THE ROBERTS COURT REVOLUTION, INSTITUTIONAL LEGITIMACY, AND THE PROMISE (AND PERIL) OF CONSTITUTIONAL STATESMANSHIP

Thomas G. Donnelly[*]

Our nation is in the middle of a constitutional revolution. While many periods of constitutional transformation have arisen out of large-scale political realignments, the Roberts Court Revolution is a product of our nation's long (and unusual) political interregnum. Even as neither political party has managed to secure enough support to reconstruct our nation's politics, the Roberts Court—with its young and ambitious conservative majority—has already moved quickly to reconsider key pillars of the existing constitutional regime. This represents a challenging moment for the Roberts Court and its institutional legitimacy. To counteract this danger, the Justices might return to an old idea—one that has both seduced and vexed scholars and Justices alike for generations: constitutional statesmanship. When wrestling with the statesmanship ideal, theorists are often inclined to simply shrug their shoulders, concede that a precise definition is impossible, and suggest that we often know statesmanship when we see it. We can do better. In this Article, I define constitutional statesmanship for our age of constitutional revolution. Drawing on a diverse set of theorists and methodological approaches—most notably, Ronald Dworkin's famous concept of "fit"—I argue that constitutional statesmanship is best understood as the balance between three modes of analysis: (1) legal fit (relying on conventional legal materials and arguments); (2) popular fit (drawing on concrete indicators of current public opinion); and (3) pragmatic fit (factoring in predictions about public responses, policy consequences, and assessments by legal elites).

INTRODUCTION

Our nation is in the middle of a constitutional revolution. It isn't our nation's first. However, this one *is* unusual.

In his influential account of constitutional change, Gary Jacobsohn defines a constitutional revolution as "a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity."[1] Throughout American history, successful constitutional revolutions often follow transformations in American politics.[2] These key

[*] Thomas G. Donnelly. Climenko Fellow and Lecturer on Law, Harvard Law School; J.D., Yale Law School; M.A., Princeton University; B.A., Georgetown University. For their suggestions, encouragement, and inspiration, I extend my deep thanks to Bruce Ackerman, Paul Frymer, Robert George, Jan-Werner Mueller, Robert Post, Jeffrey Rosen, Reva Siegel, and Keith Whittington.

[1] Gary Jeffrey Jacobsohn, *Theorizing the Constitutional Revolution*, 2 J. L. & CTS. 1, 3 (2014).

[2] JOHN B. GATES, THE SUPREME COURT AND PARTISAN REALIGNMENT: A MACRO- AND MICROLEVEL PERSPECTIVE 3–15 (1992); BRUCE ACKERMAN, WE THE PEOPLE, TRANSFORMATIONS 3–31 (1997).

periods of large-scale change reshape existing political debates and realign our nation's politics—with the opposition party vanquishing its political foes and a new governing coalition reconstructing our nation's political order.[3] Sometimes these political realignments follow a single decisive election.[4] Other times they slowly emerge over time.[5] Either way, the victorious party manages to refashion our nation's core commitments—building a new governing regime with a new set of political leaders, a new political vision, and a new policy agenda.[6] In turn, the Supreme Court constructs a new constitutional regime to match it.[7]

Not so today. The Roberts Court emerged out of our nation's long (and unusual) political interregnum. For decades, our nation's political parties have battled to a draw—with long stretches of divided government and neither party winning a decisive political victory.[8] As a result, the Roberts Court Revolution is more a function of good fortune than political triumph—with Donald Trump losing the popular vote, winning the Electoral College, and filling three Supreme Court vacancies during his single term in office. This newly constituted Court acts within a challenging political environment—with high levels of partisan polarization,[9] closely competitive elections,[10] gridlock in the

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3 *See* JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 25 (2020); JAMES L. SUNQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES 4 (1983); WALTER DEAN BURNHAM, CRITICAL ELECTIONS: AND THE MAINSPRINGS OF AMERICAN POLITICS 4–5 (1971); ELMER ERIC SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 80–81 (1960).

4 V.O. Key, *A Theory of Critical Elections*, 17 J. POL. 3, 4 (1955).

5 V.O. Key, *Secular Realignment and the Party System*, 21 J. POL. 198, 199 (1959).

6 BURNHAM, *supra* note 3, at 9.

7 BALKIN, *supra* note 3, at 28; KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 82 (2007); *see* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001) (describing how political outcomes lead to shifts in the constitutional regime).

8 *See* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 8–32 (2004) (describing the sociological and systemic causes of the current, prolonged period of divided government).

9 MATT GROSSMANN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND INTEREST GROUP DEMOCRATS 3 (2016); NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 25–27 (2016); ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2011); Christopher Hare & Keith T. Poole, *The Polarization of Contemporary Politics*, 46 POLITY 411 (2014); Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AM. J. POL. SCI. 35 (2000).

10 *See, e.g.,* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 1–2 (2016) (arguing that changes in electoral dynamics have increased congressional focus on partisanship); *see also* Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL. SCI. 261, 263, 268 (2015) (arguing that the polarization of political parties has diminished Congress's capacity for legislative function).

elected branches,[11] an increasingly fractured legal culture,[12] and a "calcified politics," with Americans "more firmly in place and harder to move away from their [partisan] predispositions" than in the past.[13] While this political environment might counsel judicial caution, the Court's conservative majority is instead moving quickly to reconsider key pillars of the existing constitutional regime: the administrative state, reproductive rights, affirmative action, voting rights, religious liberty, and gun rights—to name but a few.[14]

With political power shifting between the parties, the Court's ideological composition set in place, and the Roberts Court's conservative majority pursuing an ambitious agenda,[15] it's little wonder that progressive critics have stepped up their attacks on the Roberts Court.[16] While some of these critics call for judicial reforms with strong cross-ideological support,[17] others propose blunt court-curbing measures with a sharper edge.[18] With a closely divided Congress, the Roberts Court may be safe for now. But the Justices shouldn't ignore the challenges of the current constitutional moment. A Supreme Court legitimacy crisis still looms.[19]

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[11] *See* MARC J. HETHERINGTON & THOMAS J. RUDOLPH, WHY WASHINGTON WON'T WORK: POLARIZATION, POLITICAL TRUST, AND THE GOVERNING CRISIS 3–20 (2015) (arguing that increased polarization and diminished mutual trust between the parties have made it far more difficult for Congress to function).

[12] NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 104 (2019); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 4–5 (2008).

[13] JOHN SIDES, CHRIS TAUSANOVITCH, & LYNN VAVRECK, THE BITTER END: THE 2020 PRESIDENTIAL CAMPAIGN AND THE CHALLENGE TO AMERICAN DEMOCRACY 6 (2022).

[14] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overturning federal constitutional protections for abortion); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (holding a public-school coach could not be disciplined for encouraging players to pray before games); *see also* New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (establishing a historical precedent test for firearms regulations); West Virginia v. EPA, 142 S. Ct. 2587 (2022) (extending the Major Questions Doctrine).

[15] MCCARTY, POOLE & ROSENTHAL, *supra* note 9, at 3–4.

[16] *See, e.g.*, Matt Ford, *The Chief Justice Who Isn't: How John Roberts Lost Control of the Supreme Court*, NEW REPUBLIC (Oct. 20, 2022) (describing the Chief Justice's waning influence over the Court's right wing). For a thoughtful overview of possible Supreme Court reforms, see Daniel Epps & Ganesh Sitaraman, *How To Save the Supreme Court*, 129 YALE L.J. 148, 151 (2019).

[17] *See, e.g.*, BALKIN, *supra* note 3, at 152 (calling for Supreme Court term limits); *see also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL. 769, 822–54 (2006) (providing evidence of longstanding conservative support for this proposal).

[18] Julia Mueller, *House Democrats Tout Bill To Add Four Seats to Supreme Court*, THE HILL (July 18, 2022).

[19] *See, e.g.*, RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 1–19 (2018) (outlining several facets of the public and academic debate about the Court's legitimacy).

Simply put, Supreme Court legitimacy refers to the public's overall support for the Court as an institution.[20] In their classic account in the political science literature, Gregory Caldeira and James Gibson offer a helpful explanation of the concept of legitimacy in this context.[21] When the Court enjoys high levels of institutional legitimacy, the American people will continue "to concede" the Court's broader authority to decide cases and settle constitutional disputes even if Americans "disagree" with some of the Court's specific rulings.[22] In his own influential account of Supreme Court legitimacy, Richard Fallon adds that the Court's institutional reputation turns on its ability to remain legally, sociologically, and morally legitimate in the eyes of the legal profession and the American public.[23]

Viewed one way, the Justices have little power to reshape the existing political environment. On this view, critics attack the Court because of structural factors beyond the Justices' control: partisan polarization,[24] competitive parties,[25] life tenure,[26] a young and conservative Court,[27] dysfunction in the elected branches,[28] and divisions among legal elites.[29] These factors aren't going away any time soon, and there's little that the Justices can do to eliminate them.[30] Even so, the Justices are far from powerless in the face of various threats to the Court's institutional legitimacy. Furthermore, there's ample evidence to suggest that the Court's own actions—namely, its recent decisions on issues like abortion and gun rights—may have magnified the Court's institutional challenges.[31] Moving forward, the Justices themselves can

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[20] *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992) (discussing varied means of measuring public support for the Supreme Court). For an extensive treatment of the Roberts Court and Supreme Court legitimacy, see Thomas G. Donnelly, *Supreme Court Legitimacy: A Turn to Constitutional Practice*, 47 B.Y.U. L. REV. 1487 (2022).

[21] Caldeira & Gibson, *supra* note 20, at 635.

[22] *Id.* at 637.

[23] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91 (2005).

[24] For an overview of polarization in modern America and its effect on national politics, see NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW (2019); *see also* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016).

[25] Lee, *supra* note 10, at 268.

[26] *See generally*, THE FEDERALIST NO. 78 (Alexander Hamilton).

[27] *See generally*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2242 (2019).

[28] HETHERINGTON & RUDOLPH, *supra* note 11, at 3.

[29] DEVINS & BAUM, *supra* note 12, at 104.

[30] Lee, *supra* note 10, at 275–76.

[31] Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (Jun. 23, 2022); Devan Cole, *60% of Americans Approved of the Supreme Court Last July. Now, It's 38%, According to a New Poll*, CNN.COM (July 20, 2022).

act in ways that lower the political heat on the Court as an institution. The choice is theirs. One solution turns on an old idea—one that has both seduced and vexed scholars and Justices alike for generations: *constitutional statesmanship*.

Constitutional statesmanship is one of constitutional theory's longest-running obsessions.[32] As far back as the Age of Jackson, Alexis de Tocqueville called on statesmanlike judges to "discover the signs of the times" and guard against attacks to national supremacy and the rule of law.[33] Half a century later, James Bradley Thayer celebrated the constitutional statesmanship not of judges, but of legislators, arguing that the elected representative best combined "a lawyer's rigor with a statesman's breadth."[34] The statesmanship ideal continued to capture the imaginations of leading theorists well into the twentieth century—and beyond.[35]

American history is filled with debates over constitutional meaning.[36] The Constitution's text is broadly worded—and in many cases, open to a variety of reasonable interpretations.[37] Disagreement is deep and widespread.[38] Constitutional statesmanship often turns on the statesman's ability to mediate these disputes and speak to something more than mere partisan interest. While the Supreme Court has always been political, the statesmanship ideal captures the longstanding dream that with the right kind of leadership, the Court might transcend the brute, unthinking partisanship of the elected branches and promote our nation's highest constitutional principles.[39]

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[32] The countermajoritarian difficulty is certainly a close competitor. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

[33] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 142 (Harvey C. Mansfield & Delba Winthrod, eds., 2000).

[34] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138 (1893).

[35] For the most successful accounts of constitutional statesmanship in the recent literature, see GARY J. JACOBSOHN, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT (1977); and Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008). For earlier important accounts of constitutional statesmanship, see ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908); Felix Frankfurter, *The Court and Statesmanship*, *in* LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913-1938, at 34 (E.F. Prichard, Jr. & Archibald Macleish, eds., 1939).

[36] *See* Edward S. Corwin, *Constitution v. Constitutional Theory*, 19 AM. POL. SCI. REV. 290, 299 (1925).

[37] *See* JACK M. BALKIN, LIVING ORIGINALISM 6 (2011).

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

[39] *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 24–26, 36–38, 51 (2005).

And yet, in the twenty-*first* century, it's easy to ask whether the concept of constitutional statesmanship has outlived its usefulness. The word itself—states*man*ship—seems outdated. And semantics aside, constitutional statesmanship has always been an elusive ideal.

In this Article, I take up the task of defining constitutional statesmanship for our age of constitutional revolution. When wrestling with the statesmanship ideal, theorists are often inclined to simply shrug their shoulders, concede that a precise definition is impossible, and suggest that we often know statesmanship when we see it.[40] We can do better. Drawing on a diverse set of constitutional theorists and methodological approaches—most notably, Ronald Dworkin's famous concept of "fit"[41]—I build a conceptual framework for understanding the statesman's practical task.

When deciding constitutional cases, the aspiring statesman should balance between *three* modes of analysis: (1) *legal* fit (relying on conventional legal materials and arguments); (2) *popular* fit (drawing on concrete indicators of current public opinion); and (3) *pragmatic* fit (factoring in predictions about public responses, policy consequences, and assessments by legal elites). While each mode of analysis is imperfect (and even dangerous) when applied in excess, the constitutional statesman balances the virtues (and vices) of each perspective when deciding constitutional cases. In short, constitutional statesmanship is best understood as a search for *constitutional balance*.

To guard against current threats to the Court's institutional legitimacy, the Justices should take up the task of constitutional statesmanship. However, scholars and commentators can also use the dimensions of fit—legal, popular, and pragmatic—to analyze (and critique) the specific contours of the Roberts Court Revolution, both at the regime level and at the case level.

In Part I, I frame the Roberts Court's institutional challenge—drawing on key insights from both political science and constitutional theory, including the influential work of America's leading theorist of constitutional revolution, Bruce Ackerman

In Part II, I review the existing literature on constitutional statesmanship—exploring competing visions of the statesmanship ideal, weighing challenges to its normative appeal, and detailing a range of lingering questions. In Part III, I offer my own conceptual framework for understanding the statesman's task,

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[40] *See, e.g.*, JACOBSOHN, *supra* note 35, at 13 ("Statesmanlike attributes . . . exist in the eyes of the beholder."); *see also* Siegel, *supra* note 35, at 963 ("Sometimes one simply seems to know statesmanship when one sees it—or when one does not see it.").

[41] RONALD DWORKIN, A MATTER OF PRINCIPLE 160 (1985).

filling in the theoretical and methodological details of the three modes of fit—legal, popular, and pragmatic. Finally, in Part IV, I end with a concrete example of constitutional statesmanship in action—the Roberts Court's final Term before Justice Ginsburg's death in 2020.

I. POPULAR SOVEREIGNTY, LEGAL FIDELITY, AND THE LEGITIMACY OF THE ROBERTS COURT REVOLUTION

Following a wave of new appointments by President Trump, the Roberts Court has moved quickly to transform key areas of constitutional law—expanding individual gun rights, reinvigorating the First Amendment's protection of religious liberty, and returning the issue of abortion to the states.[42] In response, progressives have attacked the overall legitimacy of this transformational push—arguing that it isn't a function of legal fidelity or political triumph, but, instead, of good fortune.[43] This progressive critique focuses, in part, on the role of the Supreme Court nomination process in the Roberts Court Revolution. Attacking the Court's decision to overturn *Roe v. Wade*, Justices Breyer, Kagan, and Sotomayor take dead aim at the role of President Trump's new Supreme Court appointees, arguing, "The Court reverses course today for one reason and one reason only: because the composition of this Court has changed."[44]

Of course, throughout American history, new Supreme Court appointments have often reshaped constitutional law.[45] At America's Founding, George Washington packed the Court with loyal Federalists.[46] As the nation's politics shifted, Andrew Jackson countered with a wave of Jacksonian Democrats.[47] A century later, FDR filled the Supreme Court with

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[42] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022); New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

[43] *See, e.g.*, 142 S. Ct. at 2350 (Breyer, J., Sotomayor, J., and Kagan J., dissenting) ("Now a new and bare majority of this Court—acting at practically the first moment possible—overrules *Roe* and *Casey* . . . . [I]t undermines the Court's legitimacy.").

[44] *Id.* at 2320.

[45] Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1167 (1988).

[46] *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 57–64 (2008).

[47] GERARD N. MAGLIOCCA, ANDREW JACKSON AND THE CONSTITUTION: THE RISE AND FALL OF GENERATIONAL REGIMES 20–26 (2007); MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 115–66 (2006); 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 74–80 (1991).

ardent New Dealers.[48] And the Warren Court Revolution itself emerged, in part, from the appointments of Presidents aligned with a durable governing regime committed to eradicating Jim Crow and protecting civil liberties.[49]

On one view, the Roberts Court Revolution is just as legitimate as these previous efforts at constitutional transformation—with President Trump simply following a longstanding tradition of pursuing constitutional change through new Supreme Court appointments.[50] However, the Roberts Court Revolution differs from these previous pushes in important ways. These differences—tied to each revolution's popular and legal legitimacy—threaten to undermine the Roberts Court's institutional reputation.

A. SUPREME COURT NOMINATIONS, CONSTITUTIONAL CHANGE, AND THE LEGITIMACY OF CONSTITUTIONAL REVOLUTIONS

Politics is a story of both stability and change. Many political scientists emphasize the power of political stability—often framing their analyses with the familiar concept of path dependence.[51] On this view, the political status quo dies hard. Even so, it *does* sometimes perish. In the traditional account, scholars often focus on sharp breaks with the past—whether framed as critical junctures, political realignments, or constitutional moments.[52] However, many scholars complicate this story of rapid change.[53] For these scholars, political transformations are often driven not by abrupt shifts, but by slow-moving processes.[54] As James Mahoney and Kathleen Thelen explain, "Although less dramatic than . . . wholesale transformations, these slow and piecemeal

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[48] DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 336–37 (2005); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 213-36 (1995).

[49] ABRAHAM, *supra* note 46, at 197–232; LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 50–53 (2000).

[50] Balkin & Levinson, *supra* note 7, at 1053.

[51] Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 93 AM. POL. SCI. REV. 243, 245 (2004) ("Past social policy choices create strong vested interests and expectations, which are extremely difficult to undo. . . .").

[52] James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, *in* EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER, at 1, 7 (James Mahoney & Kathleen Thelen, eds., 2010).

[53] For the most persuasive critique of this literature, see DAVID R. MAYHEW, ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE (2004).

[54] *See* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 13 (2004).

changes can be equally consequential for patterning human behavior and for shaping substantive political outcomes."[55]

In the context of constitutional reform, key actors often play the long game. The reason for this is simple: the American constitutional system itself resists transformational change. The Constitution's text is difficult to amend.[56] The Constitution grants Supreme Court Justices life tenure—insulating them from political influence.[57] Constitutional norms cut against efforts by the elected branches to curb the Court.[58] And the American people themselves generally value the Court's role as an independent check on government officials.[59] While certain constitutional moments *do* sometimes transform the Constitution's meaning in fundamental ways, these moments are rare.[60] Constitutional change—even *transformational* change—often takes time.[61] Supreme Court nominations often play an important role in this process.[62]

Most modern Presidents look to place their constitutional stamp on the Supreme Court through new nominations.[63] At the same time, scholars often use the nomination process as a way of legitimating the exercise of judicial review—with new vacancies, appointments by the President, and confirmations by the Senate linking constitutional law to the governing regime over time.[64] For these scholars, the countermajoritarian difficulty may be little difficulty at all—with the Supreme Court acting as part of the governing coalition and the Court rarely striking down laws that run against public opinion.[65] On this view, the constitutional system itself maintains a link between the Constitution's

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[55] Mahoney & Thelen, *supra* note 52, at 1.

[56] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2008).

[57] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

[58] For an overview of the constitutional norms that cut against court-curbing efforts in the twenty-first century, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 227–48 (2004).

[59] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 367–86 (2009).

[60] ACKERMAN, *supra* note 2, at 5.

[61] David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905 (1996).

[62] Balkin & Levinson, *supra* note 7, at 1045.

[63] WHITTINGTON, *supra* note 7, at 87.

[64] *See* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 126 (2001) (describing the connection between popular conceptions of justice and judicial review).

[65] *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (arguing that the Supreme Court's policy views are usually in line with the legislative majority's).

meaning and popular constitutional views—through elections, judicial retirements, and new appointments.[66]

Sometimes Supreme Court nominations come in waves—with Presidents transforming the Supreme Court's personnel and constitutional doctrine at a single critical juncture.[67] Other times, Supreme Court nominations work more slowly—entrenching a particular party's constitutional views through the gradual replacement of Supreme Court Justices over a longer time horizon.[68] Either way, Supreme Court nominations help maintain a link between the governing party, election returns, public opinion, the Supreme Court's composition, and constitutional doctrine.

Drawing on these insights, Bruce Ackerman offers *the* canonical account of constitutional revolution in the theoretical literature—providing scholars with a way of situating Supreme Court appointments within the context of broader transformations in constitutional law. Importantly, Ackerman's account offers concrete criteria for evaluating the popular legitimacy of various pushes for constitutional change. In the process, Ackerman provides scholars with a way of distinguishing the Roberts Court Revolution from many of its predecessors.

B. CONSTITUTIONAL REVOLUTION FROM AN ACKERMANIAN PERSPECTIVE: THE IMPORTANCE OF POPULAR LEGITIMACY

For Bruce Ackerman, a constitutional revolution "succeeds when it *fundamentally* reorganizes dominant beliefs and practices in a *relatively* short period of time."[69] However, in Ackerman's view, such a transformative push is only legitimate if it is consistent with America's commitment to popular sovereignty.[70] From an Ackermanian perspective, the American people are *the* key agents of constitutional reform, and judges are constrained by the American people's constitutional commands when delivered during periods

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[66] FRIEDMAN, *supra* note 59, at 16; Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583 (2005); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

[67] *See* Ackerman, *supra* note 45, at 1170 (describing President Reagan's judicial nominations as "transformative").

[68] *See* Balkin & Levinson, *supra* note 7, at 1045 (noting that constitutional change occurred over a ten-year period).

[69] BRUCE ACKERMAN, REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW 28 (2019).

