jurisdiction-stripping measures.[87] He quotes Lord Blyce to justify the Court's surrender in the face of such threats: "To yield a little may be prudent, for the tree that cannot bend to the blast may be broken."[88] Acknowledging that these weapons have fallen out of use, Friedman suggests that the memory of "violent upheaval" in years gone by continues to deter deviations from the popular will.[89] Friedman then moves on to his next argument, leaving the attentive reader to notice the lack of compelling evidence to support this naked assertion.

Of course it is not difficult to understand how past battles *could* create a more compliant Court, historical reexaminations notwithstanding.[90] But *could* falls far short of *did* or *does.* In addition to failing to support this conclusion, Friedman fails to seriously consider alternative explanations.

One possibility is that the disputes of today are structured in a way that makes counter-majoritarian decisions unlikely. Consider the survey data already discussed.[91] Guns, gay marriage, and abor-

[86] *Id.* at 376.
[87] *Id.*
[88] *Id.* (citation omitted).
[89] *Id.*
[90] *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF CONSTITUTIONAL REVOLUTION (1998) (contending that FDR's Court-packing plan did not really cause the Court's "switch in time"). This uncertainty undermines the claim that such threats can coerce Court compliance with the popular will.
[91] *See supra* text accompanying notes 59-62.

tion are three of the most contentious issues of the last few decades. Yet public opinion was so close on all three that a small shift over a short period reversed the majority and minority positions.

Friedman persuasively argues that the Court has largely served majoritarian ends. Given our governmental structure and confirmation process, however, this conclusion should not surprise us. Friedman then argues that the Court is motivated to pursue majoritarian ends in order to avoid threats from The People. This conclusion proves unconvincing: Friedman lacks evidence and fails to consider alternative explanations.

V.
CONCLUSION

Despite a shared normative ideal – The People as the ultimate arbiters of constitutional meaning – Friedman's and Kramer's descriptive narratives and prescriptive recommendations sharply clash. Nevertheless, their theories both suffer from excessive vagueness and insufficient constraint in terms of how we define *who* constitutes The People, and how (or even whether) we constrain the substance of popular will. Upon close scrutiny, moreover, central flaws undermine both theories. Kramer's claim of faith in The People seems overcome with doubt and Friedman's most celebrated conclusions prove either unsurprising or unconvincing.

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THE CASE FOR JUDICIAL REVIEW OF DIRECT DEMOCRACY

Elise Hofer[†]
with a Preface by Suzanna Sherry[*]

PREFACE

Elise Hofer focuses on the last few weeks of the same seminar,[a] when we read three scholars' defenses of judicial review and judicial activism: Christopher Eisgruber's *Constitutional Self-Government*, Jonathan Siegel's "The Institutional Case For Judicial Review,"[b] and my own short essay, "Why We Need More Judicial Activism."[c] She asks how the various arguments – from political theory, institutional competence, and history – translate from the context of representative democracy to the context of direct democracy. This is an important question, as about half the states have some form of popular referendum. It is also a novel question, to which Elise gives a counter-intuitive answer: Judicial activism is even *more* justified and *more* necessary in the context of direct democracy. She supports her conclusion with fascinating information about the actual workings of the referendum process, which by itself makes the paper worth reading.

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[a] For a description of the seminar, see Suzanna Sherry, *Preface* to Will Marks, *Whose Majority Is It Anyway? Elite Signaling and Future Public Preferences*, 4 J.L. (1 NEW VOICES) 13, 13 (2014).
[b] 97 IOWA L. REV. 1147 (2012).
[c] Suzanna Sherry, *Why We Need More Judicial Activism*, *in* CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT (Giorgi Areshidze, Paul Carrese, and Suzanna Sherry eds., forthcoming 2014), *available at* http://ssrn.com/abstract=2213372; *see also* Micro-Symposium, *Suzanna Sherry's Why We Need More Judicial Activism*, 16 GREEN BAG 2D 449 (2013).