[70] ACKERMAN, *supra* note 47, at 3–31 (documenting the historic understanding of popular sovereignty and arguing that modern government fails to represent that sovereignty).

of higher lawmaking.[71] As a result, a new constitutional movement must *earn* the right to speak for the American people.[72]

While the American people have sometimes amended their Constitution through Article V, they have also pushed for big constitutional changes outside of the formal amendment process—whether by defying the Articles of Confederation at the Founding, stretching Article V to its breaking point during Reconstruction, transforming the scope of national power during the New Deal, or shedding the doctrinal fetters of Jim Crow during the Civil Rights Revolution.[73] By studying these key periods in constitutional history, the Ackermanian looks to derive America's rule of recognition—one that establishes a method for identifying genuine acts of popular sovereignty and excluding reformers who falsely claim to speak for the American people.[74] This is no simple task. Even restricting ourselves to Ackerman's four recognized constitutional moments—the Founding, Reconstruction, the New Deal, and the Civil Rights Revolution—each moment offers its own distinct set of revolutionary actors, institutional configurations, sequences of action, and canonical legal materials.[75] Despite these differences, Ackerman still identifies a core that unites each of these key periods.

For Ackerman, it's the very process of constitutional contestation itself—no matter the precise actors, sequence, or institutional forum.[76] No matter the specifics, a new constitutional movement must earn the right to speak for the American people—surviving a multi-year series of debates, elections, legislative battles, and Supreme Court cases.[77] Over time, reformers must secure the broad, durable, and genuine support of the American people—persuading an engaged public, winning a series of institutional fights (at the ballot box, in Congress, and in the courts), securing support (or forcing acquiescence) from the political opposition, and convincing the Supreme Court to write the movement's political victories into constitutional doctrine.[78] This is how Ackerman identifies the American people's constitutional commands.[79] This is what it means for reformers to create a constitutional moment.[80]

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[71] *Id.* at 139 (arguing that the proper order of influence is "bottom-up" from the people to judges).

[72] ACKERMAN, *supra* note 2, at 266–94.

[73] 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 1–19 (2014).

[74] ACKERMAN, *supra* note 47, at 59.

[75] ACKERMAN, *supra* note 73, at 1–19.

[76] ACKERMAN, *supra* note 73, at 3–5.

[77] ACKERMAN, *supra* note 2, at 266–94.

[78] ACKERMAN, *supra* note 73, at 42.

[79] *Id.* at 51.

[80] *Id.* at 3.

From an Ackermanian perspective, this popular mandate forms the core of a legitimate constitutional revolution. During periods of ordinary politics, judges must continue to act within the boundaries set by the existing constitutional regime as defined by the written Constitution and the principles endorsed during those rare moments when We the People have spoken.[81] On this view, the judge's task is one of intergenerational synthesis, not constitutional revolution.[82] Rather than pushing to transform the existing constitutional regime, judges should instead look to synthesize the American people's past constitutional achievements and protect them from ongoing threats by ordinary politicians (and their supporters).[83] Only during periods of higher lawmaking—when constitutional reformers secure the "broad" and "sustained" support of the American people—may these reformers (and their allied judges) rewrite the constitutional rules.[84]

Within Ackerman's theory, the Roberts Court Revolution lacks popular legitimacy. The Roberts Court emerged out of our nation's long (and unusual) political interregnum—not a large-scale political realignment. For decades, our nation's political parties have battled to a draw—with long stretches of divided government and neither party winning a decisive political victory.[85] Over time, Democrats never secured a clear enough political advantage to build a durable progressive majority on the Supreme Court. And the Republican Party—led by Donald Trump—never secured a big enough political victory to earn the right to transform the existing constitutional regime.

Of course, recent Supreme Court appointments *have* strengthened the Roberts Court's conservative majority—bolstering its political power.[86] With Neil Gorsuch's confirmation, President Trump and Senate Republicans fortified the Court's conservative base—swapping out an aged originalist for a young one.[87] And with the additions of Brett Kavanaugh and Amy Coney Barrett, Republicans reshaped the ideological composition of the Court—replacing the Court's swing Justice (Anthony Kennedy) with a conservative

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[81] ACKERMAN, *supra* note 47, at 230–65.

[82] *Id.* at 86–99.

[83] *Id.* at 139.

[84] ACKERMAN, *supra* note 73, at 224.

[85] *See* Tushnet, *supra* note 8, at 32 (describing "divided ideological government").

[86] KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT 299–300 (2019).

[87] Grove, *supra* note 27, at 2242 (summarizing critique of recent Supreme Court confirmations).

stalwart[88] and one of its most famous progressive voices (Ruth Bader Ginsburg) with a leading conservative academic and judge.[89]

This reconstituted conservative majority—young, ambitious, and with considerable intellectual heft—has already transformed constitutional law. It is also in a strong position to reshape our nation's constitutional politics for decades to come. Even so, the Roberts Court Revolution represents a revolution by political fortune, judicial replacement, and ideological faction—not one driven by popular sovereignty, political realignment, and a Supreme Court allied with a strong governing regime. Sure, Donald Trump won the Electoral College and filled three Supreme Court vacancies during his single term in office. However, this bout of political luck isn't enough to satisfy Ackerman's criteria for a legitimate constitutional revolution. President Trump didn't win the popular vote in either of his runs for President, and the Republican Party itself lost control of Congress shortly after President Trump's election. Finally, even after the election of President Biden, our nation remains mired in a political interregnum.

From an Ackermanian perspective, neither President Biden nor President Trump has earned the right to reshape the constitutional order.[90] In this sense, the Roberts Court Revolution most closely resembles—not the transformative pushes of Washington, Jackson, FDR, or the Warren Court—but, instead, that of the Chief Justice who led the last conservative revolution at the Supreme Court: Melville Fuller.

C. Comparing Conservative Constitutional Revolutions: The Fuller Court, the Roberts Court, and the Importance of Legal Legitimacy

In his influential study of presidential history, Stephen Skowronek posits that presidential politics unfolds in a series of recurrent cycles—driven by a President's relationship to a given period's governing regime and whether the existing regime is weak or strong.[91] He refers to these cycles as the passage of *political time*.[92] For Skowronek, a President's place in political time

[88] Scott Shane, *Brett Kavanaugh: Influential Judge, Loyal Friend, Conservative Warrior—and D.C. Insider*, N.Y. TIMES (July 14, 2018).

[89] Brett Kendall & Jess Bravin, *Amy Coney Barrett: What Comes Next and How the Supreme Court Will Change*, WALL ST. J. (Oct. 25, 2020).

[90] ACKERMAN, *supra* note 73, at 42.

[91] STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 33 (1997).

[92] *Id.* at 34.

determines her overall power to shape (or even reshape) the politics of a governing regime.[93] However, this isn't always true of her influence over the Supreme Court's composition or the future path of constitutional law. The reason for this is simple: *The Supreme Court—and, with it, a regime's constitutional politics—run on their own time*.[94]

New vacancies don't cleanly track governing regimes, presidential terms, or a President's political power. The pace of constitutional change shifts as a governing regime grows older. And even a regime's founding moment can only settle so many constitutional issues. As a result, the most powerful figure in political time isn't always the most powerful figure in constitutional time. The factors that shape a President's political power don't always match those that determine whether she can use that power (and new nominees) to entrench a lasting constitutional vision on the Supreme Court. And even a regime's most powerful President—what Skowronek refers to as a regime's "reconstructive" President—has only so much control over that regime's constitutional destiny.[95]

While a President's place in political time may shape her immediate power to impose her will on our nation's politics, even the most powerful Presidents may not have the opportunity to use Supreme Court nominations to entrench a lasting constitutional vision.[96] In the Supreme Court nomination context, opportunity, a stable regime, and a pattern of elite consensus are sometimes more important than raw political power. That's certainly the story of our nation's last conservative constitutional revolution—the revolution led by Chief Justice Melville Fuller.

The Fuller Court Revolution was driven, in part, by the Supreme Court nominations of two Presidents with weak popular mandates—Grover Cleveland and Benjamin Harrison.[97] Much like our current constitutional moment, the Fuller Court Revolution emerged from a period of political interregnum—with the parties electorally competitive and highly polarized.[98] Over the course of twelve years, Presidents Cleveland and Harrison appointed

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[93] *Id.* at 17–58.

[94] For a thoughtful account of the passage of constitutional time, see BALKIN, *supra* note 3, at 29.

[95] SKOWRONEK, *supra* note 91, at 27–34.

[96] For a powerful example of this insight in the context of President Lincoln's Supreme Court nominations, see BRIAN MCGINTY, LINCOLN & THE COURT (2008); DAVID M. SILVER, LINCOLN'S SUPREME COURT (1956).

[97] For overviews of the politics shaping the presidencies of Grover Cleveland and Benjamin Harrison, see RICHARD E. WELCH, JR., THE PRESIDENCIES OF GROVER CLEVELAND (1988); HOMER E. SOCOLOFSKY & ALLAN B. SPETTER, THE PRESIDENCY OF BENJAMIN HARRISON (1987).

[98] MCCARTY, POOLE & ROSENTHAL, *supra* note 9, at 24–26.

a total of eight new Justices—including four for Harrison, a one-term President who lost the popular vote.[99] With these new appointments, the Fuller Court began to take shape. Harrison replaced Republican stalwarts—Samuel Freeman Miller and Joseph Bradley—and Cleveland appointed Chief Justice Melville Fuller.[100] By the end of Cleveland's second term, only Stephen Field, Horace Gray, and John Marshall Harlan remained from the pre-Cleveland Court—surrounded by six new Justices, including a new Chief Justice.

With these new appointments, the Waite Court—with its extended period of doctrinal experimentation on issues like race and economic regulation[101]—gave way to the Fuller Court's familiar (and hardened) approach to these issues, with the Court turning away from Reconstruction in the South and towards the creation of a modern commercial republic.[102] By the election of William McKinley in 1896, the Fuller Court had already issued landmark decisions like *United States v. E.C. Knight*,[103] *In re Debs*,[104] *Pollock v. Farmers' Loan & Trust Co.*,[105] and *Plessy v. Ferguson*.[106] Others like *Giles v. Harris*[107] and *Lochner v. New York*[108] would soon follow. This constitutional revolution wasn't a function of changing views among the sitting Justices or a large-scale political reconstruction of our nation's politics. Instead, it was driven, in important part, by new Supreme Court vacancies.

The Cleveland-Harrison nomination story reminds us that Presidents with weak political mandates sometimes have the opportunity to reshape constitutional law. However, even the Fuller Court Revolution had a stronger claim to a certain type of legitimacy than the revolution driven by the Roberts Court's conservatives. While Chief Justice Fuller and his colleagues acted with

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[99] ABRAHAM, *supra* note 46, at 111–21.

[100] *Id.*

[101] *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 3 (2011); PAUL KENS, THE SUPREME COURT UNDER MORRISON R. WAITE, 1874–1888, at 1–20 (2010); Howard Gillman, *The Waite Court (1874–1888): The Collapse of Reconstruction and the Transition to Conservative Constitutionalism*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 124 (Christopher Tomlins ed., 2005).

[102] *See* Linda Przybyszewski, *The Fuller Court (1888–1910): Property and Liberty*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 147, 167 (Christopher Tomlins ed., 2005); JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888–1910, at 212–15 (1995).

[103] 156 U.S. 1 (1895) (limiting the reach of Congress's commerce power).

[104] 158 U.S. 564 (1895) (upholding the use of labor injunctions by federal courts).

[105] 157 U.S. 429 (1895) (striking down the federal income tax).

[106] 163 U.S. 537 (1896) (establishing the doctrine of "separate but equal").

[107] 189 U.S. 475 (1903) (refusing to strike down state constitutional provisions that deny African Americans access to the ballot box).

[108] 198 U.S. 45 (1905) (striking down a New York law regulating working conditions in bakeries).

a weak popular mandate (and, in many respects, a morally abhorrent constitutional vision), they could at least lay claim to a certain form of *legal* legitimacy. In contrast with lawyers in our own constitutional moment, late-nineteenth-century legal elites in both political parties had converged around a common constitutional vision—a response, in part, to growing unrest among labor activists and agrarian radicals.[109]

This constitutional vision emerged from the growth of a new liberal orthodoxy within the legal elite.[110] Many of these elite voices began the Reconstruction era as reformers, concerned about corporate consolidation, the emerging wage-labor system, and the decline of civic republicanism.[111] However, as labor activism—with its waves of strikes and its bouts of violence—grew, many liberal reformers turned against labor, instead embracing a new liberal vision centered on property rights, limited government, and concerns about excessive democracy.[112] As the Fuller Court used the Fourteenth Amendment to police the government's power to regulate the economy during the Gilded Age, its jurisprudence often reflected the liberal values of elite lawyers in both political parties.[113] At the same time, the Court advanced a narrow vision of the Fourteenth Amendment outside of the context of economic liberty—including on issues of race and in cases involving incorporation.[114]

For many economic conservatives, the period's new dissenting voices—labor activists, anarchists, African Americans, suffragists, and agrarian radicals—were a threat to the political and economic order.[115] These dissenting voices challenged the vision of economically conservative Republicans and

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[109] For detailed analyses of the constitutional views of elite legal culture in the Gilded Age, see BENJAMIN ROLLINS TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1962); ARNOLD MILTON PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 (1960).

[110] RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896, at 440–76 (2017); NANCY COHEN, THE RECONSTRUCTION OF AMERICAN LIBERALISM: 1865–1914, at 1–19 (2002).

[111] William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 770 (1985).

[112] *Id.*

[113] WHITTINGTON, *supra* note 86, at 148.

[114] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 8–60 (2004); Bryan H. Wildenthal, *The Road to* Twining*: Reassessing the Disincorporation of the Bill of Rights*, 61 OHIO ST. L.J. 1457, 1460 (2000).

[115] HEATHER COX RICHARDSON, WEST FROM APPOMATTOX: THE RECONSTRUCTION OF AMERICA AFTER THE CIVIL WAR 231–342 (2007); HEATHER COX RICHARDSON, THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901, at 183–224 (2001).

their allies among Cleveland Democrats.[116] As a result, elites within both parties turned to law and order. The Fuller Court Justices—particularly those appointed by Presidents Cleveland and Harrison—aligned with this conservative constitutional vision. As a result, the Fuller Court Revolution emerged from a powerful combination of judicial replacement and constitutional convergence—with Presidents Cleveland and Harrison building a new Court with a whole new set of Justices and the Justices themselves building a new jurisprudential framework that reflected a moment of constitutional convergence between legal elites within both political parties. The same is not true of the Roberts Court Revolution.

Like Cleveland and Harrison, President Trump had the opportunity to transform constitutional law through new Supreme Court appointments despite a weak popular mandate. Even so, the Roberts Court Revolution doesn't reflect a moment of constitutional convergence among legal elites. Far from it. Instead, it's driven by the views of a specific constitutional faction.

In their influential account of elite legal culture, Neal Devins and Lawrence Baum argue that legal elites began to polarize in the 1980s.[117] While many in the legal profession shared a common worldview for much of the twentieth century, the conservative legal movement's ambitions grew with the advent of the Reagan Revolution.[118] By the 1980s, progressives dominated the most prestigious institutions within legal culture—the Supreme Court bar, law school faculties, top-flight law firms, and the legal press.[119] With ample funding and newfound political power, conservatives built new legal institutions of their own—conservative public-interest law firms to push a conservative constitutional vision inside the courts, professional organizations like the Federalist Society to build a community of conservative lawyers, academic positions to spur new legal movements inside our nation's laws schools like originalism and law and economics, and conservative think tanks to translate conservative constitutional ideas into political arguments and policy proposals for use by political leaders in Washington.[120] In turn, the growth of the conservative legal movement spurred a backlash on the left—leading to the

[116] RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900, at 115 (2000).

[117] DEVINS & BAUM, *supra* note 12, at 104.

[118] Lee, *supra* note 10, at 273.

[119] For an influential account of the rise of the progressive legal apparatus, see STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 22–57 (2008).

[120] TELES, *supra* note 12, at 4–5.

creation of a new set of progressive institutions like the American Constitution Society.[121]

Today, there is no single legal culture. Instead, there are several different legal subcultures—many with their own substantive preferences (and priorities), conceptions of the Supreme Court's proper role in our constitutional system, and preferred constitutional methodologies.[122] As a result, while the Fuller Court Justices were acting in ways consistent with a certain legal mandate derived from a bipartisan group of legal elites, the Roberts Court Revolution proceeds without broad support from either the American people or elite legal culture. This political (and legal) environment raises a difficult set of challenges for the Roberts Court and its nascent revolution.

D. CONSTITUTIONAL REVOLUTION IN AN AGE OF POLITICAL INTERREGNUM

We live in a polarized age.[123] No single party dominates our nation's politics.[124] Our parties are sharply divided.[125] Our elections are closely contested.[126] Our elected branches are gridlocked.[127] And even the legal profession itself has fractured.[128] Overall, the American people distrust our nation's political institutions[129]—including (increasingly) the Roberts Court.[130] And American politics itself has "calcified," with political partisans less "willing[] to defect from their party" even in the face of major historical events and colossal failures by our nation's political leaders.[131] At the same time, recent Supreme Court appointments have locked in place a conservative

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[121] DEVINS & BAUM, *supra* note 12, at 43–44.

[122] *Id.* at 3.

[123] *See* MCCARTY, POOLE & ROSENTHAL, *supra* note 9, at 3 (describing the relationship between economic inequality and "the increased polarization of the U.S. party system.").

[124] FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 18-40 (2016).

[125] *See* MCCARTY, POOLE & ROSENTHAL, *supra* note 9, at 4 (defining one aspect of polarization as the two parties "pull[ing] apart.").

[126] *See* Lee, *supra* note 10, at 267—68 (noting the closeness of elections for Congress and President).

[127] *See* HETHERINGTON & RUDOLPH, *supra* note 11, at 15 (proposing root causes of "a gridlocked political system with little incentive to compromise.").

[128] *See* DEVINS & BAUM, *supra* note 12, at 117–18 (describing the emergence of distinct legal career paths for conservatives and liberals).

[129] *See* BALKIN, *supra* note 3, at 44–46 (arguing that we are living in a period of distrust between the public and government officials).

[130] *See* Jones, *supra* note 31 (reporting that Americans' confidence in the Supreme Court fell to a new low in 2022).

[131] SIDES, TAUSANOVITCH, & VAVRECK, *supra* note 13, at 6.

majority poised to endure for decades.[132] This mismatch between a shifting balance of power in the elected branches, political gridlock between Congress and the President, a calcified and polarized politics, a lack of professional consensus among legal elites, and sustained conservative dominance on the Supreme Court risks both increasing the Roberts Court's power and raising new questions about the Court's institutional legitimacy.[133]

While the current political environment may suggest a time for judicial humility, the Court's newly constituted conservative majority has already begun to pursue an ambitious substantive agenda. From the perspective of institutional legitimacy, the early returns aren't promising. Even so, the Justices still retain considerable control over their own constitutional destiny. Moving forward, they are free to act in ways that bolster the Court's legitimacy—or not. In this Article, I suggest one possible path forward: the path of constitutional statesmanship.

II. CONSTITUTIONAL STATESMANSHIP: AN ELUSIVE IDEAL

In 1960, Robert McCloskey published *The American Supreme Court*—one of the classic works of constitutional history.[134] A leading scholar in Harvard's Government Department, McCloskey was a pioneer of historical-institutionalist analysis, building on the pathbreaking work of an earlier generation of constitutional scholars—most notably, Edward Corwin, Thomas Reed Powell, and Alpheus Thomas Mason.[135]

In his landmark study, McCloskey offers one of the canonical accounts of constitutional statesmanship. For McCloskey, the Supreme Court exists as an institution at the intersection of principle, politics, and public opinion. On the one hand, the Court provides an important check on the elected branches and even majority opinion—curbing the nation's "impuls[es]" and its support for "short-run fads, enthusiasms, and rages."[136] While the elected branches "represent[]" the public's "immediate and sometimes imperative interests," the Supreme Court "take[s] the longer view,"[137] often privileging longstanding constitutional principle over short-term popular policymaking.

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[132] Grove, *supra* note 27, at 2242.

[133] *See* WHITTINGTON, *supra* note 86, at 300 (discussing normative theories about judicial review).

[134] MCCLOSKEY, *supra* note 39.

[135] Howard Gillman, *Robert G. McCloskey, Historical Institutionalism, and the Arts of Judicial Governance*, *in* THE PIONEERS OF JUD. BEHAV. 336, 337 (Nancy Maveety, ed., 2003).

[136] MCCLOSKEY, *supra* note 39, at 250.

[137] *Id.* at 249–50.

On the other hand, the Court remains a vulnerable institution. The Justices are unelected, and the Court has no army.[138] It must cooperate with the elected branches to carry out its orders.[139] All it has at its disposal is its pen, its legal expertise, its reputation, and its powers of persuasion.[140] While the constitutional system provides the Court with "the opportunity for greatness," this opportunity is shaped by these institutional limits.[141] In short, McCloskey's statesman exercises both power and restraint—combining constitutional vision, an awareness of the political environment, and the judgment to know when to push ahead and when to trim back. This is no easy calculation, and McCloskey himself offers few clues for how to realize this ideal in practice.

Of course, McCloskey is hardly alone. Generations of scholars have struggled to define the statesmanship ideal—with the concept itself remaining elusive. Felix Frankfurter offered an uneasy combination of judicial forbearance and elite leadership.[142] Alexander Bickel weighed his famous concerns about the countermajoritarian difficulty against his admiration for the substantive achievements of the Warren Court.[143] And across the decades, various theorists have offered the statesmanship ideal as an important response to Bickel's dilemma—a means of defending the legitimacy of judicial review and defining the distinct contribution that judges make to our constitutional system.[144] Even so, constitutional statesmanship has always been normatively problematic.

Supreme Court Justices are appointed not to be politicians in robes, but instead to apply legal expertise to contested questions of law.[145] On this view,

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[138] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) (discussing the "root difficulty [] that judicial review is a counter-majoritarian force in our system.").

[139] *See* Or Bassok, *The Changing Understanding of Judicial Legitimacy*, *in* JUDGES AS GUARDIANS CONSTITUTIONALISM AND HUM. RTS. 50, 55 (Martin Scheinin, Helle Krunke & Marina Aksenova eds., 2016) (discussing the necessity that courts depend on the "goodwill of their constituents for both support and compliance . . . .").

[140] *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (the judiciary "may truly be said to have neither FORCE nor WILL but merely judgment.").

[141] MCCLOSKEY, *supra* note 39, at 247.

[142] *See* Frankfurter, *supra* note 35, at 35 (discussing the "deliberate determination of the Court to confine itself to its judicial task . . . while careful to maintain its authority as the interpreter of the Constitution . . . .").

[143] For extensive reflections on this challenge, see ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

[144] *See* JACOBSOHN, *supra* note 35, at 16–17; Siegel, *supra* note 35, at 963–64.

[145] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46–47 (1997) ("The people will be willing to leave interpretation of the Constitution to lawyers and law courts so long as the people believe that it is . . . essentially lawyers' work—requiring a close

constitutional statesmanship risks undermining the rule of law—licensing Justices to cast aside their best readings of the traditional legal materials in order to address certain *extra*-legal concerns, such as policy consequences and the risk of backlash.[146] At best, constitutional statesmanship forces a Justice to take seriously the practical effects of her rulings—promoting judicial humility without undermining traditional legal analysis. However, at worst, it becomes a warrant for a judicial power grab—a cynical attempt to use a vague concept to legitimate a Justice's policymaking ambitions.[147] But that hardly exhausts the reasons for skepticism.

Skeptics may also fear that calls for constitutional statesmanship are often nothing more than high-minded smokescreen for bare political opportunism. On this view, scholars, commentators, and advocates rarely call for statesmanship when they hold the balance of power on the Supreme Court. Instead, they reserve their learned citations to Frankfurter and Bickel for times when the Court is stacked against them. In this context, constitutional statesmanship forms the core of a defensive argument used by those out of power—critics whose worldviews run against the Court's dominant ideology. Out of legal options, critics use the statesmanship ideal to appeal to the judicial ego—a Justice's hope for a place in the constitutional canon.[148] As a result, skeptics may fear that the call for statesmanship is often little more than the predictable (and cynical) cry of political (and legal) losers—an attempt to use fancy words to get key Justices to bend their views of the law, trim back on their substantive ambitions, and abdicate their constitutional responsibilities.

Name-calling aside, even those sympathetic to the statesmanship ideal may suspect that it can't survive our polarized age.[149] At its core, constitutional statesmanship calls for elite leadership that transcends mere partisanship.[150]

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examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth.").

[146] *See* Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 296 (1933) (describing a "[s]ensitive understanding of the broader implications of economic and social policy" as "essential background" for practicing in the Supreme Court).

[147] BICKEL, *supra* note 35, at 29 (quoting Justice Frankfurter "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society.").

[148] *See* ACKERMAN, *supra* note 73, at 32–33 (defining the constitutional canon).

[149] *See* MCCARTY, POOLE & ROSENTHAL, *supra* note 9, at 3 (arguing that increased inequality is related to the "increased polarization of the U.S. party system.").

[150] *See* FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 52–53 (1961) (relating President Theodore Roosevelt's belief that "[i]n the ordinary and low sense which we attach to the words 'partisan' and 'politician,' a judge of the Supreme Court should be neither," but that a Justice should be a "constructive statesman" who "advance[s] the ends of government.").

And yet, partisan polarization abounds[151]—especially among elites.[152] There's even evidence that it's filtered into legal culture.[153] With this increase in polarization, it's easy to imagine that there's simply no political (or legal) center for the constitutional statesman to occupy. Even statesmanship's proponents may fear that cross-ideological, broad-based statesmanship is no longer possible—replaced instead by statesmanship-in-miniature, tailored to one's preferred legal subcommunity.[154] Besides, with institutional trust at an all-time low, no one really believes in elite leadership anyway, right?[155]

And yet, the statesmanship ideal still exerts a gravitational pull on constitutional discourse.[156] When we moan about partisan divisions on the Court today, our collective imagination often wanders back to the great constitutional statesmen of yesterday—whether that's John Marshall navigating partisan waters and forging a new national government in the Jeffersonian Age,[157] Charles Evans Hughes building a cross-ideological coalition and mediating the New Deal Revolution,[158] Earl Warren assuaging concerns among his colleagues and ensuring unanimity in *Brown v. Board of Education*,[159] or Sandra Day O'Connor embracing a politics of compromise and pushing the Rehnquist Court to the center of public opinion.[160] Of course, sympathetic theorists must guard against the risk of confusing nostalgia for constitutional theory. Even so, perhaps the statesmanship ideal retains some appeal. In fact, it may even match the distinct challenges of our polarized politics.[161]

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151 GROSSMANN & HOPKINS, *supra* note 9, at 3.

152 *See* DEVINS & BAUM *supra* note 12 at 104 ("Starting in the 1980s, there has been a substantial increase in polarization in government and among political elites outside government.").

153 *See id.* at 117–18 (describing the emergence of distinct legal career paths for conservatives and liberals).

154 *See* TELES, *supra* note 12, at 5 (surveying the history of the conservative legal movement).

155 *See* Lydia Saad, *Trust in Federal Government's Competence Remains Low*, GALLUP (Sept. 29, 2020), https://news.gallup.com/poll/321119/trust-federal-government-competence-remains-low.aspx [https://perma.cc/XZE8-XG4L].

156 *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1977) (referring to the "gravitational force" of precedent).

157 *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 1–3 (1996) ("[T]he power of the national government grew, the role of the judiciary expanded, and the opinions of the Marshall Court withstood the test of time.").

158 *See* JACOBSOHN, *supra* note 35, at 192 (explaining the application of principles to facts that became Hughes' judicial doctrine).

159 POWE, *supra* note 49, at 27–28.

160 *See* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 135–38 (2006) (detailing Justice O'Connor's compromises on race-based redistricting).

161 *See* Grossmann & HOPKINS, *supra* note 9, at 3 (delineating the differences between the Republican and Democratic Parties).

Of course, commentators offer a range of advice to the aspiring statesman. Some keep it simple, urging her to tend to the Supreme Court's institutional legitimacy.[162] However, this suggestion—without more—often tells her very little. Depending on the specific case and the surrounding context, a variety of approaches might bolster the Court's institutional reputation—or undermine it. As a result, while the aspiring statesman may value the Supreme Court as an institution, this common trope often leaves her with little more than a mantra in search of a theory (and method).

Other commentators try to reduce the statesman's task to tracking public opinion. For instance, Neil Siegel argues (correctly) that the aspiring statesman must sometimes express societal values tied to the public's views.[163] However, Siegel offers few clues for how the aspiring statesman might go about applying this advice in concrete cases. Should she rely on judicial restraint?[164] Patterns of popular lawmaking?[165] The commands of a constitutional moment?[166] Her own intuitive sense of societal trends?[167] Or the findings of the most recent opinion poll?[168] Commentators remain vague on the specific contours of a principled form of popular constitutional analysis.

In the end, constitutional statesmanship—as a matter of both theory and practice—remains a work in progress. In this Article, I offer a conceptual framework for understanding the statesman's practical task. For now, we must settle for a brief preview.

To answer the call of constitutional statesmanship, a Justice must often balance her own best reading of the traditional legal materials against other key considerations—including the contours of public opinion and predictions

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[162] *See* FRIEDMAN, *supra* note 59, at 374 (discussing the relationship of Supreme Court justices to public opinion); *see also* Jeffrey Rosen, *John Roberts Is Just Who the Supreme Court Needed*, THE ATLANTIC (July 14, 2020) (restating Chief Justice Roberts' "highest priority to protect the Court's institutional legitimacy").

[163] Siegel, *supra* note 35, at 986.

[164] *See* Thayer, *supra* note 34, at 156 ("Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.").

[165] *See, e.g.*, Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards*,*"* 57 U.C.L.A. L. REV. 365, 366–67 (2009) (discussing the Eighth Amendment's "standards of decency" doctrine under which punishments violate the Cruel and Unusual Punishment Clause only when a majority of states have already prohibited said punishment).

[166] ACKERMAN, *supra* note 47, at 3–31.

[167] *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 569 (2006) (explaining that a living constitution "keep[s] in touch with contemporary values").

[168] *See* Tom Donnelly, *Popular Constitutional Argument*, 73 VAND. L. REV. 73, 131–33 (2020) (exploring the positive and negative aspects of utilizing public opinion polls in constitutional interpretation).

about her ruling's consequences.[169] Sometimes the aspiring statesman surveys the landscape and chooses to exercise constitutional forbearance. She may vote to deny a cert. petition in a difficult case, allowing the underlying issue to continue to percolate in the lower courts and work itself out in public discourse.[170] She may embrace a minimalist approach to a vexing constitutional question, resolving the specific dispute before the Court but leaving important issues open for another day.[171] And she may simply defer to the elected branches, leaving an existing law in place and respecting the constitutional judgments of a fellow branch of government.[172] Despite its grand name, constitutional statesmanship often calls for judicial humility and (to borrow from Learned Hand) a "spirit of moderation."[173]

But not always. Sometimes constitutional statesmanship requires action—even *bold* action. Sometimes the traditional legal materials point to a clear answer.[174] Sometimes the laws on the books are out of step with a popular constitutional consensus[175]—or they are inadequate to address new societal needs.[176] And sometimes the most probable consequence of inaction is too much for the aspiring statesman to tolerate.[177] Perhaps the elected branches remain inactive in the face of constitutional evil.[178] Or perhaps they themselves are promoting it.[179]

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169 *See* BICKEL, *supra* note 35, at 12 (discussing the Warren Court's reliance on events for vindication as well as their awareness of condemnation of their predecessors).

170 BICKEL, *supra* note 139, at 70.

171 *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999) (arguing that judicial minimalism prevents courts from "foreclose[ing] options in a way that may do a great deal of harm.").

172 *See* Frankfurter, *supra* note 35, at 35 ("The Court has not sought to aggrandize itself at the expense of either executive or legislature."); *see also* Thayer, *supra* note 34, at 134 (emphasizing the division of power between the three branches).

173 LEARNED HAND, THE SPIRIT OF LIBERTY 181–82 (1953).

174 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, & JUDICIAL REVIEW 4 (1999) ("An originalist Court may well find itself quite active in striking down legislation at odds with the clear requirements of the inherited text.").

175 *See* Tom Donnelly, *Judicial Popular Constitutionalism*, 30 CONST. COMMENT. 541, 542 (2015) (discussing the relationship between Bruce Ackerman's book WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION and the theory of popular constitutionalism); *see also* Siegel, *supra* note 35, at 979 (arguing that judicial statesmanship should express social values as social circumstances change).

176 *See* JACOBSOHN, *supra* note 35, at 17 (arguing that a judicial statesman will "adapt the Constitution to changing social realities without altering the meaning of the document").

177 *Cf.* FALLON, *supra* note 17, at 21 (arguing that the interpreter's methodological preferences must sometimes yield to the practical consequences of a particular interpretation).

178 *See* Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 157, 173 (2012) (arguing that legislation is not a reliable indicator of contemporary values); 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 5 (2014).

179 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF DEMOCRACY 4 (1980).

When the situation calls for action, the constitutional statesman must exercise elite leadership—using judicial review to attack the constitutional violation and leveraging the Court's institutional advantages to persuade the American people and their elected representatives of the ruling's constitutional wisdom.[180] Sometimes the aspiring statesman enforces enduring principles rooted in America's past.[181] Sometimes she embraces the American people's current constitutional views.[182] And sometimes she tries to predict the future—taking a stand that falls short of majority support today in the hope that it becomes celebrated constitutional orthodoxy sometime in the not-so-distant future.[183]

Of course, even when the situation merits action, the aspiring statesman remains constrained by the Court's institutional limits—the conventions of legal culture,[184] the powers of the elected branches,[185] the risk of public backlash,[186] the threat of constitutional alienation,[187] and the unpredictability of a decision's downstream effects.[188] Constitutional statesmanship is far from a simple call for raw judicial policymaking. Even so, in the right circumstances,

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[180] *See* Siegel, *supra* note 35, at 983 ("Judges . . . are charged with . . . putting the power and prestige of the law behind the [values] they embrace . . . .").

[181] JACOBSOHN, *supra* note 35, at 119 (quoting Theodore Roosevelt's letter to Henry Cabot Lodge, which called for Justices to exercise "constructive" statesmanship, "constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in according with which it must go on").

[182] *See* Siegel, *supra* note 35, at 986 ("Judges who practice statesmanship attempt to step outside their own experiences and commitments by approaching cases with a genuine regard for the reasonable concerns of both sides.").

[183] *See* Felix Frankfurter, *The Judicial Process and the Supreme Court*, *in* OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1939-1956, at 31, 35 (Philip Elman, ed., 1956) (discussing the need for law to respond to an ever-changing society).

[184] LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION 5 (2019).

[185] *See* Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (arguing that the attitudinal model most accurately captures Supreme Court decision making); *see also* Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992) (arguing that congressional hostility impacts judicial independence).

[186] *See* KLARMAN, *supra* note 114, at 464 (listing Supreme Court decisions eliciting public backlash); *see also* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 36 (1991) (arguing that courts can be effective producers of social reform when there is low levels of opposition from the public); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41 (1961).

[187] *See* Siegel, *supra* note 35, at 978 ("The more a court expresses certain values and attempts to move a society in the direction of their further realization, the more alienating the law can become to members of the subcommunity who do not share those values.").

[188] *See* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 106 (2012) (arguing for judicial restraint "in the cause of far-flung yet uncertain consequences").

the aspiring statesman might offer a redemptive vision of the Constitution that transforms constitutional law, wins the support of the American people, and reshapes American society.[189]

The key question is *when*? When should the aspiring statesman act, and when should she stand aside? Absent a clear command—whether one of constitutional forbearance or constitutional action—the statesman's task remains unclear in any given case. I address this core issue—and explore the practical work of constitutional statesmanship—in the remainder of this Article.

III. CONSTITUTIONAL STATESMANSHIP AS A MATTER OF FIT

In this Part, I offer a conceptual framework for understanding the task of constitutional statesmanship. My account draws on a diverse set of constitutional theorists and methodological approaches—most notably, Ronald Dworkin's concept of "fit."[190] My goal is to make constitutional statesmanship—and the underlying analysis that it requires—more concrete for Justices and commentators alike. My approach also responds to some of the strongest arguments offered by statesmanship's critics.

For Dworkin, the judicial task was a mix of legal fidelity and moral judgment—requiring both the legal craft (and creativity) of a Benjamin Cardozo and the normative charge of a John Rawls.[191] A generation removed from Henry Hart and Herbert Wechsler, Dworkin set out to justify the Warren Court Revolution and provide a compelling vision of robust judicial review—one rooted in America's past, sensitive to the traditional tools of legal analysis, and shaped by each judge's moral sensibility.[192]

To describe the proper interpretive approach, Dworkin introduces his well-known image of Hercules—"a lawyer of superhuman skill, learning, patience, and acumen."[193] For Dworkin, judges must interpret the Constitution in such a way that their interpretation properly "fits" the American constitutional tradition, while also promoting the best account of political

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[189] *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 1–16 (2011) (arguing for a narrative of constitutional redemption).

[190] DWORKIN, *supra* note 41, at 160.

[191] *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 66 (1996) (explaining how Dworkin was "another Rawls convert" and "articulated a rights-based jurisprudence designed to constrain judicial discretion . . . integrate law with morals, and promote democracy").

[192] *See* WHITTINGTON, *supra* note 175, at 27 (explaining how "constitutionalism is intended to control majorities" but "the very reality of moral principles frees Dworkin from reliance on the constitutional text").

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

morality consistent with that tradition.[194] To satisfy the fit requirement, Hercules—and flesh-and-blood American jurists—must survey the past, "read[ing] through what other judges . . . have written not only to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively *done*."[195] Famously, Dworkin likens this judicial task to authoring a new chapter in a chain novel.[196] On this view, "[t]he dimension of fit . . . provide[s] some boundaries" for a jurist's independent moral judgments.[197]

While Dworkin's fit requirement could—as a matter of both theory and practice—significantly constrain judges, he offers few clues for how this requirement might operate in practice. It's little wonder that critics have long argued that in the hands of Dworkin's Hercules, fit is no match for political morality.[198] Even so, it's easy to imagine a fit requirement with actual bite. In this alternative universe, Dworkin's own approach might be understood as a form of *legal* fit—one that looks to the handiwork of past judges in order to determine the contours of the American constitutional tradition. However, once we take the fit requirement seriously, we can also see that legal fit is only one way in which we might use the concept of fit to constrain (or evaluate) judges. In fact, constitutional theory—past and present—suggests (at least) three types of fit: legal, popular, and pragmatic.

With *legal fit*, the interpreter looks to America's past—relying on the traditional tools of legal analysis, including arguments from constitutional text, history, structure, and doctrine.[199] With *popular fit*, she considers America's present—drawing on concrete indicators of public opinion to assess the views of Americans today.[200] These indicators might include measures associated with the President, Congress, state and local governments, the American people's actions and traditions, and the constitutional views of the American

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[194] DWORKIN, *supra* note 41, at 159.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 160.

[198] *See generally* Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 REV. POL. 197 (2000) (arguing that Dworkin's reconceptualization of originalism is theoretically flawed); *see also* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution*, 65 FORDHAM L. REV. 1269 (1997) (refuting Dworkin's belief that his approach of constitutional interpretation is superior).

[199] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6–7 (1982) (explaining the "various types of constitutional argument" as historical argument, textual argument, structural argument, prudential argument, and doctrinal argument).

[200] Donnelly, *supra* note 168, at 110–32.

people themselves. And with *pragmatic fit*, she looks to America's future—making predictions about public responses, policy consequences, and assessments by legal elites. Taken together, these three modes of fit form the core of my conceptual framework for understanding the task of constitutional statesmanship—with the constitutional statesman attempting to strike the right balance between them when deciding constitutional cases. Of course, scholars and commentators can also use these dimensions of fit to analyze (and critique) the specific contours of the Roberts Court Revolution—both at the regime level and at the case level.

In this Part, I consider each form of fit, in turn. Within the mode of legal fit, I explain the legal resources available to the aspiring statesman, including specific legal materials, types of arguments, and constitutional methodologies. Within the mode of popular fit, I offer concrete indicators that might guide the aspiring statesman in assessing current public opinion on an issue. And within the mode of pragmatic fit, I consider the types of consequences that the aspiring statesman might weigh in reaching a decision. Finally, within each Section, I warn of the dangers of relying on any one of these three modes of analysis in excess.

A. LEGAL FIT: HEARING THE VOICES OF AMERICA'S PAST

Legal culture shapes the norms and conventions of constitutional analysis—the legal materials, types of arguments, and methodological approaches recognized as legitimate within the legal profession.[201] These norms and conventions are advanced by scholars, taught in law schools, promoted in public discourse, embraced by political parties, advanced in legal briefs, and used in court opinions.[202]

At first glance, the concept of legal fit may seem simple and straightforward. Justices should simply use the legal materials, arguments, and methodologies broadly accepted by legal culture. However, legal culture itself is messy. While lawyers are trained to craft powerful arguments, legal culture's

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[201] *See* Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002) ("Courts and judges are certainly part of the political world, but they are also part of a distinctive legal culture.").

[202] *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 1–48 (2012) (discussing the impact of the implicit meaning of the Constitution); Tom Donnelly, *The Popular Constitutional Canon*, 27 WM. & MARY BILL RTS. J. 911, 913 (2019) (embracing the notion that the people are the "highest authority in the land on constitutional law").

norms and conventions shift over time.[203] New constitutional arguments rise, and others fall.[204] Some become more persuasive, and others become less powerful.[205]

Furthermore, legal culture itself doesn't point to a single way of interpreting the Constitution. Thayerians defer to the elected branches.[206] Minimalists decide as little as possible.[207] Originalists privilege the Constitution's text and history.[208] And living constitutionalists adapt the Constitution's broad principles to changes in society.[209] Even within individual methodological camps, divisions abound. Originalism divides between the "Old" and the "New."[210] Living constitutionalism includes Dworkinian moralists, common law constitutionalists, Ackermanian popular sovereignty theorists, and constitutional pluralists.[211] And Jack Balkin's living originalism even tries to bridge the traditional divide between originalism and living constitutionalism.[212]

In the end, legal culture's methodological pluralism presents a challenge for offering a broadly applicable account of legal fit. However, even within

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[203] *See* BICKEL, *supra* note 35, at 88 ("history shows that the judges' norms, like those of other statesmen, are by no means all of permanent validity.").

[204] *See* BOBBITT, *supra* note 199, at 175 ("[N]ew arguments will evolve as the ongoing relationship between the Constitution and our people works out its history."); *cf.* Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985) (observing similar shifts in constitutional theory).

[205] *See* BOBBITT, *supra* note 199, at 65 (showing how different interpretive approaches can vary in persuasiveness).

[206] Thayer, *supra* note 34.

[207] *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996) ("[F]requently judges decide no more than they have to decide.").

[208] For a thoughtful overview of the originalism literature, *see generally* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013) (assessing where originalist theory currently stands, outlining points of agreement and disagreement within originalist literature); and Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989) (giving a guide to the issue of originalist intent).

[209] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (arguing against originalism and for living constitutionalism); *see also* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986) ("[O]ur acceptance of the fundamental principles [of the Constitution] has not and should not bind us to those precise, at times anachronistic, contours.").

[210] For helpful examples of scholarship exploring the divisions within originalism, *see generally* Peter J. Smith, *How Different Are Originalism and Non-Originalism*, 62 HASTINGS L.J. 707 (2011) (analyzing the differences between new originalism and non-originalism); *see also* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009) (explaining how originalism is nothing more than a broad umbrella for different principles of constitutional interpretation).

[211] For a thoughtful overview of the various theories of living constitutionalism, *see generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1262–71 (2019) (discussing the dispute about "the nature of *originalism* and *living constitutionalism* as concepts or ideas").

[212] *See* BALKIN, *supra* note 37, at 3 ("The method of text and principle is both originalist and living constitutionalist.").

this pluralistic culture, there is a set of legal indicators embraced by interpreters from across the methodological spectrum. Whether the interpreter is a Thayerian, a minimalist, an originalist, or a living constitutionalist, she will still often recognize the legitimacy—at a bare minimum—of arguments from constitutional text, history, structure, and doctrine.[213] For purposes of legal fit, I limit this mode of analysis to these widely accepted modalities—keeping the concept of legal fit rather thin for purposes of analytical clarity.

To be clear, by referring to these modalities as components of *legal* fit, I don't mean to disparage any of the modalities that I'm excluding from this concept—for instance, arguments from prudence, ethos, and popular meaning. Instead, I will fold these forms of constitutional analysis into the components of popular fit and pragmatic fit. For the moment, we will simply bracket considerations that turn on analyses of current public opinion or predicted outcomes—focusing instead on arguments relying on constitutional text, history, structure, and doctrine.

1. *Legal Fit and the Traditional Tools of Legal Analysis: Text, History, Structure, and Doctrine*

Regardless of an interpreter's methodological approach, legal fit is concerned with the distinctly *legal* aspects of her constitutional methodology—how she reads text, how she reconstructs history, how she understands structure, and how she synthesizes (and adapts) doctrine. In short, legal fit

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[213] *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 154 (1996) ("In both cases [of constitutional interpretation], interpretive arguments resting on the text, history, structure, and fundamental values of the Constitution were required to make sense of the clauses in question."); *see also* William Baude, *Is Originalism Our Law*, 115 COLUM. L. REV. 2349, 2403 (2015) ("[It is] nearly universal . . . that original meaning is 'relevant' and acknowledges that total rejection of originalism 'is not a live competitor in contemporary debates.'"); *see also* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1766 (1997) ("Although there are very few strict originalists, virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation."). Of course, originalists continue to debate the proper role of precedent. *See, e.g.*, Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017) (discussing whether stare decisis is compatible with originalism through the lens of Justice Scalia's approach to precedent); *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) (challenging the notion that originalism is inconsistent with precedent while arguing that the Constitution does not forbid judges from following precedent). Even so, most originalists acknowledge the legitimacy of doctrinal arguments. *But see* Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005) (explaining how stare decisis and originalism cannot co-exist).

goes to an interpreter's best reading of traditional legal materials—without factoring in other concerns like public opinion or practical consequences.