I.
INTRODUCTION

Numerous scholars have dealt with the apparent tension between judicial review and majoritarian democracy. Critics of judicial review have frequently cited the "counter-majoritarian difficulty" – that is, the argument that judicial review is illegitimate because it allows unelected judges to overrule the law-making of elected representatives, thus undermining the will of the people.[1] In response, the courts' defenders have traditionally advanced two arguments in favor of judicial review. The first is that judicial review is appropriate only to the extent that it secures rights necessary to a well-functioning democracy.[2] The problem with this argument, however, is that most people believe that judges should enforce some rights that bear little or no relation to the electoral or legislative process.[3] The second is that the courts *should* limit democracy in ways that promote justice and protect individual fundamental rights.[4] An obvious weakness with this latter argument is that it concedes that judicial review is, in fact, undemocratic.[5]

The three authors discussed in this paper are also defenders of judicial review, and advance three additional arguments in favor of judicial review, which attempt to rebut the counter-majoritarian difficulty in distinct ways. First, Christopher Eisgruber argues that judicial review thwarts the will of the *legislature*, not the will of the *people*, and that it is a mistake to equate the two.[6] Based on this distinction, he reconceives judicial review as a kind of democratic institution that is "well-shaped to speak on behalf of the people about

[1] *See, e.g.*, Alexander M. Bickel, THE LEAST DANGEROUS BRANCH 16-23 (1962) ("[J]udicial review is a counter-majoritarian force in our system.").
[2] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
[3] *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46-47 (2001) ("Judicial review is usually regarded as a constraint upon the American people's ability to act on their own judgments.").
[4] *Id*.
[5] *Id*.
[6] *See* EISGRUBER, *supra* note 3, at 49-50 ("It does not always follow that the best institution to represent the people will always be . . . thoroughly majoritarian.").

questions of moral and political principle" due to judges' life tenure and consequent disinterestedness.[7] Second, and relatedly, Jonathan Siegel posits that the judicial process has additional "institutional characteristics" (beyond life tenure) that make the judicial process "the superior method of constitutional enforcement" when compared to the electoral and legislative processes.[8] Finally, Suzanna Sherry summarizes the arguments of many scholars that the central problem of democratic government is protecting minorities from the tyranny of the majority; thus, Sherry argues, the courts have an obligation to act as a counter-majoritarian institution dedicated to protecting constitutional rights against legislative excess.[9] In other words, contrary to conventional wisdom, the judiciary's counter-majoritarian nature is its strength, not its weakness.

Notably, all three authors defend judicial review in the context of *representative* democracy. The question remains, however, whether their arguments hold in the context of *direct* democracy. Although most laws originate in a legislative body, the constitutions of approximately half the states authorize lawmaking by the electorate itself, usually in the form of statewide initiatives (which allow citizens to enact new statutes or constitutional amendments) or referenda (which allow citizens to repeal a statute enacted by the state legislature).[10]

Like legislative enactments, the results of voter enactments are subject to constitutional challenge, and have sometimes been invalidated on equal protection or other grounds.[11] Judicial opinions in

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[7] *Id*. at 3.

[8] Jonathan R. Siegel, *The Institutional Case for Judicial Review*, 97 IOWA L. REV. 1147, 1147 (2012).

[9] Suzanna Sherry, *Why We Need More Judicial Activism*, *in* CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT (Giorgi Areshidze, Paul Carrese, & Suzanna Sherry eds., forthcoming 2014) ("The courts *should* stand in the way of democratic majorities, in order to keep majority rule from degenerating into majority tyranny.").

[10] *See Initiative and Referendum States*, NATIONAL COUNCIL OF STATE LEGISLATURES (Sept. 2012), http://perma.cc/WB9R-4UEW (listing the twenty-six states with either statutory or constitutional provisions for direct democracy).

[11] Perhaps the best known example of this is Romer v. Evans, 517 U.S. 620 (1996), in which the Supreme Court held that Colorado's anti-gay rights initiative did not pass rational basis review under the Equal Protection Clause.

such cases have applied the same standards they would have applied to a legislative enactment.[12] A plausible argument can be made, however, that the judiciary should afford greater deference to exercises of direct democracy than it would to products of representative democracy. This is so for at least two reasons. First, if the legislature's inability to speak accurately on behalf of the people justifies, at least in part, judicial review of legislative enactments (as Eisgruber and Siegel claim), then the need for judicial review would seem to diminish when the people are able to speak for themselves, as in the context of direct democracy. Second, striking down an action taken directly by the public, rather than by their elected representatives, seems to make the counter-majoritarian difficulty even more readily apparent.