To understand the legal fit requirement, let's begin with Keith Whittington's influential distinction between interpretation and construction.[214] This distinction is at the core of contemporary originalist theory,[215] but it's also a useful way of distinguishing legal fit from its popular and pragmatic counterparts. For Whittington, interpretation refers to the use of the traditional tools of legal analysis to determine the Constitution's original meaning. These tools include "relatively technical and traditional instruments, such as text and structure, framers' intent, and precedent."[216] However, Whittington also acknowledges the limits of these tools—recognizing that there's a point in which the legal task runs out, leaving residual indeterminacy.[217]

Of course, some parts of the Constitution express clear rules.[218] For instance, a Senator must be at least thirty years old. However, the Constitution is also filled with provisions that use broad language—phrases like "due process of law," the "freedom of speech," and the "equal protection of the laws."[219] Even when interpreters apply the traditional tools of legal analysis, these terms often remain irreducibly vague or ambiguous. At that point, interpreters must turn away from the task of interpretation and engage in constitutional construction.

For Whittington, construction "fills the inevitable gaps created by the vagueness" of the Constitution's text "when applied to particular circumstances."[220] When traditional legal materials leave certain questions open, construction "fill[s] in" these "gaps in constitutional meaning."[221] On this view, construction is a political—not legal—task. And depending on the theorist, it may be carried out by the judiciary, the elected branches, or both—

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214 *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1–19 (1999) ("both interpretation and constitution expands [sic] the field of constitutional elaboration without shrinking the range of interpretation."); WHITTINGTON, *supra* note 174, at 5–14 (discussing the distinction between constitutional interpretation and constitutional construction).

215 *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 95 (2010) ("The interpretation-construction distinction . . . is both real and fundamental . . . .").

216 KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1 (1999).

217 *Id.*

218 *See* BALKIN, *supra* note 37, at 6 (stating that the Constitution "contains determinate rules").

219 *Id.*

220 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 102 (2004).

221 Whittington, *supra* note 208, at 403.

with the chosen actor deciding between a range of options based on criteria that fall outside of the traditional tools of legal analysis.[222]

Legal fit is akin to Whittington's concept of interpretation. To satisfy the legal fit requirement, the Roberts Court must consider each constitutional issue from the perspective of constitutional text, history, structure, and doctrine.

Beginning with the Constitution's text, the aspiring statesman tries to discover the best reading of the relevant constitutional provision at the time of its ratification.[223] To that end, she consults the period's leading dictionaries.[224] She analyzes how the relevant words were used in context—possibly through some combination of corpus linguistics and immersion.[225] She determines whether the provision includes any legal terms of art.[226] She studies the leading methodological approaches at the time of ratification.[227] She accounts for any widely recognized constitutional backdrops.[228] And she considers whether the provision is best read as embodying a constitutional rule, standard, or

[222] *See id.* at 404 (discussing one method for constitutional interpretation that involves both judicial and government actors).

[223] *See* BOBBITT, *supra* note 199, at 38 (describing how textual arguments necessarily depend on consistency with the "plain words" of the Constitution even when the Constitution does not specifically address the issue discussed in the argument).

[224] *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 281–83 (2004) (illustrating the process of finding the originalist meaning of the word "commerce" in the Constitution and using contemporary dictionary definitions to do so).

[225] *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 279–93 (2017) (describing the use of semantic meaning, linguistic intuitions, dictionary definitions, corpus linguistics, and other methods in finding the originalist meaning of a given piece of text).

[226] *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1630–32 (examining how legal terms of art can still be understood years or centuries later and help with comprehension of the text).

[227] *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457–58 (2019) (arguing for and describing the original-law methodology); *see also* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–52 (2009) (arguing for and describing the original methods originalism approach to interpreting the Constitution). Admittedly, this sort of inquiry straddles constitutional text and history. *See* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373–75 (2019) (arguing for and describing the original methods approach to Constitutional interpretation, which interprets the Constitution in according to the "conventional legal interpretive rules that would have [applied to the] document . . . at the time it was enacted.").

[228] *See* Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012) (defining constitutional backdrops as "rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text").

principle.[229] Overall, she attempts to understand the Constitution's text from the perspective of a reasonable person reading the provision at the time of its ratification.[230]

Turning to the Constitution's history, the aspiring statesman studies the debates that shaped the provision's framing and ratification.[231] For the original Constitution, she turns to the records of the Constitutional Convention.[232] For later amendments, she considers any battles in Congress.[233] From there, she analyzes the contours of the ratification debates for each provision—both in public discourse and in the ratifying bodies themselves.[234] And she incorporates any leading accounts from the academic literature.[235] Through studying these materials, she looks to understand the key factors driving the push for constitutional reform; the paradigm evils that the ratifying generation was seeking to address; any broad principles that it was looking to write into

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229 *See also* BALKIN, *supra* note 37, at 3–34 (arguing that the original meaning of the constitution is important to its analysis under living constitutionalism); *see also* DWORKIN, *supra* note 41, at 135 (describing "a form of positivism that provides for the special connection . . . between propositions of law and propositions about lawmaking acts"); *see also* William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J. L. & PUB. POL'Y 401, 402 (2006) (discussing the Constitutional framers' general word choices and the ability for succeeding generations to interpret the Constitution through a living constitution framing).

230 *See also* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 19–22 (2006) (arguing for the '"underlying principles' approach" to interpreting the Constitution rather than finding meaning in only the text); *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. J. L. & PUB. POL'Y 599, 607–12 (2004) (describing the differences between the new originalism and the old originalism theory of constitutional interpretation); *see also* Randy E. Barnett, *An Originalism for Non-Originalists*, 45 LOY. L. REV. 611, 620–29 (1999) (describing new originalism as searching for original meaning and old originalism as search for original intention); *see also* Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 360 (1988) (arguing that an interpretation of the Constitution must be consistent with past cases and traceable to a decision made by the people over which it governs).

231 *See* BOBBITT, *supra* note 199, at 21–24 (describing the history of the ratification of the Eleventh Amendment and its impact on its modern interpretation).

232 *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3–22 (1997) (describing the importance of the people and writings from the constitutional convention in modern day study of the Constitution); *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 372 (1977) (explaining that "[a] 'transcript of [the framers'] minds' was left . . . in the debates of the 39th Congress").

233 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 465–77 (2005) (describing the method by which the author researched the book, including going beyond the text of the Constitution).

234 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (describing the extensive analysis which must be used to find originalism meaning, including, for example, researching the debates at the time of Amendment ratification).

235 *See* Solum, *supra* note 226, at 293 (stating that the academic culture of history can offer a lot to originalism analysis because historical research can give the legal field the context of the time in which the Constitution or one of its amendments was written).

the Constitution; and any evidence of how this generation expected the provision to apply to specific issues.[236] In the process, she may also analyze any evidence of the Framers' intent.[237]

Turning to the Constitution's structure, the aspiring statesman reads the Constitution holistically and tries to derive any structural principles embodied in its text.[238] As Philip Bobbitt explains, "[s]tructural arguments are inferences from the existence of constitutional structures and the relationships which the Constitution ordains among the[m]."[239] For instance, although the Constitution doesn't include a specific Separation-of-Powers Clause, it's possible to infer that principle from the Constitution's text and apply it in specific cases. Decades ago, Charles Black was a pioneer of this approach to constitutional interpretation, showing how this form of argument played a key role in a range of landmark cases—most notably, the Marshallian masterpiece, *McCulloch v. Maryland*.[240]

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[236] *See* BALKIN, *supra* note 190, at 1–16 (discussing how the Constitution necessarily depends on belief in certain narratives and stories); JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 3–70 (2005) (arguing that there are no standard or official rules to interpretation of the Constitution which gives judges the power to bring in outside considerations); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 13 (1971) (discussing how the *Brown v. Board of Education* decision could not have been made if there was clear and detailed legislative history that the framers wanted segregated schooling).

[237] *See* Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 541 (2013) (discussing how the intended meaning of the authors of a law might not be the same as the intended application of the same law); *see also* Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 143 (2010) (describing how intended meaning may change depending on the situation, even for the lawmakers themselves); *see also* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 705 (2009) (describing lawmakers intention as the "paramount consideration" in interpreting statutes); *see also* Walter Benn Michaels, *A Defense of Old Originalism,* 31 W. NEW ENG. L. REV. 21, 25 (2009) (arguing that the intentions of the authors of a statute are necessary to understanding its textual meaning and how it should apply in new situations); *see also* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1827 (1997) (comparing reading a statute to reading a recipe and arguing that the important questions of statutory interpretation involve how to apply different methods of original meaning); *see also* Edwin Meese III, Speech Before the American Bar Association (July 9, 1985) (transcript available at justice.gov) (arguing for the importance of original intention of lawmakers when courts interpret and apply laws).

[238] *See* BOBBITT, *supra* note 199, at 91–92 (arguing for greater use of structural arguments when interpreting government statutes and actions).

[239] *Id.* at 74.

[240] *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39 (1969) (explaining that constitutional protection can come from inferential support that is as strong as textual support).

Finally, the aspiring statesman engages in doctrinal analysis.[241] While Dworkin's image of judge-as-chain-novelist is a powerful constitutional metaphor, perhaps the most sophisticated account of constitutional doctrinalism is David Strauss's common law constitutionalism.[242] Strauss's approach trumpets the virtues of remaining faithful to well-established precedent and shaping doctrine through an incremental process. It's a distinctly non-Herculean form of legal fit—Dworkin for mere mortals. On this view, a successful Justice connects her decision in a specific case with the American constitutional tradition as articulated inside the courts over time, wrestling mostly with doctrine—not constitutional text, history, or structure. For Strauss, constitutional law is largely a conversation between Justices across generations.

In the end, the traditional tools of legal analysis help define the contours of legal fit. Justices use these resources to analyze new issues, craft arguments in their opinions, and apply the Constitution to new cases. At its best, this mode of analysis draws on the aspiring statesman's professional expertise and fulfills the legal profession's powerful vision of the jurist as legal craftsman.

2. The Pathologies of Legal Fit

When deciding a constitutional case, the aspiring statesman must balance between the three modes of fit—legal, popular, and pragmatic. When taken to the extreme, each mode has its own distinct pathologies. Legal fit is no exception.

The Dangers of Wooden Formalism. Legal fit privileges distinct virtues—the norms and conventions endorsed by legal culture. Many legalists favor consistency, principle, reason, and doctrine.[243] They view legal innovations with suspicion.[244] And they look to preserve what's best about America's

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[241] *See* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 16 (1990) (explaining that previous cases must be analyzed when deciding on current constitutional matters in order to ensure order and stability).

[242] *See* Strauss, *supra* note 61, at 879–80 (laying out and arguing in favor of common law constitutionalism). For Strauss, judges sometimes *do* turn to policy calculations and independent moral judgments when deciding cases. *See* STRAUSS, *supra* note 209, at 38 (arguing that when precedents are not clear, judges will use their own views on fairness and social policy to decide the outcome of a case). For now, I simply bracket those considerations.

[243] *See* Post, *supra* note 241, at 16 (stating that courts follow the principle of *stare decisis* to create stability and uphold institutional legitimacy).

[244] *See* Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1438–41 (2019) (arguing that the success of the United States depended on a written Constitution which produced stability and predictability).

constitutional past.[245] This Burkean approach to constitutional decisionmaking has its value.[246] Tradition often preserves important commitments.[247] Not all doctrinal innovations improve constitutional law.[248] And not all reformers have earned the right to transform our nation's constitutional tradition.[249]

Even so, overly strict legalism has its own dangers. By privileging the voices of America's past, interpreters may remain tethered to a static text,[250] outdated values,[251] and unattractive doctrine.[252] They may reach outcomes unresponsive to the challenges of a changing world.[253] And they may issue stingy rulings inconsistent with the Constitution's spirit and purpose.[254] Furthermore, these potential pitfalls are all the more troubling given the mechanics of the Article V Amendment process, which makes the U.S. Constitution the toughest constitution to amend in the world.[255]

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245 *See* Scalia, *supra* note 234, at 862 (arguing that the purpose of constitutional guarantees is that original values from the founding of the United States will not be changed by current changes in thought, unless done with by the difficult constitutional amendment process).

246 *See* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 11–24 (1975) (describing Edmund Burke's work, life, and impact).

247 *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1694–95 (2010) (arguing in favor of originalism because its supermajority features provide for the welfare of future generations).

248 *See* Paulsen, *supra* note 213, at 291 (arguing that *stare decisis* based on cases which are not consistent with the Constitution is unconstitutional).

249 *See* ACKERMAN, *supra* note 47, at 3–31 (arguing that the historical development of constitutional understanding has led to intellectual alienation).

250 *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741 (2007) (discussing tbe lack of emphasis on newer Constitutional amendments over older amendments and the disappearing drive to change the Constitution through new amendments).

251 *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1873) ("The paramount destiny and mission of women are to fulfil[sic] the noble and benign office of wife and mother. This is the law of the Creator."); *see also* Siegel, *supra* note 35, at 971 (arguing that there are "weighty social values" beyond "rule-of-law values" like "consistency" and that when social values clash with rule-of-law values, "it may be misguided to assume that judicial decision making fulfills its functions merely by remaining faithful" to the latter).

252 *See e.g.*, Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (establishing the doctrine of separate but equal); FALLON, *supra* note 19, at 126 ("[A] previously formulated, rigidly algorithmic theory . . . might yield intolerably unjust or practically disastrous outcomes . . . .").

253 *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276–77 (1918) (striking down a congressional statute regulating child labor); *see also* JACOBSOHN, *supra* note 35, at 27 (warning that "[t]he formalistic judge, committed to strict adherence to a prescribed model, arrives at a particular judgment through a mechanical process of deductive logic" divorced from practical reality).

254 *But see* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3–7 (2018) (discussing defining characteristics of originalism and arguing for understanding a duty of good faith to be imbued in originalist methodology).

255 *See* LEVINSON, *supra* note 56, at 160 ("[N]o other country—nor, for that matter, any of the fifty American states—makes it so difficult to amend its constitution.").

Alexander Bickel wrestled with these issues during the height of the Warren Court Revolution. While Bickel was often critical of the Warren Court's legal reasoning, he also understood the dangers of carrying the Legal Process School's criticisms too far:

> [The Warren Court's critics] counsel the Court to forgo action if no principled basis for it can be found, and thus to halt movement in one or another direction of progress. But this is expensive advice, and it is natural to question . . . the insistence on principle, perhaps even always on reason, on analytical rigor, purity, some would say mere elegance, especially since on occasion, . . . reasonable men may differ about the conclusions to be drawn from the most rigorous attempt at analysis itself . . . . [M]any . . . might question whether the price of craftsmanship is not too high when it is exacted in the discriminatory refusal to sell a house to a[n] [African American], [or] in continuation of a poll tax[ ] in denying the vote to Spanish-speaking Puerto Ricans.[256]

For Bickel, the cost of legalistic purity may have been the Warren Court Revolution itself.

The Challenge of Legal Indeterminacy and the Perils of Result-Driven Decisionmaking. If wooden formalism risks the dead hand of outdated commitments, legal indeterminacy opens up the dangers of judicial adventurism[257]—whether in the form of Dworkin's Hercules,[258] Strauss's common law Justice,[259] Ackerman's intergenerational interpreter,[260] or any flavor of originalist (whether Scalian,[261] Borkian,[262] Balkinian,[263] or some other variety[264]). Legal fit requires a certain faith that traditional legal analysis might yield a clear answer in a given case. However, many scholars challenge this

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[256] BICKEL, *supra* note 35, at 97–98.

[257] For a thoughtful reflection on the nature of legal indeterminacy, see Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J. L. & PUB. POL'Y 411, 411 (1996) (discussing "the correct relationship between uncertainty and indeterminacy" and "how originalists should deal with indeterminacy in interpreting the federal Constitution").

[258] *See* RONALD DWORKIN, LAW'S EMPIRE 400 (1986).

[259] *See* Strauss, *supra* note 61, at 877 (discussing the role of common law and the lack of emphasis on Constitutional text in Constitutional interpretation).

[260] *See* ACKERMAN, *supra* note 2, at 255–78 (discussing the importance of understanding each generation's interpretation of the lessons of the Civil War and how that impacts Constitutional understanding).

[261] *See* SCALIA, *supra* note 145, at 3 (introducing Scalia's understanding of "the current neglected state of the science of construing legal texts" and his "suggestions for improvement").

[262] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (discussing the impact of different political movements on the Court and arguing that "[a] judge has begun to rule where a legislator should").

[263] *See* BALKIN, *supra* note 37, at 3 (outlining Balkin's theory of framework originalism, which "views the Constitution as an initial framework for governance that sets politics in motion").

[264] *See* Colby & Smith, *supra* note 210, at 239 (arguing that originalism encompasses many separate theories of Constitutional interpretation which only share a misleading label).

premise.[265] On this view, none of the traditional tools of legal analysis—neither text, history, structure, nor doctrine—constrains the interpreter. These critiques—though familiar—remain an important challenge to legal fit's usefulness.

Richard Fallon has offered one of the most forceful expressions of this view in the recent literature. According to Fallon, "all of the leading . . . constitutional theories are highly substantially indeterminate"—"leav[ing] their adherents with many choices and, thus, many opportunities for result-driven decision making."[266] On this view, many of the Constitution's most important provisions are broad and open-ended.[267] Original intent—whether of the Framers or of the ratifiers—is either unknowable or non-existent.[268] For each important constitutional provision, the ratifying generation often disagreed over the text's meaning and its expected applications.[269] Furthermore, when turning to the task of interpretation, the Framers and ratifiers—much like members of our own generation—often disagreed on the correct interpretive approach.[270] In short, for many of the most important constitutional questions today, the ratifying generation agreed on no single intent, understanding, method, or expected set of applications.[271] From this perspective, even originalism's recent emphasis on original public meaning solves few

[265] Many of these critiques track criticisms of originalism. For the best recent critique of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 1 (2009) (critiquing the ambiguity within originalism while noting that originalists all agree that the original aspect of the Constitution they focus on should take precedence in Constitutional interpretation).

[266] FALLON, *supra* note 19, at 126.

[267] *See* BALKIN, *supra* note 37, at 6 (arguing that the text of the Constitution lists rules, standards, and general principles and that "Constitutional interpretations are not limited to applications specifically intended or expected by the framers").

[268] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 213–17 (1980) (discussing challenges to determining original understanding at the time of ratification); *see also* RONALD DWORKIN, LAW'S EMPIRE 45–86 (1986) (discussing philosophical questions about interpretation and applying these ideas to legal interpretation and debate).

[269] *See* Saul Cornell, Heller, *New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"* 56 UCLA L. REV. 1095, 1098–1101 (2009) (discussing "the problem of multiple subjective intents" in interpretation and evidence for original intent when interpreting the Constitution).

[270] *See* Saul Cornell, *Reading the Constitution, 1789-91: History, Originalism, and Constitutional Meaning*, 37 L. & HIST. REV. 821, 832–40 (2019) (describing how the framers had different opinions on how to interpret the Constitution, including specifically Hamilton and Madison); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887 (1985) (concluding that "there was a tension" in views of constitutional interpretation "during and immediately after the ratification process").

[271] *See* GRIFFIN, *supra* note 215, at 168 (discussing the different ways in which historians and lawyers study constitutional history and finding that many historians have shown that the intent of the framers has no meaning as a historical concept).

interpretive problems.[272] Far from guiding scholars and jurists to firmer methodological ground, Fallon and his fellow critics argue that this move simply forces interpreters to engage in a new set of open-ended, subjective judgments.[273]

But even if we turn away from the Constitution's text and history, neither structural argument nor constitutional doctrinalism satisfies the critics of traditional legal analysis either. Critics have long charged that both structural argument and constitutional doctrine are every bit as manipulable as the Constitution's text and history—and perhaps even more so.[274] To its critics, structural argument often feels like nothing more than the clever interpreter's slight-of-hand—pulling robust, enforceable constitutional principles out of scattered (and often vague) snippets of constitutional text.[275] And critics have long argued that constitutional doctrine settles few contested questions, leaving the interpreter with few constraints.[276] Finally, even if we overcome these various challenges, why *should* we be bound by the dead hand of the past anyway—whether by the Constitution's original meaning[277] or by the decisions of previous jurists?[278] Shouldn't the Constitution belong to the living?

For critics of the traditional tools of legal analysis, legal fit simply isn't enough. As Fallon explains, "When legal rules of recognition are vague or indeterminate"—and for Fallon, that's most of the time—"Justices must make normative judgments concerning what would be best, fairest, or most legitimacy enhancing."[279] On this view, legal fit is often little more than a way

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[272] *See also* Whittington, *supra* note 232, at 610 (discussing the lack of importance of the framers' original intent and arguing that ratification by the public is the important part to giving meaning to the text).

[273] For a thoughtful critique of the turn to original public meaning, see Larry Alexander & Saikrishna Prakash, "*Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 985–89 (2004) (arguing that interpretation can never be separated from authorial intent).

[274] BOBBITT, *supra* note 200, at 84 ("Structural arguments are sometimes accused of being indeterminate . . .").

[275] Brest, *supra* note 270, at 218 ("Inference from structure . . . [is not] less fraught with indeterminacy . . . . [T]he constitutional ordering of institutions permits alternative inferences.").

[276] *See* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 76–85 (2002) ("[I]n cases concerning constitutional interpretation, the Court is more openly willing to reexamine its precedents."); *see also* Paulsen, *supra* note 215, at 298 (arguing that *stare decisis* corrupts all methods of constitutional interpretation).

[277] *See* Leib, *supra* note 168, at 353–54 (questioning living constitutionalism and arguing that "living constitutionalism's core animating anxiety is that the Constitution (and most especially its original meaning) may not be binding").

[278] *See* Paulsen, *supra* note 215, at 289 (defining stare decisis as "adhering to prior judicial precedents that are contrary to original public meaning").

[279] FALLON, *supra* note 19, at 128.

of using legalism and professional jargon to mask raw judicial policymaking driven by the interpreter's own normative preferences. For these critics, the traditional tools of legal analysis are inadequate. Constitutional interpretation is normative to its core.

Supreme Court Worship and the Risk of Ignoring the American People. Both Ronald Dworkin and David Strauss place the Supreme Court and constitutional doctrine centerstage. By privileging the Justices' constitutional voices, these accounts of doctrinal decision making risk downplaying the role that popular constitutional activism has played in shaping constitutional meaning over time.