Notwithstanding these two arguments, I will argue in this paper that the results of direct democracy call for *more*, not less, judicial review. This is so because in the context of direct democracy, the judiciary is the only functioning check on majority power. While critics of judicial review are likely to reject the notion that the judiciary should be able to check the clear will of the people, this line of thinking incorrectly assumes that the outcomes of direct democracy accurately reflect majority will. Instead, I argue below that those outcomes are hardly a perfect reflection of majority will; rather, the same shortcomings of the electoral process plague both direct and representative democracy. Moreover, even if direct democracy results *were* accurate gauges of the majority's views, views do not become constitutional merely because they are majoritarian. To the contrary, the Framers were acutely aware of the threat that unchecked majorities pose to unpopular groups and viewpoints, and designed a system of government to combat that threat.[13] Thus,

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[12] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 938 (N.D. Cal. 2010) (holding that, although "[a]n initiative measure adopted by the voters deserves great respect," California had no rational basis in denying homosexuals marriage licenses), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *aff'd on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (holding petitioners lack standing to bring appeal).

[13] *See, e.g.,* THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 2003) ("Complaints are everywhere heard . . . measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an inter-

while strong judicial review of direct democracy may at times place courts in the precarious position of standing in the way of democratic majorities, it is both necessary and desirable in order to safeguard minority rights.

II.
THE AUTHORS' CASE FOR JUDICIAL REVIEW OF REPRESENTATIVE DEMOCRACY

In *Constitutional Self-Government*, Eisgruber refutes the notion that judicial review is undemocratic. He argues that, if we deepen our understanding of democracy, we can view the Supreme Court as a kind of representative institution that is sometimes better able than legislatures to speak on behalf of the people.[14] Eisgruber begins by noting that, in large nation-states (such as the United States), "the people" can never act in any direct way; instead, they act through a variety of institutions, including the legislature, none of which represent them perfectly.[15] This is so for two reasons.

First, democracy is governed by the *whole*, while a majority is by definition only a *fraction* of the people.[16] In order to truly speak on behalf of the people, Eisgruber contends, a government must take into account the interests and opinions of *all* the people, not just those of the majority.[17] Second, Eisgruber argues that both legislators and voters have incentives to make political decisions on the basis of self-interest.[18] In the case of legislators, the incentive is clear: to keep their jobs. This may lead them to disregard their own moral judgments in order to please voters. Of course, that would not be a problem if voters' preferences were good proxies for "the people's" values. Unfortunately, however, the office of "voter" also provides incentives for self-interested behavior for several reasons:

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ested and overbearing majority.").
[14] EISGRUBER, *supra* note 3, at 48-49.
[15] *Id*. at 49.
[16] *Id*. at 50-52.
[17] *Id*.
[18] *Id*. at 52-56.

> [V]oters act anonymously; they are neither required nor enabled to give reasons for their decision; and they must choose among a very limited set of options (for example, selecting one candidate from among a small set of competitors, or by voting "yes" or "no" on a ballot question). Moreover, each voter knows to a virtual certainty that her individual ballot will have no impact on the outcome of the election. The office of "voter" thus gives people very little incentive to take their responsibilities seriously . . . .[19]

After explaining why "the people" should not be equated with the legislature, Eisgruber argues that four crucial features of the judiciary make it the institution best suited to speak on behalf of the people on contested issues of morality.[20] First, judges have life tenure, and their consequent disinterestedness makes it more likely that they will decide contested moral issues on the basis of principled judgment, rather than self-interest.[21] Second, judges' votes often have a decisive impact on the outcome of a case; therefore, they have a much stronger incentive to take full responsibility for their choices.[22] Third, judges are held publicly accountable for their decisions and must give a public account of their reasoning.[23] Finally, judges are politically appointed and selected "on the basis of their political views and political connections," helping to ensure that the views of each judge are "unlikely to be radically at odds with the American mainstream."[24] For these reasons, Eisgruber concludes that judges, while unelected, are nevertheless representative of the people and are better able to protect rights and advance principles of justice than are legislatures.

In "The Institutional Case for Judicial Review," Siegel points to other institutional characteristics of the judicial process to reach the same conclusion: that judicial review is the superior method of constitutional enforcement when compared to the electoral and legisla-

[19] *Id*. at 50.
[20] *Id*. at 71.
[21] *Id*. at 57-59.
[22] *Id*. at 60.
[23] *Id*. ("[Federal judges] are not required to stand for election, but they must quite literally *give a public account* of their reasoning.").
[24] *Id*. at 71.

tive processes.[25] The most important of these characteristics, according to Siegel, is that the judicial process is focused: it "resolves a specific claim raised by a specific plaintiff."[26] In contrast, the electoral process forces voters to choose between particular candidates; they are in essence voting for a package of positions on many different issues, and have no way to express their views on any one issue in particular.[27] For example, a voter may be forced to choose between a candidate who reflects her views on economic issues or one who reflects her views on social issues. Elections thus deliver results but no reasons, making it impossible for politicians to follow the voters' judgment on constitutional issues, given that they do not know for sure why they were elected in the first place or what the voters' positions are on any specific issue.[28] Siegel points to various other characteristics of the judicial process as well, and concludes that "[t]he full range of distinctive institutional characteristics, not just the political isolation of judges, normatively justifies judicial review."[29]

While Eisgruber essentially argues that judicial review is not really undemocratic, in "Why We Need More Judicial Activism," Sherry *embraces* the fact that judicial review is undemocratic, arguing that the "courts *should* stand in the way of democratic majorities, in order to keep majority rule from degenerating into majority tyranny."[30] Her argument rests on three grounds. First, she distinguishes between a pure democracy, in which the majority is entitled to enact its wishes into law, and a constitutional democracy, in which the Constitution places limits on the majority's power.[31] Because our Constitution establishes a constitutional democracy, constitutional *theory* suggests a need for judicial oversight of the popular branches.[32] Second, and relatedly, our own constitutional *history* confirms

[25] Siegel, *supra* note 8, at 1147.
[26] *Id*. at 1169.
[27] *Id.* at 1169-70.
[28] *Id*. at 1173.
[29] *Id*. at 1147 (noting that judicial review is focused and mandatory, whereas the legislative process is unfocused and discretionary).
[30] Sherry, *supra* note 9, at 1.
[31] *Id.* at 7; *see also id.* ("The Constitution establishes liberty as well as democracy.").
[32] *Id*. at 7-9.

that the Framers saw a need for a strong bulwark against majority tyranny, and recognized that the remedy for legislative excess was judicial activism.[33] Finally, Sherry argues that an examination of constitutional *practice* shows that too little activism – or, in other words, the failure to invalidate a law that should be declared unconstitutional – produces worse consequences than does too much.[34] To illustrate this point, Sherry compiles a list of "condemned cases"[35] (consisting of such predictable names as *Plessy v. Ferguson*[36] and *Korematsu v. United States*[37]) and notes that each case on the list has at least two commonalities: first, it is universally recognized as wrong; and second, the Supreme Court *upheld* the challenged governmental action rather than invalidating it.[38] While there have clearly been unpopular decisions in which the Court struck down the challenged action (the Court's recent decision in *Citizens United v. Federal Election Commission*[39] immediately jumps to mind), Sherry's list nevertheless persuasively demonstrates that an overly deferential Court may not be as desirable as critics of judicial review suggest.

III.
THE CASE FOR JUDICIAL REVIEW OF DIRECT DEMOCRACY

Although the authors' arguments in defense of judicial review appear to have been articulated with representative democracy in mind (particularly in the case of Siegel), their arguments apply with equal – if not greater – force in the context of direct democracy. Democracy, whether direct or representative, reflects majority

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[33] *Id.* at 9-11.
[34] *Id.* at 11 ("[W]e are better off erring on the side of too much judicial activism than too little.").
[35] *Id.* at 14-15.
[36] 163 U.S. 537 (1896) (upholding Louisiana's racially segregated railcars).
[37] 323 U.S. 214 (1944) (upholding an executive order excluding Japanese Americans from the West Coast during World War II).
[38] Sherry, *supra* note 9, at 16.
[39] 558 U.S. 310 (2010) (holding that the First Amendment prohibits the government from restricting political independent expenditures by corporations, associations, or labor unions).