While Dworkin famously celebrates the Supreme Court as a "forum of principle," it's easy to overstate the Court's institutional advantages.[280] The Justices rarely converse about the cases on their docket.[281] When analyzing constitutional issues, they hardly ever go beyond the parties' briefs.[282] And many Justices even leave the first drafts of their opinions to their clerks.[283] While the Justices remain in control of the Court's docket and its decisions, this institutional setting is far from the Dworkinian ideal.

Furthermore, the Supreme Court often errs.[284] While many theorists celebrate the Court's ability to promote liberty and equality, the constitutional anticanon is filled with decisions like *Dred Scott v. Sandford* and *Plessy v. Ferguson*.[285] And even when the Court *does* issue inspiring decisions like *Brown*, these decisions often follow years of constitutional advocacy by social movements, elected officials, and ordinary citizens.[286]

Constitutional revolutions often require more than legal craft, common law decisionmaking, and judicial power. Instead, they often turn on popular claims rooted in the American constitutional tradition—claims that connect

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280 DWORKIN, *supra* note 41, at 71.

281 *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 240 (2004) (discussing the lack of discussion between Supreme Court Justices as their decisions are drafted and their high reliance on law clerks to research and draft their opinions).

282 *Id.*

283 *See* ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 200–36 (2007) (discussing the history of the role of law clerks in opinion writing and noting that justices tend to have their law clerks draft their opinions).

284 Waldron, *supra* note 38, at 1377 ("The same sectarian pressures often explain judicial neglect of rights as well.").

285 *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 379–85 (2011) (discussing cases in which the holdings cannot be relied upon).

286 *See generally* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 116–67 (1996) (describing the legal strategy of Thurgood Marshall and the NAACP legal defense fund that eventually culminated in *Brown v. Board of Education*).

with America's past, but extend beyond the limits of constitutional orthodoxy defined by the Supreme Court and legal culture. In the process, the Supreme Court writes once-frivolous arguments about issues like marriage equality and gun rights into durable constitutional doctrine.[287]

In the end, the cost of constitutional settlement—and judicial supremacy—is often doctrinal rigidity and entrenched evil. Furthermore, by privileging the Supreme Court as *the* authoritative constitutional voice, theorists risk discouraging the American people from laying claim to their own constitutional tradition and, when necessary, transforming it.

Founder Worship and the Threat to Popular Sovereignty. Finally, by looking to the mythical past and celebrating our nation's Founders, many theorists risk (further) undermining the constitutional confidence of today's generation. To satisfy legal fit, a Justice must link her analysis in a current case to principles extending back towards America's past. While this move adds legitimacy to the Court's doctrinal adaptations, it also risks flattening out the American constitutional tradition.[288] Kurt Lash describes this danger as the American belief in a "constitutional big bang."[289]

Instead of facing up to our constitutional innovations, we subscribe to (what Bruce Ackerman calls) a "myth of rediscovery"—an attempt to use a reimagined (and distorted) view of America's past to mask later constitutional transformations.[290] Ackerman argues, "[M]any lawyers embrace[] th[is] myth as a convenient legal fiction"—one that normalizes some of our greatest constitutional achievements and relieves lawyers of the burden of justifying these achievements on new constitutional grounds.[291] Ackerman's key example is the New Deal Revolution. Instead of honoring FDR's genuine constitutional innovations—validated by the American people—lawyers and Justices alike try to root these achievements in a certain story about the early

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[287] BALKIN, *supra* note 190, at 1 ("Opinions and views that were once 'off-the- wall' later become orthodox, and the settled assumptions of one era become the canonical examples of bad interpretation in another. Canonical cases, ideas, and doctrines soon become anti-canonical, completely reinterpreted, or merely forgotten.")

[288] *See* GRIFFIN, *supra* note 215, at 167 (warning that the need to align current judicial decisionmaking with past constitutional jurisprudence risks realizing "an absence of intellectual content").

[289] *See* Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar's* The Bill of Rights, 33 U. RICH. L. REV. 485, 487 (1999) ("In both popular and legal culture, there is a lingering belief in a constitutional big bang: the idea that all of our most cherished constitutional values sprang into existence in a single moment at the Founding.").

[290] ACKERMAN, *supra* note 2, at 260.

[291] *Id.*

republic, with the New Deal emerging as a simple articulation of principles advanced by Alexander Hamilton and the Marshall Court.[292]

For Ackerman, the key danger of this myth is that it risks undermining popular sovereignty.[293] It undersells the American people's ongoing contribution to constitutional development. It ignores key lessons about many principles at the core of the American constitutional tradition. And it downplays various pathways of legitimate constitutional change—both inside the courts and outside of them. In short, Ackerman fears that this narrative teaches a troubling lesson: "*Popular sovereignty is dead in America*."[294]

B. POPULAR FIT: HEARING THE VOICES OF AMERICANS TODAY

Legal fit ensures that the aspiring statesman fulfills the expectations of the legal craftsman. To satisfy this requirement, she draws on traditional tools of legal analysis like text, history, structure, and doctrine. She issues opinions based on enduring constitutional principles—applying those principles and her own methodological approach consistently across a range of cases. And she grounds her analysis in commands from America's past. These qualities appeal to legal culture and ensure that she satisfies the craft requirements of the well-trained lawyer. However, for purposes of constitutional statesmanship, legal craft simply isn't enough. Even the superb legal craftsman may lack the virtues of the constitutional statesman.[295] In addition to legal fidelity, the aspiring statesman must remain attuned to the voice of the American people today—satisfying the demands of (what I refer to as) *popular fit*.

Simply put, popular fit takes the American people's *current* views—if any—into account when analyzing a constitutional issue, granting considerable weight to any evidence of a popular constitutional consensus. To satisfy the demands of popular fit, the aspiring statesman must do more than appeal to the vague commands of "We the People." She must tend to the actual contours of public opinion today—relying on concrete indicators to determine whether the American people have reached a constitutional consensus. While I've provided a more detailed discussion of this form of popular constitutional analysis elsewhere, I build on this previous work to offer an account of popular

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[292] ACKERMAN, *supra* note 47, at 43.

[293] *Id.* at 36–43.

[294] ACKERMAN, *supra* note 73, at 17.

[295] JACOBSOHN, *supra* note 35, at 160 ("Justice Frankfurter appears to have been more in the tradition of [Morrison] Waite than in the tradition of [John] Marshall. He was far less the judicial statesman than a superb judicial craftsman.").

fit—one that responds to longstanding concerns that both living constitutionalists and popular constitutionalists have failed to offer interpreters the methodological tools necessary to build concrete, principled versions of each theory.[296] However, as with any approach to constitutional analysis, popular fit is not without its dangers.

1. Popular Fit as a Constitutional Sensibility—A Preliminary Look

To satisfy the requirements of constitutional statesmanship, the Roberts Court must balance between the competing demands of legal culture and popular sovereignty. Perhaps no theorist better combined a legal scholar's rigor with a political scientist's concern with public opinion than Edward Corwin.

Corwin's distinct approach may have grown out of his own experience as both a scholar and public intellectual. Trained as an historian, Corwin was a pathbreaking scholar at Princeton in the first half of the twentieth century.[297] He succeeded Woodrow Wilson as Princeton's McCormick Professor of Jurisprudence and "served as the first chair of the Princeton Politics Department."[298] As Cornell Clayton explains, "Under Corwin's direction, Princeton's politics department became the disciplinary center for the study of what the U.S. Constitution means."[299] Corwin also advised two Presidents and was a prominent public intellectual.[300] In fact, even though he wasn't a lawyer, Corwin was so respected as a constitutional scholar that FDR placed him on his Supreme Court short list.[301] In the end, Corwin offered a rare mix of academic rigor and real-world experience. This perspective is evident in his approach to the Constitution—one that blends concerns with both legal and popular fit.

To frame his approach, Corwin discusses the relationship between the Constitution, constitutional law, and constitutional theory. For Corwin, the Constitution is "the nucleus of a set of ideas."[302] Constitutional law is a "rule of decision," and "[s]urround[s] this nucleus and overlap[s] it to a greater or lesser extent."[303] And constitutional theory is "the sum total of ideas of some

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296 *See* Donnelly, *supra* note 169; Donnelly, *supra* note 176.

297 Cornell W. Clayton, *Edward S. Corwin as Public Scholar*, at 289, *in* PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety, ed., 2003).

298 *Id.*

299 *Id.*

300 *Id.* at 290.

301 *Id.*

302 Corwin, *supra* note 36, at 294.

303 *Id.*

historical standing as to what the [C]onstitution is or ought to be," and it sits "[o]utside" of the realm of constitutional law—"interpenetrating it and underlying it."[304]

This powerful image raises (at least) two key questions. What's the relationship between law and politics? And who (or what) should drive constitutional development?

As to the first question, Corwin explores the relationship between constitutional theory and policy preferences. Corwin doesn't deny that "judges make law."[305] However, he *does* think that constitutional theory has independent content and serves a distinct purpose within our constitutional system—one that connects the Constitution, the courts, and public opinion. As an example, Corwin offers the longstanding debate over federalism. Since the early republic, two competing theories have battled for supremacy—one arguing for robust national power (the Hamiltonian view) and the other defending states' rights (the Jeffersonian view).[306] Over time, "[e]ach theory... has enjoyed its period of predominant influence with the [C]ourt, and each in consequence has back of it a respectable line of supporting precedents."[307]

When new debates over federalism emerge, these jurisprudential traditions provide judges (and those outside of the courts) with a well-established framework for debating those issues—a way of connecting the issues of today to enduring principles rooted in America's past. Mere legal materials don't settle the debate. Both sides can *fit* their conclusions within the American constitutional tradition as a matter of *law*. The question remains who (or what) should drive constitutional development. For Corwin, the answer is simple: *the American people*.[308]

Corwin was writing in response to *Lochner*-era court decisions restricting the powers of the government to regulate the economy. In reaching these decisions, the courts were able to draw on a well-established jurisprudential tradition—one with a restrictive vision of governmental regulatory power.[309]

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[304] *Id.*

[305] *Id.* at 298.

[306] *Id.* at 298–99.

[307] *Id.*

[308] *See* Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1085 (1936) (arguing that courts must read the Constitution as an "instrument of a people's government and of a unified nation which has not yet lost faith in its political destiny"); Corwin, *supra* note 36, at 302 (explaining that the Constitution—"as a *law*"—"derives all its force from the people of the United States of this day and hour").

[309] For an overview of the *Lochner* era jurisprudence, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE (1993).

However, for Corwin, judges must do more than simply choose the constitutional tradition that matches their own normative preferences. Instead, they must seek one that's consistent with the American people's considered judgments. In other words, they must study the contours of popular constitutional opinion and embrace a legally legitimate tradition that *fits* the American public's views. This is the core of popular fit.

The key question for scholars is how to make popular fit work in practice. Corwin offers a powerful framework for wrestling with this question. However, he offers the interpreter little concrete guidance. Corwin is in good company.

Beginning in the early twentieth century, Woodrow Wilson described the Constitution as a "living" document—calling on interpreters to adapt its meaning to "the thought and habit of the nation, its conscious expectations and preferences[.]"[310] A half century later, Robert McCloskey offered a similar vision of constitutional decisionmaking, with the Supreme Court practicing (what Howard Gillman describes as) "the arts of judicial governance"—"half judicial tribunal and half political preceptor, sensitive but not subservient to popular expectations[ ]".[311] Of course, modern theorists offer a similar set of images and metaphors. Broadly speaking, living constitutionalists envision a Constitution that keeps up with the times,[312] and popular constitutionalists call on the American people to settle the Constitution's meaning.[313] From there, various scholars offer their own variations on these theories, from Lawrence Lessig's account of constitutional "translation" to Jack Balkin's vision of constitutional redemption—and so on.[314]

While these theorists diverge in important ways—perhaps, most notably, in how *big* and how *self-conscious* a role public opinion should play in constitutional decisionmaking—they share one common shortcoming. They fail to provide the interpreter with concrete tools for analyzing the American people's constitutional views—whether that's determining the American people's "thought[s]," "habit[s]," and "expectations"; understanding new popular contexts for acts of constitutional translation; or evaluating the depth

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[310] WILSON, *supra* note 35, at 22.

[311] MCCLOSKEY, *supra* note 39, at 14; HOWARD GILLMAN, ROBERT G. MCCLOSKEY, HISTORICAL INSTITUTIONALISM, AND THE ARTS OF JUDICIAL GOVERNANCE, at 337, in THE PIONEERS OF JUDICIAL BEHAVIOR (Nancy Maveety, ed.) (2003)

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

[313] *See generally* KRAMER, *supra* note 283.

[314] *See generally* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); BALKIN, *supra* note 190.

of public support for a social movement's push for constitutional redemption before writing its vision into the law. Stripped of methodological specifics, the interpreter is left adrift with little more than a constitutional sensibility to guide her. And the judge remains largely unconstrained. Popular fit demands more methodological rigor than that.

At the same time, another set of scholars argues that the best way to redeem the promise of popular self-government is for judges to commit themselves to a strong form of judicial restraint.[315] Even so, political scientists have long recognized the representative deficiencies of our nation's elected branches.[316] Our system's many veto points—federalism, bicameralism, the separation of powers, checks and balances, and the filibuster—often prevent elected officials from passing popular laws and repealing unpopular ones.[317] These obstacles to lawmaking often widen the gap between the elected branches' actions and the American people's considered judgments. By exercising judicial view, the Roberts Court might close this gap—striking down outlier laws in the states, invalidating unpopular congressional statutes passed by old majorities, and enforcing the American people's constitutional commands.[318] From the perspective of popular fit, simple judicial restraint isn't enough.

Of course, once the interpreter moves beyond this Thayerian vision, the methodological challenges of popular fit magnify. Theorists must not shy away from them.

2. A New Approach: Popular Fit as the Search for Popular Meaning—Studying the Contours of Current Public Opinion

With popular fit, the aspiring statesman studies the Constitution's popular meaning. She determines whether the American people have reached a constitutional consensus. And if so, she works to fit her own conclusions within it. However, bare majority support isn't enough. To constrain the

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315 For the classic statement of judicial restraint, see Thayer, *supra* note 34, at 144 (urging courts to only invalidate a law when the legislature has "not merely made a mistake," but has "made a very clear one—so clear that it is not open to rational question").

316 *See* Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 DRAKE L. REV. 989, 993, 1010 (2013) (discussing stifling effect of the partisan "vetogates" and filibuster within Senate and House).

317 *Id.*

318 *See* Lain, *supra* note 179, at 152 (explaining that gerrymandering has resulted in politicians "pander[ing] to their partisan base, not the median voter") ; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–5 (1996) (discussing the role of judicial review in protecting minorities).

aspiring statesman, a constitutional consensus must draw broad support from the American people. It must arise out of extensive deliberation and debate. In short, it must reflect the American people's considered judgments—not their fleeting preferences.

As part of this analysis, the interpreter doesn't ignore popular evidence from America's past. However, this post-ratification evidence—whether framed as arguments from tradition,[319] convention,[320] historical practice,[321] or constitutional liquidation[322]—must tell her something meaningful about the constitutional views of the American people today. For instance, these post-ratification materials might point to valuable evidence about a current view's depth, breadth, longevity, or deliberativeness.

Of course, the American people may not have views on many (or even most) constitutional issues.[323] And even when they *do* have them, the American people may not reach a genuine consensus.[324] Perhaps the public is divided. Perhaps it's ignorant. Perhaps its views are shallow and fragile. Or perhaps the debate is still raging. As a result, popular fit might have analytical bite in only a limited set of circumstances. However, when the American people *have* reached a genuine constitutional consensus, popular fit demands that the aspiring statesman takes it into account. The question remains: *what's the best method for ensuring this level of popular fit?*

Theorists neglected this question for generations. However, a new wave of scholarship has begun to address it—with scholars (myself included) working to offer interpreters the methodological tools necessary to assess the American people's constitutional views and determine the contours of the Constitution's popular meaning.[325] While I have addressed this issue in more detail

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[319] Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. UNIV. L. REV. 1653, 1667–1670 (2020); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1125 (2020).

[320] Caleb Nelson, *Originalism and Interpretive Conventions*, 70 UNIV. CHI. L. REV. 519, 551 (2003).

[321] Curtis A. Bradley, *Doing Gloss*, 84 UNIV. CHI. L. REV. 59, 59–63 (2017).

[322] William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 3 (2019).

[323] *See* Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1635, 1657–59 (2012) (reviewing data showing that a majority or near majority of surveyed American citizens know little about "how the Supreme Court operates or the cases it decides").

[324] *See* Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757–60 (2011) (discussing the philosophical and logistical limitations of finding a consensus among the American public).

[325] *See, e.g.*, Donnelly, *supra* note 169 (analyzing popular constitutionalism); Donnelly, *supra* note 176 (reviewing a work of popular constitutionalism scholar Bruce Ackerman); Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1207 (2010) (arguing the constraint of public opinion "should sometimes be understood as an aspect of constitutional interpretation rather than as an alternative to it"); Lain, *supra* note 166, at 365 (examining the

elsewhere, I briefly survey the types of indicators that interpreters might use to determine whether the American people have reached a constitutional consensus.[326] Drawn from work by a range of scholars and Supreme Court opinions authored by Justices from across the ideological spectrum, these indicators provide the Roberts Court with concrete guidance for determining whether a particular constitutional approach fits the American people's constitutional views.

When searching for the Constitution's popular meaning, the Roberts Court might draw on at least *five* sets of indicators—popular indicators associated with Congress; the President; state and local governments; the American people's actions and traditions; and the constitutional views of the American people themselves. I consider each set of indicators, in turn.

Beginning with Congress, the aspiring statesman analyzes indicators associated with congressional actions, activities, and practices. To that end, she studies the congressional laws on the books to determine whether Congress has passed any statutes that might cast light on a given constitutional issue—whether by enshrining a specific principle in a single landmark statute[327] or by promoting a particular vision through a pattern of lawmaking.[328] She consults the legislative debates underlying some of Congress's greatest achievements—exploring any constitutional arguments written into committee reports, endorsed by congressional leaders, or advanced by a critical mass of lawmakers.[329] She analyzes any constitutional claims offered by Members of Congress inside the courts—whether as parties or as amici.[330] And she weighs

"Supreme Court's reliance on majority position of the states to identify and apply constitutional norms").

326 For a more complete treatment of these issues, see Donnelly, *supra* note 169.

327 *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the constitutionality of the Voting Rights Act under Congress's enforcement powers); ACKERMAN, *supra* note 73, at 100 (discussing the constitutional dimensions of the Voting Rights Act); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2, 14, 30–34 (2003) (exploring Congress's role in defining constitutional meaning through its enforcement powers).

328 *See*, *e.g.*, Fin. Oversight & Mgmt. Bd. v. Aurelius Investment, LLC, 140 S. Ct. 1649, 1658 (2019) (drawing on patterns of congressional lawmaking to shape the Court's reading of the Appointments Clause); Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973) (using a pattern of congressional lawmaking to justify heightened scrutiny for laws that classify on the basis of sex).

329 *See*, *e.g.*, Shelby County v. Holder, 570 U.S. 529, 564 (2013) (Ginsburg, J., dissenting) (emphasizing Congress's "conscientious[]" study of the problem of voter discrimination when reauthorizing the Voting Rights Act); ACKERMAN, *supra* note 73, at 150-51 (exploring speeches by congressional leaders and arguments advanced in committee reports during the battle over the Civil Rights Act of 1964).

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

any evidence of longstanding custom—whether established by the internal policies (and practices) of Congress itself or emerging as the product of dialogue (and conflict) between Congress and the other branches of government.[331] Together, these congressional constitutional indicators provide evidence of whether any of Congress's actions, activities, or practices reflect a broader popular constitutional consensus.

Turning to the President, the aspiring statesman studies actions, activities, and practices associated with various executive-branch institutions, officials, and lawyers. To that end, she studies any affirmative efforts by the President to advance a particular constitutional vision—whether through prominent speeches (like Inaugural Addresses),[332] major legislative efforts (like presidential pushes for landmark statutes),[333] unilateral executive actions (like new regulations, executive orders, or signing statements),[334] or any broader claims to an electoral mandate (especially following lopsided victories at the polls).[335] She analyzes any constitutional arguments offered by executive-branch lawyers *both* inside the courts (for instance, when the United States, key institutions, or leading officials serve as parties or as amici in certain cases)[336] *and* outside of the courts (through opinions written by the Attorney General, the Office of Legal Counsel, the White House Counsel's Office, or

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[331] *See, e.g.*, Dep't of Commerce v. New York, 139 S. Ct. 2551, 2567 (2019) ("We look . . . to Congress's broad authority over the census, as informed by long and consistent historical practice."); NLRB v. Noel Canning, 573 U.S. 513, 526–38 (2014) (analyzing the contours of Senate practice and constitutional debate over time, including congressional resolutions, existing laws, committee reports, amicus briefs submitted by leading Senators, and patterns of Senate acquiescence); Town of Greece v. Galloway, 572 U.S. 565, 575–76 (2014) (drawing on Congress's longstanding practice of allowing sectarian prayers by its chaplains to reject a First Amendment challenge to a similar practice by a town council).

[332] *See, e.g.*, Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1838–44 (2009) (discussing the constitutional significance of Inaugural Addresses).

[333] *See, e.g.*, ACKERMAN, *supra* note 73, at 65–66 (treating Lyndon Johnson as a significant constitutional voice during the fight over the Voting Rights Act).

[334] *See, e.g.*, WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 16 (2010) (highlighting the constitutional importance of various administrative regulations throughout American history); Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1633 (2017) (discussing the constitutional value of presidential veto messages, signing statements, and executive orders).

[335] *See, e.g.*, ACKERMAN, *supra* note 73, at 65 (exploring Franklin Roosevelt's constitutional mandate after his landslide victory in 1936).

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

other sets of executive-branch lawyers).[337] Finally, as with Congress, she assesses any claims of longstanding executive-branch custom.[338] Through studying these materials, the aspiring statesman looks to determine whether any of the executive branch's—and especially the President's—actions, activities, or practices suggest that the American people have reached a considered judgment on a given constitutional issue.

Turning away from the national government, the aspiring statesman also explores actions, activities, and practices associated with state and local governments. To that end, she studies whether state and local governments across the nation have taken official actions that might reflect a nationwide consensus—with the statesman often analyzing (and counting) state legislation on the books to assess the depth and breadth of popular support for a given position.[339] In addition, she weighs any constitutional arguments advanced by state and local governments inside the courts.[340] She analyzes any patterns of law enforcement (or non-enforcement) at the state and local level.[341] And she consults the day-to-day activities of state and local governments across the country—searching for any patterns of institutional practice that might inform

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337 *See, e.g.*, Trump v. Vance, 140 S. Ct. 2412, 2426–27 (2020) (citing an Office of Legal Counsel memorandum for the President's view that "state grand juries are free to investigate a sitting President with an eye toward charging him after the completion of his term"); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 95-110 (2010) (explaining the role of the Office of Legal Counsel as a key constitutional actor within the executive branch).

338 *See, e.g.*, 573 U.S. at 538 (drawing on Opinions of the Attorneys General and the President's consistent practice of issuing recess appointments during intra-session recesses when interpreting the Recess Appointments Clause).

339 *See*, *e.g.*, 142 S. Ct. at 2161 (Kavanaugh J., concurring) (describing the New York concealed weapon permitting scheme as an "outlier"); 561 U.S. at 742 (drawing on a state legislation count to incorporate the Second Amendment against the states); Lawrence v. Texas, 539 U.S. 558, 570–73 (2003) (looking to patterns in state legislation—both the laws on the books and trends in state legislation—to show "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"); Atkins v. Virginia, 536 U.S. 304, 312 (2002) (describing state legislation as "the clearest and most reliable objective evidence of contemporary values"); Lain, *supra* note 166, at 367 (discussing the use of state legislation counts in death penalty cases).

340 *See, e.g.*, 142 S. Ct. at 2242 ("26 States have expressly asked this Court to overrule *Roe* and *Casey* and allow the States to regulate or prohibit pre-viability abortions."); 561 U.S. at 789 (highlighting an *amicus* brief "submitted by 38 states" as part of its analysis of whether to incorporate the Second Amendment against the states); Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2011) (exploring the role of state attorneys general in constitutional litigation).

341 *See, e.g.*, 539 U.S. at 573 (explaining that state laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private).

a given constitutional issue.[342] Overall, these state and local government indicators are a powerful way of identifying whether the American people have reached a broad constitutional consensus—one that has swept the nation.

Turning away from popular indicators rooted in the elected branches, the aspiring statesman also studies the actions and traditions of the American people themselves. To that end, she considers certain concrete indicators tied to official political actions, such as state constitutional provisions[343] and the results of state and local ballot measures.[344] However, she might also turn away from these concrete indicators and explore how the American people's own practices and traditions—and often how ordinary Americans simply live their lives—might reflect a particular constitutional perspective.[345] Akhil Amar argues that these types of indicators go to (what he describes as) "America's Lived Constitution."[346]

Most controversially, the aspiring statesman might also weigh the results of public opinion polls and analyze the constitutional views of the American people themselves. Of course, many Justices, lawyers, Court watchers, and scholars may recoil at this practice. However, some Justices already consult public opinion data in certain cases.[347] Furthermore, public opinion polls

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342 *See, e.g.*, Hous. Comm'y Coll. Sys. v. Wilson, 142 S.Ct. 1253, 1259–60 (2022) (using an argument from state and local legislative practice—namely, evidence that "[e]lected bodies in this country have long exercised the power to censure their members," including "no fewer than 20 censures in August 2020 alone"—to conclude that a college board of trustees did not violate the First Amendment when it censured one of its own members); 572 U.S. at 577 (drawing on the longstanding use of legislative prayer by state and local governments as a defense against a First Amendment challenge to the practice).

343 *See, e.g.*, 561 U.S. at 769 (looking to gun rights enshrined in state constitutions when determining whether to incorporate the Second Amendment); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2037 (2017) (Sotomayor, J., dissenting) (observing that thirty-nine states banned funding for religious schools in their constitutions and concluding that these provisions reflected the "Nation's understanding of how best to foster religious liberty").

344 *See, e.g.*, Ariz. Free Enter. Club v. Bennett, 131 S. Ct. 2806, 2829–31 (2011) (Kagan, J., dissenting) (drawing conclusions about the public's views on money-in-politics from the results of state ballot measures); Nixon v. Shrink Mo. Gov't PAC, 120 S.Ct. 897, 901 (2000) (Souter, J., dissenting) (same).

345 *See, e.g.*, Texas v. Johnson, 109 S. Ct. 2533, 2551 (1989) (Rehnquist, C.J., dissenting) (reviewing the American flag's role as symbol of the nation "in peace as well as in war"—including by "the graves of loved ones"—as part of a constitutional argument in favor of upholding laws banning flag burning); Joseph Burstyn, Inc. v. Wilson, 72 S. Ct. 777, 780 (1952) (extending First Amendment protections to motion pictures because they are "a significant medium for the communication of ideas"—one that "affect[s] public attitudes and behavior in a variety of ways, ranging from direct espousal of a political and social doctrine to the subtle shaping of thought which characterizes all artistic expression").

346 *See generally* Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734 (2011).

347 *See, e.g.*, Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1675 (2015) (Ginsburg, J., concurring in part and concurring in the judgment) (using polling data to support campaign finance regulations

remain one of the few direct ways of assessing whether the American people have reached a constitutional consensus on a given issue—whether by offering a snapshot of the public's current views or by providing evidence of broader patterns in public opinion over time.

Finally, when assessing (and weighing) each set of popular indicators, the aspiring statesman might also consider a variety of other factors that might strengthen (or weaken) the popular signal.[348] For instance, she might analyze the contours of public debates over a given constitutional issue and assess whether the opposing sides have reached any points of *constitutional convergence*—areas in which constitutional combatants may have coalesced around a common understanding even as they continue to disagree over many other key issues.[349] She might study a given constitutional provision's *post-ratification history*—drawing on historical narratives, public opinion data, and trends in the state laws (and constitutional provisions) on the books to assess the strength of a given popular constitutional perspective over time.[350] She might look to determine whether a particular constitutional issue has been the topic of consistent, extensive, and widespread public *deliberation* (and debate)—allowing her to distinguish between battle-tested views and unreflective snapshots.[351] And she might look for any evidence of an *interbranch custom*—any areas in which the President and Congress may have settled on a specific practice over time.[352]

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covering judicial elections); 122 S. Ct. 2242, 2255 (2002) ("[P]olling data shows a widespread consensus among Americans . . . that executing the mentally [disabled] is wrong."); *see also* Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 UNIV. PA. L. REV. 119, 119 (2004) (studying the widespread use of public opinion data in the context of challenges to campaign finance regulations).

[348] Donnelly, *supra* note 169, at 133–43.

[349] *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016) (drawing on a brief by a bipartisan group of White House counsel arguing for a narrow reading of an anti-corruption statute because of its risk in chilling speech within government); 539 U.S. at 576 (using "substantial and continuing" attacks on *Bowers v. Hardwick* by key conservative voices like Charles Fried and Richard Posner to signal a growing cross-ideological consensus condemning the criminalization of same-sex sodomy).

[350] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (embracing a "modest approach" to Establishment Clause cases and "focus[ing] on the particular issue at hand and look[ing] to history"—especially patterns of historical practice—"for guidance"); Citizens United v. FEC, 130 S.Ct. 876, 979 (2010) (Stevens, J., dissenting) (arguing that the history of corporate campaign spending bans represents "the common sense of the American people....").

[351] *See, e.g.*, Washington v. Glucksberg, 117 S. Ct. 2258, 2265 (1997) (explaining that state laws rejecting a right to die had been "reexamined and, generally, reaffirmed" in "recent years" following extensive debates in the states); 383 U.S. at 308–09 (highlighting the "great care" that Congress used to study the problem of voter discrimination, including the extensiveness of the hearings and the "voluminous legislative history").

[352] *See, e.g.*, 573 U.S. at 557 ("[W]e look to the actual practice of Government to inform our interpretation.").

Taken together, the various popular indicators provide the Roberts Court with concrete ways of evaluating whether the American people have reached a constitutional consensus on a given issue. And factors like constitutional convergence, post-ratification history, deliberation, and interbranch custom can either strengthen or weaken the popular signal. Of course, no single indicator is perfect, and different interpreters might weigh them differently. Nevertheless, when various indicators all point in the same direction, they might offer the aspiring statesman concrete (if imperfect) guidance for identifying a genuine consensus worthy of popular fit.

3. The Pathologies of Popular Fit

Popular fit ensures that constitutional law maintains a connection to the constitutional present. However, when taken to the extreme, it risks a range of pathologies.

Subverting the Rule of Law. Critics of popular fit might tell a certain constitutional story. Lawyers are trained to read texts, analyze cases, distill doctrine, and apply old principles to new situations.[353] Courts issue decisions that settle constitutional disputes—bringing stability to the law, promoting long-term coordination, and advancing societal peace.[354] Judicial review checks the threat of majoritarian tyranny—protecting vulnerable minorities and enforcing individual rights.[355] And our constitutional system tasks the elected branches—not the courts—with translating the American people's considered judgments into public policy.[356] Popular fit challenges each part of this story.

First, popular fit risks transforming the aspiring statesman into a false prophet of popular sovereignty.[357] Judges are trained to be lawyers—not public opinion experts.[358] The American people don't speak clearly or with a single voice.[359] And no single institution truly represents the constitutional views of

[353] GRIFFIN, *supra* note 215, at 182.

[354] *See* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1640 (2005); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1025 (2004).

[355] Calabresi, *supra* note 246, at 1421.

[356] Thayer, *supra* note 34, at 134.

[357] *See* JAN-WERNER MUELLER, WHAT IS POPULISM? 101 (2016) (describing the potential dangers from politicians who run on a populist message).

[358] *See* Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 15 (2007–2008) (highlighting the educational and training impact on judicial decision making).

[359] *See* Neal Devins, *The D'Oh of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1340 (2007) (describing the difficulties of identifying what the most popular judicial outcome is for the American people).

the American people.[360] By misreading (or abusing) the tools of popular constitutional analysis, the aspiring statesman might embark on a new form of judicial adventurism, substituting her own constitutional views for those of the American people—whether by mistake or by design.[361]

Second, popular constitutional analysis risks undermining law's settlement function.[362] Americans divide over many constitutional issues—both large and small. These divisions yield societal conflict, divergent court decisions, and large-scale legal uncertainty. However, the Supreme Court often issues decisions that address these problems—settling contentious debates, resolving conflicts across jurisdictions, and ensuring legal certainty (and national uniformity).[363] For many commentators, this is precisely what it means for the Supreme Court to act as a court of law.[364] On this view, by answering popular fit's call and following the whims of the American people, the aspiring statesman risks undermining the rule of law itself.

Third, popular fit is in tension with the traditional conception of judicial review as a check against majoritarian tyranny.[365] On this view, even if the aspiring statesman manages to determine the American public's views, she shouldn't listen to them. Americans know little about the Constitution itself or the issues on the Supreme Court's docket.[366] At best, the American people remain silent. At worst, they utter constitutional nonsense—the product of passion (not reason) or elite cue-taking (not independent thinking).[367] Either way, the American people are prone to democratic excesses—especially in times of emergency. By privileging the Constitution's popular meaning, the aspiring statesman risks eliminating an important check on majoritarian abuses.[368]

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360 *See* ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6 (1991).

361 Primus, *supra* note 360, at 13.

362 Chemerinsky, *supra* note 356, at 1015.

363 Post, *supra* note 243, at 16.

364 Alexander & Solum, *supra* note 356, at 1629.

365 *See* Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, U. ILL. L. REV. 673, 690 (2004) (explaining the important role of the judiciary in protecting minority rights).

366 Devins, *supra* note 361, at 1340.

367 *See* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 897–99 (2005) (highlighting the divergent and frequently unprincipled views of the American public on judicial decisions).

368 *See* Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackermanian Program*, 123 YALE L.J. 2644, 2648 (2014) (reiterating the potential threat to minority rights by the reliance on popular outcomes in judicial decision making).

Finally, the Supreme Court derives much of its legitimacy from both its political insulation and its use of the traditional tools of legal analysis.[369] Popular fit—with its focus on public opinion—risks damaging it. By taking the Constitution's popular meaning seriously, the aspiring statesman risks collapsing the law-politics distinction and undermining the legitimacy of the Supreme Court as a distinctly legal institution.[370] For critics of popular fit, the Roberts Court should follow the commands of the law, not the commands of the American people.

Undermining American-Style Popular Sovereignty. Constitutional reform is at the heart of American constitutionalism.[371] Even so, a critic of popular fit might read American constitutional history as supporting a distinct vision of popular sovereignty—not one promoting the ongoing expression of the popular will, but instead one tethered to a formal reform process and the rigors of legal fit.

Keith Whittington provides the most sophisticated defense of this form of American-style popular sovereignty. For Whittington, "'the people,' in their sovereign capacity do not always exist."[372] In fact, they rarely awake from their civic slumber. Most of time, public officials simply govern with an imperfect popular mandate, and the American people themselves give little thought to the Constitution. On this view, the American people only awake "at particular historical moments to deliberate on constitutional issues and to provide binding expressions of their will."[373] And when these moments end, the American people once again fall asleep, and only the Constitution's text remains.

These moments of higher lawmaking often take a particular form—channeling popular consent through formal structures like state ratifying conventions and the Article V amendment process. Whittington values these structures both as a means of promoting deliberation and as a way of channeling popular sovereignty into concrete expressions of the popular will. By formalizing constitutional reform, these structures "focus deliberation on the fact that it is a constitution that we are making," "with all the responsibility that entails."[374] And formal ratification procedures provide concrete indicators

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[369] FALLON, *supra* note 19, at 36.

[370] GRIFFIN, *supra* note 215, at 156.

[371] AMAR, *supra* note 235, at 313–464.

[372] WHITTINGTON, *supra* note 175, at 135.

[373] *Id.*

[374] *Id.* at 141.

of success—ending with new constitutional text, interpretable by future generations.

For Whittington, courts honor America's commitment to popular sovereignty by committing to a form of legal fit—one that preserves the Constitution's original meaning, including its commitment to a formal reform procedure. By limiting the interpretive task to the Constitution's text and history, the aspiring statesman respects "the authoritative decisions of the people acting as sovereign."[375] Furthermore, by defending the gains of past reformers, courts leave open the space for future reformers to use similar mechanisms to revise the Constitution and bind future generations. On this view, the Constitution exists, in part, as "a placeholder for our own future expression of popular sovereignty."[376]

By permitting constitutional change outside of Article V's formal constraints, popular fit risks short-circuiting the formal amendment process—empowering judges and undermining popular sovereignty. With few formal constraints, judges may abandon the Constitution's text and history, ignore previous acts of popular sovereignty, and "impose" their own "value choices"—all in the name of "We the People" of today.[377] Furthermore, by opening the door to judicial review as a form of fast-track constitutional reform, popular fit risks dampening reformers' zeal for pursuing constitutional change through Article V's formalities.[378] Why endure the rigors of Article V when a bare majority of the Supreme Court will do?

Closing the Constitutional Schoolhouse Doors. Scholars have long argued that one of the Supreme Court's most important functions is its educative function.[379] On this view, the Supreme Court shouldn't be a simple mirror of American society. It should be a constitutional teacher.

By standing apart from partisan politics and remaining free of popular influence, the Supreme Court might teach the American people and their elected officials important lessons about the Constitution and its history—binding today's Americans to previous generations, reinvigorating a collective belief in core constitutional principles, and urging the American people to take

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375 *Id.* at 111.

376 *Id.* at 152.

377 *Id.* at 112.

378 John McGinnis and Michael Rappaport use Article V's supermajoritarian process as a normative defense of originalism—arguing that this process yields better results than one with a lower decision-making threshold. *See* McGinnis & Rappaport, *supra* note 249.

379 *See* Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 193 (1952) (highlighting the author's belief in the important role of the Supreme Court in educating the American people on constitutional issues).

the long view.[380] At its best, constitutional law opens up a conversation across generations—one moderated by a set of knowledgeable interpreters and insulated from most political pressures.[381] At times, this insulation permits the Supreme Court to ignore the present political winds, protect minority rights, and reach principled decisions rooted in America's past—decisions that might challenge society's existing views.

When the Supreme Court embraces the Constitution's popular meaning, it risks losing this distinct institutional virtue. As David Pozen explains, "[b]y shrinking the space for independent judgment" and relying too much on public opinion, the Court is "liable to shrink the temporal horizons of constitutional law."[382] On this view, popular fit threatens to end a valuable intergenerational conversation and to close the constitutional schoolhouse doors.

C. PRAGMATIC FIT: PREDICTING AMERICA'S FUTURE

Legal fit calls on the aspiring statesman to apply the traditional tools of legal analysis and give her best reading of the law. When analyzing a case within the mode of legal fit, her focus is on legal fidelity, not current public opinion or future consequences. This mode ensures that the aspiring statesman tends to the requirements of legal craft, ruling in ways consistent with her training as a lawyer.

With popular fit, the aspiring statesman turns from traditional legal analysis to current public opinion. Do the American people hold any views relevant to the constitutional issue in a given case? Does the issue interest the American people? Divide them? Unite them? Are the public's views longstanding or newly formed? Are they the product of deliberation and debate or merely unreflective snapshots? And have the elected branches worked to promote these views in various laws, actions, and practices? By responding to *these* questions, the aspiring statesman moves beyond traditional legal analysis and asks whether a given constitutional conclusion is faithful to the American people's current constitutional views. Popular fit holds out the promise of a principled form of living constitutionalism—one

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[380] *See* Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 963 (1992) (noting the Supreme Court's role in teaching the American people about basic constitutional principles).

[381] Calabresi, *supra* note 246, at 1440.

[382] David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2126 (2010).

with a concrete methodology that constrains judges by focusing on the actual contours of popular constitutional opinion.

While legal fit looks to America's past and popular fit turns to America's present, pragmatic fit requires the Roberts Court to consider America's future. How will the public respond to a new ruling—with backlash, acquiescence, or support? How will the ruling affect the well-being of ordinary Americans? How will it shape future legal doctrine—its administrability, its guiding principles, and its applications? And how will legal culture react? Will it attack the ruling as an act of bare policymaking, or will it celebrate it as a powerful statement of our nation's highest law?

In many ways, pragmatic fit calls on the Roberts Court to predict the future. Perhaps no scholar wrestled more candidly with this task than Alexander Bickel.

1. *Building from Bickel: Towards a Rigorous Approach to Pragmatic Fit*

While Alexander Bickel is most famous for his treatment of the countermajoritarian difficulty, he also set out to justify an affirmative role for the Supreme Court within our constitutional system.[383] For Bickel, this role must be adapted to the Court's distinct virtues—namely, its capacity for "dealing with matters of principle" and "sorting out the enduring values of society."[384] However, the question remains how judges might best determine these "enduring values" in the first place. Bickel argues that the answer lies in the relationship between principle and compromise, with public opinion—both present and future—playing a key mediating role.

In Bickel's view, when the Supreme Court decides a case, it must transcend partisan politics and "act rigorously on principle, else it undermines its justification for power."[385] However, the Supreme Court may also decide to "stay[] its hand"—exercising Bickel's (famed) passive virtues and "decid[ing] not to decide."[386] For this process to work, the Court must remain attuned to public opinion—often using cert. denials and the justiciability doctrines to avoid deciding controversial issues on the merits and, in the process, living to fight (on principle) another day. Of course, the Court must also consider the public's views when determining which principles to apply when that day arrives.

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[383] WHITTINGTON, *supra* note 175, at 20.

[384] BICKEL, *supra* note 139, at 25, 26.

[385] *Id.* at 69-70.

[386] Bickel, *supra* note 139, at 133.

While Bickel cautions against expecting the Court to simply divine public opinion, he argues that it "should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent."[387] For Bickel, the Court isn't limited to the opinions of the moment—in other words, to the constraints of popular fit. Within the Madisonian system, the Court *can* serve as "a leader of opinion."[388] And as an influential institution, it "has ways of persuading" the public.[389] However, to succeed, the Court must actually win the public debate, "not merely impose its own" views on the American people.[390] Writing in the wake of the white South's massive resistance to *Brown*, Bickel warns, "sustained opinion running counter to the Court's constitutional law can achieve its nullification, directly or by desuetude."[391]

In the end, Bickel's approach calls for traditional legal analysis tempered by evidence of current public opinion and predictions about the future—in other words, a blend of legal, popular, and pragmatic fit. We hear echoes of Bickel's approach in a variety of contemporary accounts—most notably, Philip Bobbitt's description of the Court's "expressive function,"[392] Christopher Eisgruber's defense of judicial review,[393] and David Strauss's account of the Supreme Court's "modernizing mission."[394] At the same time, Bickel gives the interpreter little specific guidance for how to go about deciding (or deciding not to decide) a case. He frames the relationship between legal analysis, public opinion, and predictive judgments as one not of "quantitative proof," but instead "a question of 'antennae.'"[395] Scholars owe the Justices more concrete guidance than that. Even so, Bickel's approach provides a useful foundation for building a concrete framework for pragmatic constitutional analysis.

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[387] BICKEL, *supra* note 139, at 239.

[388] BICKEL, *supra* note 139, at 239.

[389] *Id.*

[390] *Id.*

[391] *Id.* at 28.

[392] BOBBITT, *supra* note 200, at 211, 218 (arguing that the Court "must sometimes be in advance of and even in contrast to, the largely inchoate notions of the people generally," "giv[ing] concrete expression to the unarticulated values of a diverse nation").

[393] EISGRUBER, *supra* note 64, at 126 (arguing that Justices "must instead act on the basis of a conception of justice with which Americans in general could plausibly identify themselves.").

[394] *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 860 (2009) (describing the "modernizing mission" of judicial review as an approach that seeks to anticipate trends in public opinion).

[395] BICKEL, *supra* note 139, at 239.

2. Pragmatic Fit as Pragmatic Constitutional Analysis: Predicting the Future

To satisfy the demands of pragmatic fit, the Roberts Court must try to predict the future. This is no simple task.

Sometimes pragmatic fit counsels caution.[396] The issue may be complex—vexing experts and ordinary Americans alike. The consequences of a ruling—both policy-wise and doctrinal—may be unknown. Public opinion may be divided—or may even run against the Supreme Court's preferred outcome. Legal elites may urge caution. And the issue itself may threaten to divide the Court along partisan lines. In these circumstances, perhaps a minimalist solution might be best—one that unites the Court around a narrow outcome that honors all sides, keeps the debate alive, and buys both the elected branches and the Court more time to experiment with broader solutions.[397] As Robert McCloskey observed a half-century ago, "[T]he Supreme Court often gains rather than loses power by adopting a policy of forbearance."[398]

However, pragmatic fit need not lead to narrow rulings. Sometimes the Court bets on its own constitutional foresight. This is certainly how Bickel viewed the Warren Court. For Bickel, Chief Justice Warren and his colleagues often ignored the constraints of legal craft and "overr[o]d[e] standards of analytical reasoning" in service of a "grand" goal—"the Egalitarian Society."[399] In landmark cases, the Warren Court Justices pursued "this goal... in the belief that progress, called history, would validate their course, and that another generation, remembering its own future, would imagine them favorably."[400]

For the Warren Court, "the final test" didn't turn on the nits of the current generation of legal elites, but instead on "the future."[401] Bickel explains this test well:

> [T]he Justices of the Warren Court placed their own bet on the future...If the bet pays off, whatever their analytical failings, the Justices will have won everything...Should that chance materialize, it isn't going to matter that [Herbert] Wechsler thought that [*Brown*] rested on an inadequately neutral principle, or that its reasoning is otherwise faulty, or fails to take account of all that is relevant... It would be intellectual megalomania not to concede that the

[396] Sunstein, *supra* note 209, at 8.
[397] *Id.*
[398] MCCLOSKEY, *supra* note 39, at 30.
[399] BICKEL, *supra* note 35, at 13.
[400] *Id.* at 13-14.
[401] *Id.* at 38.