will only when citizen participation in government is both widespread and informed. As I will explain below, however, in the United States few citizens vote in elections and even fewer are adequately informed of the issues at stake. Because these problems affect the outcomes of both direct and representative democracy, both direct and representative democracy fail to accurately reflect the will of "the people." Perhaps more importantly, even if exercises of direct democracy better reflect majoritarian preferences, they also uniquely facilitate majoritarian oppression of disfavored minority interests. The Framers designed our system of government with deviations from pure democracy that better protect such minority interests. Thus, I conclude that the case for judicial review is *stronger*, not weaker, in the context of direct democracy. I conclude by illustrating this point with examples of recent direct democracy measures that have consistently disfavored minority rights.[40]

A. Direct democracy fails to accurately reflect "the will of the people."

Given that "town hall democracy" is an impractical model for the United States,[41] the next best way to gauge majority sentiment would seem to be direct democracy, which allows each citizen to vote on issues rather than on candidates.[42] As a practical matter, however, popular votes do a flawed job of ascertaining what the people really want, even in the context of direct democracy. To begin with, only about half of the voting age population regularly votes, and this number drops even further in midterm election years.[43] Moreover, data demonstrate that significant numbers of

[40] Although other authors have occasionally called for increased judicial review of the products of direct democracy, they have not elaborated on the underlying reasons for doing so. *See, e.g.*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990); Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (1996); Mihui Pak, *The Counter-Majoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237 (1999).

[41] EISGRUBER, *supra* note 3, at 49.

[42] *See* Siegel, *supra* note 8, at 1168-69 (discussing taking a case "to the polls" as a costly alternative to litigation).

[43] *See Voter turnout data for United States*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND

those who vote for candidates at the top of the ballot – already a reduced segment of the populace – fail to vote on initiatives and referenda (the "drop-off" problem).[44] Based on these facts, it seems unlikely that the small subgroup that actually does vote on these issues accurately reflects the preferences of the full citizenry. To the contrary, data indicate that those who are less educated, poorer, and younger are far less likely to vote on such measures.[45]

Given the complexity of the issues presented by direct democracy measures, voters who do respond to such measures are often confused, ignorant, or mistaken about what their vote really signifies. As Eisgruber explained, voters know that their own vote rarely affects the outcome of the election; thus, rational voters have little incentive to become well informed, regardless of whether they are voting for candidates or issues.[46] While Eisgruber made this point in the context of candidate-voting, it is especially true in the context of issue-voting, particularly because a ballot is rarely limited to a single measure. For instance, California's infamous Proposition 8 was just one of twenty-one statewide propositions on its 2008 ballot, in addition to 380 local ballot measures.[47] Such overloads are all but

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ELECTORAL ASSISTANCE, http://perma.cc/L2VD-28NG (archived Feb. 8, 2014) (showing that 53.6% of voting-age population voted in the 2012 election, and just 38.5% in the 2010 midterm election).

[44] *See, e.g.*, James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2155 (2013) (citing THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 66-67 (1989)) ("[B]allot propositions generally attract fewer voters, with significant ballot drop-off between the number participating in elections for office and those who vote on the ballot proposition.").

[45] *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 33-34 (1995) ("Voting on ballot propositions only amplifies the social class bias in participation, because those with lower incomes or less education tend to skip voting on ballot questions at much higher rates.").

[46] *See* EISGRUBER, *supra* note 3, at 50-51; *see also* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1331 (1994) ("Rational ignorance among voters . . . hinders achievement of the public interest under direct democracy."). *But see* Michael S. King, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1143 (2003) ("Despite their rational ignorance, voters can still make competent political choices. . . . Heuristic cues offer the best means of improving voter competence in direct democracy at low cost.").

[47] Shane Goldmancher, *All the local ballot measures fit for a vote*, CAPITOL ALERT, SACRAMENTO BEE (Oct. 16, 2008), http://perma.cc/PR2D-YSAL.

guaranteed to strain the voters' capacity for adequate research and education. Voter confusion is likely partly responsible for the drop-off problem, with many voters deciding to simply forego voting on a ballot measure altogether. On other occasions, however, it may lead voters to vote contrary to their own desires. Sometimes such incorrect voting may be attributable to the wording of the proposition; for example, those *in favor* of same-sex marriage in California were required to vote *against* Proposition 8.[48] In sum, the weaknesses of direct democracy can result in uninformed and even mistaken voting. And even fully informed voters can still vote only yes or no, which may not fully represent their position on a given issue.