Warren Court, like Marshall's, may for a time have been an institution seized of a great vision, that it may have glimpsed the future, and gained it.[402]

And so the Warren Court did—at least for a time. In the process, it transformed constitutional law.

In the end, pragmatic constitutional analysis might yield either a constrained Court or a dynamic one. It depends on the Court's sensibility and its own predictions about the future. Regardless, Bickel's canonical account suggests *five* elements of pragmatic fit—predictive judgments about public opinion, policy consequences, legal culture's assessments, doctrinal effects, and perceptions of partisanship. I consider each element, in turn.

Predicting Public Opinion. While popular fit turns on assessments of current public opinion, pragmatic fit requires the aspiring statesman to make predictions about the future. The Supreme Court has no electoral constituency and no army of its own.[403] For its rulings to have force, the Court must secure support from the elected branches.[404] As a result, the aspiring statesman should tend to the Court's institutional legitimacy—cultivating public opinion and predicting how the American people will react to new rulings.[405] This is no easy task. Even so, it's one that the Court already undertakes with regularity across a range of important issues. David Strauss refers to this as the Supreme Court's "modernizing mission."[406]

When issuing a "modernizing" decision, the Court "looks to the future, not the past; . . . tries to bring laws up to date, rather than deferring to tradition; and . . . anticipates and accommodates, rather than limits, developments in popular opinion."[407] This approach "allow[s] an elite to move the law in the direction it considers better. . . . But . . . any effort to move the law . . . must be justified as an anticipation of how democratic politics is evolving."[408] Working within Strauss's framework, the Justices make predictive judgments about the reactions of both the mass public and their elected representatives.

Sometimes the Supreme Court predicts well, striking down laws when public opinion is already trending away from their survival—"laws that," in Strauss's words, "would not be enacted today or that will soon lose popular support."[409] In many cases, the Court may simply validate the inevitable—

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[402] *Id.* at 99-100.
[403] Caldeira & Gibson, *supra* note 20, at 635.
[404] Bassok, *supra* note 140, at 55.
[405] BICKEL, *supra* note 35, at 7.
[406] Strauss, *supra* note 396, at 859-60.
[407] *Id.*
[408] *Id.* at 907.
[409] Strauss, *supra* note 396, at 861.

offering its own support to an emerging popular constitutional consensus.[410] In other instances, the Court's decision itself may serve an educative function, shaping public opinion and persuading the American people to follow the Court's lead.[411]

However, the Supreme Court often predicts poorly, with "popular sentiment . . . mov[ing] in a different direction from what the Court anticipated."[412] As Michael Klarman warns, "many landmark Court rulings seem to have generated backlashes rather than support."[413] At best, these faulty predictions may simply divide the public—mobilizing new constituencies, but leading to little public defiance.[414] At worst, they might lead to massive public resistance—either without violence[415] or *with* it.[416]

Of course, sometimes public backlash is worth the cost.[417] However, other times the Court shifts course, reshaping doctrine to match the public's reactions.[418] Either way, the aspiring statesman should factor these potential responses into her pragmatic constitutional analysis.[419]

Predicting Policy Consequences. The aspiring statesman often makes predictions about a ruling's policy consequences.[420] In other words, she asks herself: How will my ruling affect American society and the lives of ordinary Americans if it's enforced?

Of course, important constitutional cases often involve legal controversies with strong policy arguments on each side—with the Justices themselves

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410 Obergefell v. Hodges, 135 S. Ct. 2584 (2015), may be a recent example.

411 This might describe *Brown*'s influence on Northern opinion. *See* KLARMAN, *supra* note 114, at 465.

412 Strauss, *supra* note 396, at 861.

413 KLARMAN, *supra* note 114, at 464.

414 *Id.* at 465 (providing *Roe v. Wade* as an example).

415 *See* Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing* Engel, 67 STAN. L. REV. 479 (2015) (discussing the public's response to the Warren Court's school prayer decision *Engel*).

416 KLARMAN, *supra* note 114, at 326-43 (describing the violent reaction to *Brown*).

417 *Id.* at 343 (describing how the Supreme Court "had put the issue [of school desegregation] on the map" with the *Brown* decision).

418 Strauss, *supra* note 396, at 862-63 (describing the Supreme Court's response to public backlash to its unpopular death penalty decision in *Furman v. Georgia*).

419 *See* Cass R. Sunstein, *If the People Would Be Outraged by Their Rulings, Should Judges Care*, 60 STAN. L. REV. 155, 158-59 (2007) ("Judges cannot always know whether they are right . . . and intense public convictions may provide relevant information about the correctness of their conclusions.").

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

choosing a winner, whether they like it or not.[421] Will curbing state-sponsored monopolies combat regulatory capture or sap the government's ability to promote the public welfare?[422] Do violent video games harm our children or redirect their emotions towards a healthy outlet?[423] Will a more robust set of criminal procedure protections curb police abuses or spur a spike in crime?[424] Will regulating hate speech promote equality or chill valuable speech?[425] The list goes on.

The aspiring statesman doesn't shy away from this responsibility. Instead, as part of her pragmatic constitutional analysis, she makes an independent judgment about the best response to the underlying policy dispute. While she approaches these policy predictions with humility—after all, Justices are trained in the law, not policy[426]—and while these predictions are far from dispositive, the aspiring statesman doesn't ignore the downstream effects of her votes.

Sometimes the Court validates innovations advanced by the elected branches.[427] Sometimes it blocks them.[428] And sometimes the Court itself is the main engine of policy change—pushing American society and its elected institutions down the path of (supposed) progress, ahead of public opinion and the actions of the elected branches.[429] Regardless, pragmatic fit requires the Justices to assess the arguments on each side, predict the policy consequences of a given ruling, and reach a decision in the case.

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[421] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 6 (2005) ("[I]ncreased emphasis upon [the Constitution's democratic] objective by judges when they interpret a legal text will yield better law.").

[422] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (referencing the Court's 19th century ruling on whether the creation of a Louisiana slaughterhouse monopoly was constitutional).

[423] Brown v. Ent. Merch. Ass'n, 564 U.S. 131 (2011) (referencing the Court's 2010 decision that video games, even violent ones, are protected under the 1st Amendment). Ass'n, 564 U.S. 131131 S.Ct. 2729, 2767 (2011) (weighing the arguments for and against allowing juveniles to have unrestricted access to violent video games).

[424] Miranda v. Arizona, 384 U.S. 436 (1966) (referencing the Court's 1966 decision implementing further procedural safeguards for suspects charged with a crime).

[425] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (referencing the Court's 1992 rulingestablishing that states may notcannot regulate categories of unprotected speech on the basis of content under the 1stbecause such regulation would be in violation the First Amendment).).

[426] WILKINSON, *supra* note 189, at 106 ("When judges lay aside the law for policy . . . . [w]hat is left is brute power.").

[427] Post & Siegel, *supra* note 329, at 4 ("The Court announced in *Katzenbach v. Morgan* that it would accord Congress's judgment about the scope of Section 5 power the same deference that it accorded Congress's judgment about the scope of its Commerce Power.").

[428] GILLMAN, *supra* note 311, at 131 (discussing the Court's majority decision and Justice Holmes's dissent in *Lochner*).

[429] ACKERMAN, *supra* note 73, at 137-43 (asserting that the *Brown* decision was an "act of political prophecy").

Predicting Elite Legal Assessments. Legal elites play a key role in shaping the Supreme Court's reputation.[430] These elites include legal academics, leading practitioners, and Supreme Court commentators.[431] To preserve the Court's institutional legitimacy, the aspiring statesman often makes predictions about how these elites will respond to a given ruling.[432] However, when making these predictions, she should be clear about *which* audience she values most—an audience of her legal contemporaries or an audience of future elites. As Alexander Bickel observes, these two audiences may evaluate rulings in different ways.[433]

For instance, let's return to Bickel's influential take on the Warren Court. For the Warren Court's contemporaries, legal craft mattered a great deal. As Bickel explains:

> Professors in New England—and elsewhere, to be sure—parse the glories of the Warren Court, criticize its syllogisms, reduce its purported logic to absurd consequences, disprove its factual assertions, answer the unavoidable questions it managed to leave unasked, and most often conclude by regretting its failures of method, while either welcoming its results or professing detachment from them.[434]

Surveying constitutional history, Lawrence Lessig argues that Justices often compromise their best reading of the law to match their own predictions about what current legal culture might accept.[435] For Lessig (as for Bickel), each Justice's actions are often shaped by the perceptions of legal elites—or, at least, each Justice's predictions about how legal elites will react to a given decision. Lessig refers to this as a Justice's concern with "fidelity to role."[436]

While Lessig's account captures the influence of contemporary legal culture, Bickel predicts that future generations will care less about legal craft than a Court's substantive vision. Bickel speculates, "Historians a generation

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430 DEVINS & BAUM, *supra* note 12, at 39-47; see also *id.* at 4539 (describing the impact of elites on the Supreme Court).

431 LEE EPSTEIN ET AL., , THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 34 (2013) (describing constraints of judges such as criticism by lawyers and other law professionals); Frederick Schauer, *The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 6 (2006) (examining "the Court's agenda in the context of the nation's as a way of refocusing longstanding debates about judicial review, judicial authority, and judicial power").

432 ABRAHAM, *supra* note 46 (analyzing the "presidential motivations in the appointment of the several chief justices and associate justices of the . . . Court").

433 BICKEL, *supra* note 35, at 11 (comparing the diverging methods employed by New England professors of different generations to evaluate the Warren Court).

434 *Id.*

435 LESSIG, *supra* note 185, at 17 ("[J]udges might decide a case based not solely upon the law but upon how the decision might seem to the public.").

436 *Id.* at 5.

or two hence... . . . may barely note, and care little about, method, logic, or intellectual coherence, and may assess results in hindsight—only results, and by their future lights."[437] In the end, the aspiring statesman often "bet[s] on the future"—susceptible to the evaluations of both today's and tomorrow's legal elites.[438]

Predicting Doctrinal Consequences. The aspiring statesman often makes predictive judgments about a ruling's consequences for constitutional doctrine. Doctrine does more than simply set new substantive policy. It also creates a framework for decisionmaking by other actors—both public and private. For the lower courts, it establishes a framework for analyzing future cases.[439] For legislators, it sets parameters for the types of laws that will survive a constitutional challenge.[440] For executive branch officials, it shapes how they carry out their responsibilities.[441] And for private actors, it establishes reliance interests and a framework for coordination.[442]

To satisfy the demands of pragmatic fit, the aspiring statesman creates doctrine that is consistent with both a compelling constitutional vision and legal craft virtues like clarity, consistency, administrability, and stability.[443] Doctrine should communicate clear commands to the lower courts.[444] It should provide lower court judges with administrable rules and standards.[445] It should set clear parameters for the elected branches.[446] And it should promote coordination among private actors.[447] Of course, these virtues must sometimes yield to other

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[437] BICKEL, *supra* note 35, at 11.

[438] Siegel, *supra* note 35, at 999.

[439] *See* Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 755-57 (2002) ("[A] lower court can learn more about the appellate court's view of the proper interpretation . . . by examining a line of 10 cases in qhich the same test was applied than by reading the first (or the last) ruling the appeals court issued.").

[440] United States v. Lopez, 514 U.S. 549 (1995) (limiting Congress's Commerce power to prohibit the possession of a gun near a school); Post, *supra* note 243, at 19.

[441] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (requiring that the President have Congressional and/or Constitutional authorizing to engage in lawmaking activity).

[442] *See* John M. Finnis, *Law as Coordination*, 2 RATIO JURIS 97, 100 (1989).

[443] Siegel, *supra* note 35, at 966 ("One critical facet of the relationship of trust that sustains the rule of law is the confidence of the governed that the fidelity of their governors to what I shall call rule-of-law values—that is, to the values of consistency, stability, predictability, and transparency.").

[444] Post, *supra* note 243, at 16 ("[C]ourts follow the principle of *stare decisis*, which is to say that they follow the doctrinal rules laid down in controlling precedents.").

[445] *See* June Med. Servs. v. Russo, 140 S. Ct. 2103, 2133-34 (2020) (Roberts, C.J., concurring in the judgment) (discussing the value of stable precedent to the development of the law).

[446] Post, *supra* note 243, at 19 ("On these occasions the principle of *stare decisis* holds courts to a consistent and stable interpretation of Constitution [which allows] state legislators [to] know what to do.").

[447] Finnis, *supra* note 444, at 102 ("[T]he existence of the legal order creates a shared interest which gives everyone moral reason to collaborate with the law's co-ordination solutions, i.e., moral reason to regard the law as (morally) authoritative.").

priorities like adapting to a changing society or committing to a new substantive vision.[448] Nevertheless, the aspiring statesman shouldn't lose sight of the doctrinal consequences of her rulings.

Transcending Partisan Politics. Finally, the aspiring statesman should promote public perceptions of the Court as a court of law and not one of mere partisan politics. She should pursue a consistent methodology—one that requires her to decide against her own policy preferences in some cases.[449] She should look to build cross-ideological consensus—at times, defying public expectations of an ideologically divided ruling in high-salience cases.[450] And she should remain attuned to any patterns in the Court's rulings over time—avoiding a string of decisions benefiting one side of the ideological divide.[451]

Even when issuing decisions that favor one side of a constitutional debate, the aspiring statesman should look to signal respect for reasonable arguments made on all sides—and especially arguments advanced by the losing side.[452] Sometimes this means substantive compromise—crafting a solution that falls short of a maximalist victory for the winning side. Other times it might simply require language in the majority opinion acknowledging the difficulty of the constitutional issue and the persuasive force of the losing side's argument. In short, pragmatic fit sometimes calls for a charitable spirit.[453]

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[448] BICKEL, *supra* note 35, at 98 ("[T]he Court is 'predestined in the long run not only by thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions.'").

[449] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) ("The courts have . . . the title and the duty . . . to review the actions of the other branches in the light of constitutional provisions . . . . they are bound to function otherwise than as a naked power organ; they participate as courts of law.").

[450] Grove, *supra* note 27, at 2240 ("[A] Justice should apply her preferred approach consistently across cases, with candor and in good faith.").

[451] Siegel, *supra* note 35, at 968 ("[D]emocratic legitimacy must be secured independently of particular outcomes").

[452] *Id.* at 969 ("[C]itizens must tolerate those who disagree with their views and reject their values."). For examples of this approach in recent Supreme Court decisions, see *Obergefell*, 135 S. Ct. at 2619 (Roberts, C.J., dissenting) ("[T]he compelling personal accounts of petitioners and others like them are likely a primary reason why many Americans have changed their minds about whether same-sex couples should be allowed to marry."); NFIB v. Sebelius, 567 U.S. 519, 562 (2012) ("The most straightforward reading of the mandate is that it commands individuals to purchase insurance.").

[453] BICKEL, *supra* note 248, at 142 (establishing that those in power "can only lead us ... to an imperfect justice, because there is no other kind").

3. The Pathologies of Pragmatic Fit

Pragmatic fit requires the Roberts Court to make predictions about the future. However, when taken to the extreme, it presents a range of pathologies.

Undermining the Supreme Court's Legal Legitimacy. Pragmatic fit calls on the aspiring statesman to make determinations that are usually reserved for the elected branches. Which way is public opinion shifting? Which policy choice will promote the common good? How will the public respond to an important ruling? And will the public lose trust in the Supreme Court if its decisions advance the preferences of one side of the partisan divide? By responding to these concerns—and not to the law's commands—the Supreme Court departs from its professional expertise and risks undermining its legitimacy as a legal institution.

Judge J. Harvie Wilkinson expresses this concern well: "When judges lay aside the law for policy, shall we listen to them then? Of course we shall listen, as one citizen to another, but professions that leave behind their special province divest themselves not just of training and experience but of authority and legitimacy, and ultimately of social acceptance as well."[454] Critics have long charged that constitutional statesmanship is little more than a "euphemism for the political approval" of the illegitimate—if sometimes well-intentioned—actions of certain judges.[455] In this view, judges should stick to the law and leave policy to the elected branches.

These criticisms often take aim at the threat of raw Supreme Court policymaking—with the Court casting aside its legitimate role as an authoritative legal voice to pursue a bold normative vision for America's future.[456] However, these criticisms apply equally to an aspiring statesman's turn towards judicial modesty.

In our polarized age, the aspiring statesman may strike a moderate pose in an attempt to bolster the Court's image as an institution that transcends partisan politics—compromising her best reading of the law, reaching out to her ideological opponents, and seeking to build a cross-ideological consensus across a range of important cases. However, even this move—one not of

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[454] WILKINSON, *supra* note 189, at 106.

[455] Siegel, *supra* note 35, at 995.

[456] JACOBSOHN, *supra* note 35, at 79 ("The judge must insure that the law reflects the spirit of the day.").

audacious policymaking, but instead of judicial moderation—risks undermining the Supreme Court's legitimacy.[457]

Tara Leigh Grove gives the historical example of famous "switches in time" like the New Deal Revolution and the Warren Court's decision to delay review of anti-miscegenation laws after *Brown*.[458] In each example, key Justices approached important constitutional cases "strategically"—focusing less on the specific legal issues in a given case than on "the range of high-profile cases before the Court" and the looming threat of a public backlash.[459] Faced squarely, these strategic concerns may lead to a perverse outcome: the aspiring statesman may "vote in a 'conservative' direction in one or more such cases only if she votes in a 'progressive' direction in others."[460] And vice versa. Results turn not on the law, but on a running tally of the ideological valence of the Court's decisions over time.

In the end, the aspiring statesman may face an intractable problem—sign onto ideological rulings that represent her best reading of the law or build cross-ideological coalitions organized around strategic calculations.[461] The former risks constitutional alienation and public backlash. The latter threatens the Court's legitimacy as a legal institution. There is no simple solution. This dilemma highlights the risks involved when Justices leave the legal realm and enter the strategic one.

Tolerating Constitutional Evil. Sometimes pragmatic fit calls for judicial restraint. The risk of backlash may be high. The policy consequences may be uncertain. And the downstream effects on doctrine may be unclear. In these circumstances, the aspiring statesman might heed Bickel's advice and exercise the passive virtues. Alternatively, she might build a cross-ideological coalition around a minimalist decision—"avoid[ing] issues of basic principle" and uniting around an "*incompletely theorized agreement*."[462] Even so, constitutional forbearance poses its own risks.

While the Supreme Court often falls short of its heroic reputation, it is sometimes the only institution capable of attacking a particular constitutional

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457 Grove, *supra* note 27, at 2245 ("[T]here is one legitimacy dilemma: in politically charged moments, the Justices may feel pressure to sacrifice the legal legitimacy of their judicial decisions in order to preserve the sociological legitimacy of the Court as a whole.").

458 *Id.* at 2245, 2256–58 (discussing the Supreme Court's legtimacy dilemma during politically charged moments).

459 *Id.* at 2262.

460 *Id.*

461 *Id.* at 2245 ("[T]here is some evidence that Justices do in fact 'switch' their votes in response to public pressure. . . to preserve the Court's sociological legitimacy.").

462 SUNSTEIN, *supra* note 172, at 11.

evil.[463] The majority may despise a vulnerable group. An oppressive law may retain its popularity. And the elected branches may refuse to remedy the constitutional harm. In these circumstances, when the Court stands aside or issues narrow decisions, constitutional evil persists.

Furthermore, even if judicial humility is often a virtue, the Justices may err in their predictions. Perhaps the American people *are* ready to end a persistent evil. Perhaps the elected branches *will* enforce the Court's decision. And perhaps legal elites *will* celebrate a bold ruling as a prophetic act of constitutional redemption.[464] As Tara Leigh Grove warns, by trimming her ambitions and shying away from bold decisions, a Justice might "overestimate the likelihood of political backlash" and "vote against conscience in the 'wrong' cases."[465] Viewed historically, the Warren Court might have "rule[d] differently on one person, one vote; . . . desegregation remedies; and even *Brown v. Board of Education* itself."[466]

These examples are keen reminders of both the factors that drive pragmatic constitutional analysis and the costs of yielding too easily to pragmatic concerns. To satisfy the pragmatic fit requirement, the aspiring statesman must often strike a balance between judicial humility and constitutional courage.

D. PUTTING IT ALL TOGETHER—CONSTITUTIONAL STATESMANSHIP AT THE CASE LEVEL: A SEARCH FOR CONSTITUTIONAL BALANCE

From a methodological perspective, constitutional statesmanship is best understood as a search for *constitutional balance*. While each mode of fit—legal, popular, and pragmatic—is imperfect (and even dangerous) when applied in excess, the constitutional statesman balances the virtues (and vices) of each perspective when deciding constitutional cases. This approach draws on constitutional theory's tradition of pluralism.[467]

When approaching each case, the aspiring statesman takes a holistic view of the constitutional debate at issue. She applies the three modes of

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[463] ELY, *supra* note 180, at 1–17.

[464] BALKIN, *supra* note 190, at 2.

[465] Grove, *supra* note 27, at 2268.

[466] *Id.*

[467] For leading examples of pluralistic theories, see FALLON, *supra* note 19 (discussing three perspectives, i.e., law, philosophy and political science, on Constitutional law); GRIFFIN, *supra* note 215 ("[I]nterpretive arguments resting on the text, history, structure, and fundamental values of the Constitution were required to make sense of the clauses in question."); BOBBITT, *supra* note 200 (discussing the different archetypes of arguments implemented to interpret the Constitution); and Post, *supra* note 243, at 13 (addressing theories of Constitutional interpretation).

constitutional fit—legal, popular, and pragmatic. And she searches for a reflective equilibrium between them—never losing sight of the strengths and weaknesses of each approach.[468]

The constitutional statesman understands that each mode of analysis offers a valuable (if partial) view of the constitutional landscape—rooted in its distinct source of constitutional authority. Legal fit builds from the aspiring statesman's professional expertise—both her training as a lawyer and the Constitution's status as a legal document.[469] At its best, this mode of analysis ensures that the aspiring statesman fulfills the legal profession's powerful vision of the jurist as a legal craftsman. In contrast, popular fit values the American people's constitutional insights and derives its authority not from an aspiring statesman's legal expertise, but from America's rule of recognition—popular sovereignty.[470] At its best, this mode draws on the power of public consensus—with the statesman analyzing popular meaning and looking to write constitutional common sense into legal doctrine.