B. Judicial review of direct democracy is necessary to protect against "the tyranny of the majority."

I do not mean to suggest that every, or even most, exercises of direct democracy are inaccurate reflections of the desires of those who vote. But even if direct democracy has a superior ability to convey the majority's viewpoint, the fact that a viewpoint is widely held does not make it constitutional. To the contrary, the Framers specifically designed our structure of government to guard against bare majoritarianism.[49] The goal in designing the structure of government was to "simultaneously empower and disempower popular majorities, to ensure democratic governance but nevertheless place a check on unfettered democratic rule."[50] Thus, the Framers chose a constitutional democracy over a pure democracy in order to place limits on the majority's power.[51] In addition, the Framers endorsed the separation of powers, in which the Constitution allocated the federal government's authority among three branches and, within Congress, divided the legislative power between two houses, each

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[48] *Voter Information Guide*, CA. SECRETARY OF STATE 128 (2008), *available at* http://perma.cc/8VJS-JEFL.

[49] *See* Sherry, *supra* note 9, at 7-8 ("In a constitutional democracy, the role of the judiciary is to enforce the constitutional limits, and to put the brakes on popular tyranny and popular passions.").

[50] *Id.* at 7.

[51] *Id.*

elected by and accountable to different constituencies. In the event that a majority faction dominated one house of Congress, bicameralism would hinder that faction from controlling the legislative process. Moreover, the executive branch retained the authority to veto legislation, though presidential vetoes are subject to possible override by Congress. Finally, the Framers viewed the Constitution's division of governmental authority between the federal government and the states as the final safeguard against majoritarian tyranny.

Most of these checks and balances are missing from the direct democracy process, and their absence is most acute when direct democracy measures target minority groups. Direct democracy presents a unique opportunity for a bare majority to exercise its will over the minority, a situation against which the Framers tried to guard. The National Conference of State Legislatures' database, which lists all state ballot measures since 1892,[52] illustrates the frequency with which proposals to amend state constitutions to ban affirmative action and same-sex marriage are placed on ballots and submitted to the voters. As demonstrated by Figure 1 and Figure 2, the results of such measures overwhelmingly disfavored the minority groups at issue (racial minorities and homosexuals, respectively):

FIGURE 1. AFFIRMATIVE ACTION BANS

PASSED	**FAILED**
Arizona (Proposition 107, 2010)	Colorado (Amendment 46, 2008)
California (Proposition 209, 1996)	
Michigan (Proposal 2, 2006)	
Nebraska (Initiative 424, 2008)	
Oklahoma (State Question 759, 2012)	
Washington (Initiative 200, 1998)	

[52] *Ballot Measure Database*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://perma.cc/4SD8-GG6P (archived Feb. 8, 2014).

FIGURE 2. SAME-SEX MARRIAGE BANS

PASSED	**FAILED**[53]
Alabama (Amendment 774, 2006)	Maine (Question 1, 2012)
Alaska (Ballot Measure 2, 1998)	Maryland (Question 6, 2012)
Arizona (Proposition 102, 2008)	Minnesota (Amendment 1, 2012)
Arkansas (Constitutional Amendment 3, 2006)	Washington (Referendum 74, 2012)
California (Proposition 8, 2008)	
Colorado (Amendment 43, 2006)	
Florida (Amendment 2, 2008)	
Georgia (Constitutional Amendment 1, 2004)	
Hawaii (Constitutional Amendment 2, 1998)	
Idaho (Amendment 2, 2006)	
Kansas (Proposed Amendment 1, 2005)	
Kentucky (Constitutional Amendment 1, 2004)	
Louisiana (Constitutional Amendment 1, 2004)	
Michigan (State Proposal 2, 2004)	
Mississippi (Amendment 1, 2004)	
Missouri (Constitutional Amendment 2, 2004)	
Montana (Initiative 96, 2004)	
Nebraska (Initiative Measure 416, 2000)	
Nevada (Question 2, 2002)	
North Carolina (Amendment 1, 2012)	
North Dakota (Constitutional Measure 1, 2004)	
Ohio (State Issue 1, 2004)	
Oklahoma (State Question 711, 2004)	
Oregon (Measure 36, 2004)	
South Carolina (Amendment 1, 2006)	
South Dakota (Amendment C, 2006)	
Tennessee (Amendment 1, 2006)	
Texas (Proposition 2, 2005)	
Utah (Constitutional Amendment 3, 2004)	
Virginia (Marshall-Newman Amendment, 2006)	
Wisconsin (Referendum 1, 2006)	

[53] The Maine, Maryland, and Washington ballot measures were not technically same-sex marriage *bans*, but rather, proposals to *allow* same-sex marriage that passed, which may be coincidence or may serve as evidence in support of the contention that the wording of such measures affects outcomes.

These data demonstrate the ease with which majorities can trump minority rights using direct democracy measures. And the examples do not stop there: other minority groups, including immigrants[54] and persons charged with crimes,[55] have consistently been disadvantaged by the direct democracy process as well. In this context, the courts are the only institutional check and the only protector of minority rights. Indeed, many initiatives and referenda have subsequently been declared unconstitutional by courts. For instance, in 2012, the Sixth Circuit Court of Appeals overturned Michigan's voter-approved ban on affirmative action on equal protection grounds, concluding that "Proposal 2 reorders the political process in Michigan to place special burdens on minority interests."[56] Additionally, in 2010, a federal district court ruled that California's Proposition 8 violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[57]

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[54] More than half of the states have passed measures to establish English as their official language or to require that all public schoolchildren be taught in English. *See, e.g.,* Ariz. Proposition 203 (2000) (limiting non-English instruction available in public schools); Ariz. Proposition 103 (2006) (establishing English as the official language of the state); Mass. Question 2 (2002) (requiring that all subjects be taught in English); Mo. Constitutional Amendment 1 (2008) (establishing English as the official language of the state); Okla. Question 751 (2010) (same); Utah Initiative A (2000) (same); *see also States with Official English Laws*, U.S. ENGLISH, http://perma.cc/7UKF-C99V (archived Feb. 8, 2014) (advocacy group's map of the thirty-one states with English-only laws). *But see* Colorado's Amendment 31 (2002) (failed amendment requiring English-only instruction in public schools); Oregon's Measure 58 (2008) (failed initiative that would have required "English immersion" in public schools).

[55] States have frequently passed measures to decrease the number of bailable offenses, *see, e.g.*, Texas's Proposition 13 (2007) (authorizing the denial of bail to a person who violates conditions of release in a felony or domestic violence case), and increased penalties for certain types of crimes, *see, e.g.*, Ariz. Proposition 301 (2006) (authorizing a prison term for a first-time offender of methamphetamine possession); Cal. Proposition 83 (2006) (increasing penalties and limiting early-release opportunities for sex offenders); Or. Measure 57 (2008) (increasing sentences for certain drug and property crimes). However, until recently, states have generally rejected measures to decriminalize the use and possession of small amounts of marijuana. S*ee* Alaska Ballot Measure 5 (2000); California's Proposition 19 (2010); S.D. Initiated Measure 1 (2008). *But see* Colo. Amendment 64 (2012); Wash. Initiative 502 (2012).

[56] Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 485 (6th Cir. 2012), *cert. granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

[57] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v.

IV.
CONCLUSION

Determining the will of the people is problematic whether articulated and implemented through the legislative process or through direct democracy. Additionally, unfettered majority rule has never been the goal of American democracy. To the contrary, our government has an obligation to all of its citizens, and the rights of individuals and minority groups must be protected against the actions of the majority. In the context of direct democracy, these protections can be enforced only by strong judicial review. Clearly, judicial resolution of constitutional issues will continue to generate controversy as judges interpret vague terms such as "due process" and "equal protection." Yet the ability of courts to engage in this function is necessary to protect individual liberties from majority encroachments; thus, the supposed counter-majoritarian difficulty should not foreclose judicial review of direct democracy initiatives.

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Brown, 671 F.3d 1052 (9th Cir. 2012). The Supreme Court ultimately ruled that proponents of initiatives such as Proponent 8 did not possess legal standing in their own right to defend the resulting law in federal court. The appeal was dismissed, leaving the district court's 2010 ruling in place and enabling same-sex marriages in California. Hollingsworth v. Perry, 133 S. Ct. 2652, 2661-63 (2013).