Finally, pragmatic fit trades on the aspiring statesman's practical wisdom—her time in public life, her insulation from partisan politics, and her experience deciding cases on a range of important topics.[471] Depending on the period's constitutional politics (and the statesman's predictive judgments), this mode of analysis offers the virtues of either constitutional prophecy[472] or institutional humility.[473] Either way, it ensures that the aspiring statesman doesn't ignore the consequences of her decisions.

At their best, these three modes of fit—legal, popular, and pragmatic—offer a vision of constitutional statesmanship that promotes legal craftsmanship, constitutional common sense, and practical wisdom. Of course, each mode of analysis also presents its own set of vices. Legal fit risks wooden

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[468] FALLON, *supra* note 19, at 27.

[469] WILKINSON, *supra* note 189, at 106 ("[P]rofessions that leave behind their special province divest themselves not just of training and experience but of authority and legitimacy, and ultimately of social acceptance as well.").

[470] *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044, 1049–50, 1054, 1056 (1988) ("I believe that the first, most undeniable, inalienable and important, if unenumerated, right of the People is the right of a majority of voters to amend the Constitution.").

[471] BICKEL, *supra* note 248, at 142 ("[I]f [statesmen] do resist the seductive temptations of moral imperatives and fix [their] eye on that middle distance where values are provisionally held . . . [their] moral authority will carry more weight.").

[472] BICKEL, *supra* note 35, at 38 ("The judge, [Frankfurter] wrote in 1954 . . . had to be historian philosopher and prophet.").

[473] BICKEL, *supra* note 139, at 70 (discussing the limitations of judicial review and the Court's legitimation of legislative action in adhering to principle).

formalism,[474] judicial supremacy,[475] and Founder worship.[476] Popular fit threatens majoritarian tyranny and constitutional chaos.[477] And pragmatic fit risks either raw policymaking (and serious harm to the Court's institutional legitimacy)[478] or constitutional abdication (and the tolerance of constitutional evil).[479] The aspiring statesman tries to balance the virtues (and vices) of each perspective and commit to an approach that meets her constitutional moment.

In the end, constitutional statesmanship doesn't turn on a single ideal, a blanket mandate, or a mechanical formula. Not all Justices face the same challenges—or receive the same opportunities. Not all constitutional answers turn on the same mode of fit. And not all situations call for the same response. Properly understood, the statesmanship ideal is a function of both context and judgment, turning on the statesman's situation sense—her ability to apply the modes of analysis with rigor; weigh the (often) competing commands of legal, popular, and pragmatic fit; and situate her specific task within the constitutional politics of the moment.[480] To see how constitutional statesmanship might work in practice, I end with a concrete example—the Roberts Court's final Term before Justice Ginsburg's death in 2020. While the Justices divided over important issues like abortion, guns, religion, affirmative action, student loan forgiveness, and climate change in recent Terms—a bitter Term that damaged public support for the Court[481]—Justice Ginsburg's final Term suggests an alternative path forward for the Roberts Court.

IV. CONSTITUTIONAL STATESMANSHIP—A CASE STUDY: JUSTICE GINSBURG'S FINAL TERM ON THE ROBERTS COURT

At the close of Justice Ginsburg's final Term, commentators hailed the Justices for negotiating a difficult political environment and bolstering the Court's institutional reputation.[482] However, this result was far from inevitable.

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[474] FALLON, *supra* note 19, at 126.

[475] KRAMER, *supra* note 283, at 5.

[476] ACKERMAN, *supra* note 2, at 260.

[477] ELY, *supra* note 180, at 3.

[478] WILKINSON, *supra* note 189, at 106.

[479] Grove, *supra* note 27, at 2268.

[480] ACKERMAN, *supra* note 73, at 308.

[481] Jones, *supra* note 31.

[482] *See, e.g.*, Akhil Reed Amar, *The Roberts Court Is Nothing Like America*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/opinion/john-roberts-supreme-court-partisanship.html [https://perma.cc/5EDZ-3TC6] (describing and providing examples of how the Justices have maintained partisanship in a polarized nation).

As the Term sped to a close, many commentators feared for the Supreme Court's legitimacy. The Court's docket featured a lineup of blockbuster cases covering treacherous constitutional terrain, including abortion, immigration, religious liberty, LGBTQ rights, the Electoral College, and President Trump's financial records.[483] The American people and their political leaders faced a pair of epic challenges—a raging pandemic and an economic crisis. And the nation itself was in the middle of a contentious presidential campaign—with members of both political parties often taking dead aim at the Roberts Court.[484] As the Term entered its closing weeks, many commentators wondered whether the Roberts Court could meet the challenges of this partisan (and bitter) constitutional moment.[485] However, in a string of rulings in late June, Chief Justice Roberts and his colleagues managed to build cross-ideological coalitions, defy expectations, and turn down the political heat on the Court.[486] Following these decisions, public support for the Roberts Court rose to its

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[483] *See The Supreme Court's Chief Justice Is Poised to Decide a Clutch of Controversies*, ECONOMIST (Feb. 27, 2020), https://www.economist.com/united-states/2020/02/27/the-supreme-courts-chief-justice-is-poised-to-decide-a-clutch-of-controversies [https://perma.cc/2UBU-9XDV] (discussing some of the cases the Supreme Court has ruled on and has on the docket).

[484] *See* Russell Wheeler, *Should We Restructure the Supreme Court?*, BROOKINGS (Mar. 2, 2020), https://www.brookings.edu/articles/should-we-restructure-the-supreme-court/ [https://perma.cc/CN9B-NXE2] (describing proposed structural changes to the Supreme Court, such as adding more seats to the Court, dividing the Court equally between Justices who are affiliated with the two major political parties, and imposing term limits); Darren Samuelsohn, *Trump v. John Roberts: A 2020 Battle for the Supreme Court's Reputation*, POLITICO (Dec. 20, 2019), https://www.politico.com/news/2019/12/20/trump-john-roberts-supreme-court-reputation-088287 [https://perma.cc/3887-LFSZ] (explaining the contentious relationship between former President Donald Trump and Chief Justice Roberts and both political parties criticism of Chief Justice Roberts) .

[485] *See, e.g.*, Michael S. Greve, *Is the Roberts Court Legitimate?*, 57 NAT'L AFFAIRS 42, 42-44 (Winter 2020), https://www.nationalaffairs.com/publications/detail/is-the-roberts-court-legitimate [https://perma.cc/3SPB-Q7A4] (describing the various criticisms vocalized by pundits, politicians, and prominent scholars of the Roberts Court, including that the Court is "not legitimate").

[486] *See, e.g.*, Adam Liptak, *In a Term Full of Major Cases, the Supreme Court Tacked to the Center*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/us/supreme-court-term.html [https://perma.cc/D6RW-JKGQ] ("In an era of stark partisan polarization, Chief Justice John G. Roberts Jr. steered the Supreme Court toward the middle, doling out victories to both left and right in the most consequential term in recent memory.").

highest levels in over a decade.[487] And many commentators hailed the Justices—and Chief Justice Roberts, in particular—as constitutional statesmen.[488]

Of course, part of this end-of-Term story focused on the Chief Justice himself—with many commentators proclaiming the arrival of the *Roberts* Court.[489] These commentators celebrated Chief Justice Roberts for his commitment to the statesmanship ideal—transcending partisan politics and steering his colleagues clear of a legitimacy crisis.[490] As the Court's median Justice, Roberts often cast the pivotal vote.[491] And as its Chief Justice, he decided whose voice should speak for the Court.[492] Sometimes Roberts bridged the Court's ideological divide and built coalitions that extended beyond a bare majority.[493] Other times he defied his conservative colleagues and provided the decisive fifth vote to the Court's progressives.[494] For Roberts's supporters, these moves were at the core of his claim to

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[487] *See* Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx [https://perma.cc/YRC8-PGCC] ("After the conclusion of the U.S. Supreme Court's eventful 2019-2020 term, most Americans (58%) approve of the way the judicial body is handling its job -- the court's highest rating in over a decade.").

[488] *See, e.g.*, Linda Greenhouse, *The Many Dimensions of the Chief Justice's Triumphant Term*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/opinion/supreme-court-roberts-religion.html [https://perma.cc/586G-5G5K] ("[Chief Justice Roberts] steering of the [C]ourt toward a center comfortably aligned with public opinion, and protecting it from an institutionally destructive alliance with a president who assumed the [C]ourt would do his bidding."); Dahlia Lithwick & Mark Joseph Stern, *The Political Genius of John Roberts*, SLATE (July 9, 2020), https://slate.com/news-and-politics/2020/07/political-genius-supreme-court-john-roberts.html [https://perma.cc/H3PU-GA6S] ("It was . . . clear that Roberts would prioritize public respect for the Supreme Court and the federal judiciary over short-term gains for the president and his party.").

[489] *See, e.g.*, Liptak, *supra* note 163 (stating that Chief Justice Roberts as the most powerful chief justice since at least 1937).

[490] *See, e.g.*, Nina Totenberg & Emmett Witkovsky-Eldred, *A Powerful Chief and Unexpected Splits: 6 Takeaways from The Supreme Court Term*, NPR (July 11, 2020), https://www.npr.org/2020/07/11/889785185/a-powerful-chief-and-unexpected-splits-6-takeaways-from-the-supreme-court-term [https://perma.cc/7G9S-FXLV] (XXX). For an extensive analysis of Chief Justice Roberts's move during this important Term, see Donnelly, *supra* note 20, at 1504-36.

[491] *See* Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1276-77 (2005) (defining the "pivotal" Justice as the "median" Justice, or "the Justice in the middle of a distribution of Justices, such that (in an ideological distribution, for example) half the Justices are to the right of (more "conservative" than) the median and half are to the left of (more "liberal" than) the median).

[492] *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 81-85 (1964) (describing the influence of the chief justiceship and the decisions they can make).

[493] *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020); Chiafalo v. Washington, 140 S. Ct. 2316, 2319 (2020); Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367, 2372 (2020); Our Lady of Guadalupe Sch. V. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020); Trump v. Mazars, 140 S. Ct. 2019, 2026 (2020); Trump v. Vance, 140 S. Ct. 2412, 2420 (2020) .

[494] *See generally* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020); June Med. Servs. V. Russo, 140 S. Ct. 2103, 2112 (2020).

constitutional statesmanship.[495] Even so, the Court's commitment to the statesmanship ideal extended well beyond its Chief Justice.

To close, let's consider the Roberts Court's decision that Term in *Chiafalo v. Washington.* The *Chiafalo* decision was a key part of the Court's end-of-Term story. On the eve of the 2020 presidential election, the Roberts Court took up a rare opportunity to weigh in on the mechanics of the Electoral College—addressing whether states could punish "Faithless Electors" for breaking their pledge to vote for a particular candidate.[496]

This unusual case arose out of a quixotic, post-Election Day push by Democratic-appointed Electors to deny Donald Trump a victory in the 2016 presidential election.[497] Inspired by Alexander Hamilton's elitist vision of the Electoral College,[498] these so-called "Hamilton Electors" sought to convince their Republican counterparts to exercise independent judgment, defy their state's popular vote, and abandon Trump in the Electoral College.[499] As part of this push, the Hamilton Electors broke with Hillary Clinton and cast their ballots for moderate Republicans.[500] Needless to say, this half-baked plot failed.[501] However, this push *did* give rise to a novel constitutional challenge.

Both Colorado and Washington had laws on the books that punished Faithless Electors for breaking their promise to support a particular candidate.[502] In *Chiafalo*, both states applied these laws to Hamilton Electors in their respective states. Colorado threw out the 2016 electoral vote of one Democratic Elector, who had tried to vote for Republican Governor John Kasich of Ohio.[503] And Washington fined three Democratic Electors $1,000 each for casting their 2016 ballots for Colin Powell.[504] The Hamilton Electors challenged these punishments—arguing that the Constitution protected each

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495 *See, e.g.*, Rosen, *supra* note 163 (explaining that Chief Justice Roberts' success in "persuad[ing] all but two of his colleagues to unite in two decisions ruling against President Donald Trump's efforts to fight subpoenas" thereby achieving his goal in "ensur[ing] that the Supreme Court can be embraced by citizens of different perspectives as a neutral arbiter, guided by law rather than politics").

496 *See generally* 140 S. Ct.

497 For a concise history of this effort, see Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903, 909-17 (2017).

498 *See* Alexander Hamilton, THE FEDERALIST NO. 68, *reprinted in* THE FEDERALIST PAPERS 344 (Ian Shapiro ed., 2009) ("[M]en chosen by the people for the special purpose [of selecting the President in the Electoral College] . . . will be most likely to possess the information and discernment requisite to such complicated investigations.").

499 140 S. Ct. at 2322.

500 *Id.*

501 *Id.*

502 *Id.*; *Id.* at 2322 n.2

503 140 S. Ct. at 2322.

504 *Id.*

Elector's right to exercise her own independent judgment in the Electoral College.[505]

In the end, the Court rejected the arguments advanced by the Hamilton Electors and upheld the punishments imposed by the states.[506] The vote wasn't close. Justice Kagan authored a majority opinion that attracted the support of every Justice except for Clarence Thomas.[507] And even Justice Thomas himself turned away the Electors' challenge.[508] Given this lopsided vote and Kagan's forceful opinion, it's tempting to conclude that *Chiafalo* was an easy case for the Justices. Far from it.

Within legal academia, scholars divided sharply over the case—with the Hamilton Electors drawing support from originalists and non-originalists alike.[509] In the case itself, the challengers—represented by Lawrence Lessig—offered a powerful set of arguments rooted in the Constitution's text and history, drawing on no less a source of constitutional authority than their own namesake.[510] Inside the Court, Justice Thomas criticized key aspects of the majority's textual argument—accusing Justice Kagan of "overreading" Article II's "language" to support her broad vision of state authority over Elector behavior.[511] And Justice Kagan herself had to convince a methodologically

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505 Consolidated Opening Brief for Presidential Electors, *Chiafalo v. Washington* (No. 19-465), at 16 (2020).

506 *See, e.g.*, Nina Totenberg, *Supreme Court Rules State "Faithless Elector" Laws Constitutional*, NPR (July 6, 2020), https://www.npr.org/2020/07/06/885168480/supreme-court-rules-state-faithless-elector-laws-constitutional [https://perma.cc/E4LM-F3UC] ("The U.S. Supreme Court has unanimously upheld laws across the country that remove or punish rogue Electoral College delegates who refuse to cast their votes for the presidential candidate they were pledged to support.").

507 *See* 140 S. Ct. at 2319 (showing Justice Thomas was the only Justice to not join in Justice Kagan's opinion).

508 *Id.* at 2329 (Thomas, J., concurring in the judgment).

509 For a range of scholarly views on the case, see Rebecca Green, *Liquidating Elector Discretion*, 13 HARV. L. POL'Y REV. 235 (2021); Michael Ramsey, *Faithless Electors Today*, THE ORIGINALISM BLOG (May 13, 2020), https://originalismblog.typepad.com/the-originalism-blog/2020/05/faithless-electors-today.html [https://perma.cc/2K3M-R5YL]; Sai Prakash, *'Faithless' Electors Are Faithful to the Constitution*, WALL ST. J. (May 12, 2020), https://www.wsj.com/articles/faithless-electors-are-faithful-to-the-constitution-11589322552 [https://perma.cc/NX3M-B48S]; Keith E. Whittington, *The Faithless Elector Case: Can a State Control How a Presidential Elector Votes?*, THE VOLOKH CONSPIRACY (May 12, 2020), https://reason.com/volokh/2020/05/12/the-faithless-electors-case/[https://perma.cc/FCT6-2E9J]; and Rob Natelson, *Symposium: Why the Constitution Mandates That Presidential Electors Exercise Best Judgment*, SCOTUSBLOG (Apr. 23, 2020), https://www.scotusblog.com/2020/04/symposium-why-the-constitution-mandates-that-presidential-electors-exercise-best-judgment/ [https://perma.cc/7AMG-7V3C].

510 *See* Consolidated Opening Brief for Presidential Electors, *Chiafalo v. Washington* (No. 19-465), at 18-19 (2020) (using Hamilton's arguments in *The Federalist* as a key piece of evidence linking the Founders' original expectations to the challengers' vision of Elector independence).

511 140 S. Ct. at 2329 (Thomas, J., concurring in the judgment).

diverse set of colleagues to coalesce around a common approach to an unusual constitutional issue in a politically charged case. Even so, Kagan persuaded her colleagues to embrace an opinion exhibiting many of the virtues of constitutional statesmanship.

In constructing her argument, Kagan built from a strong legal foundation. The Constitution's text carves out an important role for the states in implementing the Electoral College—with Article II granting the states the power to "appoint" their "Electors" in "such Manner as the Legislature thereof may direct."[512] For over a century, the Supreme Court itself has recognized each state's broad authority to control its slate of Electors.[513] And in 1952, the Court upheld state laws requiring Electors to pledge their support for a particular candidate in the Electoral College.[514] While Kagan acknowledged that certain Framers (like Alexander Hamilton) expected the Electors to exercise independent judgment, she concluded that the weight of legal authority supported the states.[515] However, Kagan conceded that these legal materials alone didn't settle the case.

To reinforce her legal analysis, Kagan placed great weight on the "long settled and established practice[s]" of the states—with the Founding generation designing a presidential election system premised on federalism and the states themselves using their broad authority to coalesce around electoral mechanisms that translated the voters' decisions at the ballot box into formal votes in the Electoral College.[516] While the challengers argued that Faithless Electors were a key part of our nation's constitutional tradition, Kagan countered that "'our whole experience as a Nation' points in the opposite direction," with states using their constitutional powers to enact laws that curb Elector discretion.[517]

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[512] U.S. Const. art. II, § 1.; *id.* amend. XII.

[513] *See* McPherson v. Blacker, 146 U.S. 1, 27 (1892) ("The constitution . . . recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.").

[514] Ray v. Blair, 343 U.S. 214, 228 (1952).

[515] *See* 140 S. Ct. at 2325-26 (stating that "even assuming other Framers shared that outlook . . . the Framers did not reduce their thoughts about electors' discretion to the printed page").

[516] *Id.* at 2326.

[517] *Id.* (citing James Madison and quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). For additional evidence of a popular consensus in *Chiafalo*, see Brief for Amicus Curiae South Dakota and 44 States and the District of Columbia in Support of the State Parties, *Chiafalo v. Washington* (No. 19-465) (2020) (offering evidence of a state constitutional consensus and broad constitutional convergence, with the brief drawing support from 45 states and the District of Columbia represented by Governors and Attorneys General from both parties).

Across American history, faithless votes have been rare,[518] and the states themselves have written this constitutional norm into state law—embracing the popular vote, limiting Elector independence, and "liquidating" the Constitution's meaning over time.[519] Today, nearly every state appoints Electors in the same manner—converting the statewide popular vote into a slate of Electors selected by the victorious political party in a winner-take-all system.[520] The vast majority of states—thirty-two states and the District of Columbia—require these Electors to formally pledge their support for their party's presidential candidate.[521] And a handful of states—fifteen states, including those at issue in *Chiafalo*, Colorado and Washington—go one step further, creating a formal mechanism for enforcing these pledges.[522]

Of course, from the perspective of popular fit, a state legislation count alone didn't settle the Hamilton Electors' constitutional challenge. Only *fifteen* states had enacted laws punishing Faithless Electors, and even fewer states imposed a financial penalty on them.[523] Even so, the *Chiafalo* majority sided with Colorado and Washington, concluding that those states' Faithless Elector laws were consistent with the Constitution's popular meaning. For Kagan, nothing in the Constitution's text or the Supreme Court's caselaw prohibited Colorado and Washington from punishing Faithless Electors.[524] And while only a small number of states may have had laws on the books precisely like those enacted by Colorado and Washington, the Court reasoned that even this minority approach "reflect[ed]" a broader popular constitutional

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[518] *See* 140 S. Ct. at 2328 (observing that "faithless votes represent just one-half of one percent of the total").

[519] *Id.* at 2321 (explaining that every state except for one embraced the popular vote by 1832); *id.* at 2328 (concluding that "[s]tate election laws evolved to reinforce" state practice, "ensuring that a State's electors would vote the same way as its citizens").

[520] *Id.* at 2321.

[521] *Id.* A *New York Times* poll published prior to the Court's ruling in this case offered supportive evidence for this popular expectation—with 61% of Americans agreeing that electors should be required to vote for the candidate who won a state's popular vote. *See* Adam Liptak & Alicia Parlapiano, *The Supreme Court Aligned with Public Opinion in Most Major Cases This Term*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/interactive/2020/06/15/us/supreme-court-major-cases-2020.html [https://perma.cc/5EZ8-VB92]. For additional evidence of public support for popular election of the President, see *Gallup Vault: Rejecting the Electoral College*, GALLUP.COM (Jun. 14, 2016), https://news.gallup.com/vault/192704/gallup-vault-rejecting-electoral-college.aspx [https://perma.cc/AU7L-D65L] ("Time and again over the past seven decades, Americans have told Gallup they would like to be done with the Electoral College system for electing U.S. Presidents.").

[522] *See* 140 S. Ct. at 2322 ("States began about 60 years ago to back up their pledge laws with some kind of sanction. By now, 15 States have such a system.").

[523] *Id.*

[524] *Id.* at 2328 (stating that a state's ability to sanction an elector for breach his promise "accords with the Constitution—as well as with the trust of a Nation that here, We the People rule").

"tradition more than two centuries old"—with Electors serving not as Hamiltonian "free agents," but instead casting their votes for the popular vote winner in their respective states.[525]

Interestingly, every Justice except for Clarence Thomas signed onto this form of popular constitutional analysis. Furthermore, this approach was consistent with a broader trend at the Roberts Court, with Justices from across the methodological (and ideological) spectrum turning to historical practice to bridge the methodological divide and convince cross-ideological coalitions to unite around shared approaches to difficult constitutional issues.[526] Of course, this methodological move sometimes fails to unite the Court. Even so, it remains a powerful way of bringing together Justices with diverse ideologies and varied methodological approaches in certain cases. In the end, Kagan applied a powerful blend of both legal and popular fit—concluding that the Constitution's text, the Supreme Court's caselaw, and the Electoral College's post-ratification history all confirmed that the Colorado and Washington laws at issue in *Chiafalo* fit the American constitutional tradition. Pragmatic concerns reinforced this conclusion.

While Justice Kagan didn't explore these precise concerns in her *Chiafalo* opinion, her colleagues—most notably, Justices Alito and Kavanaugh—used oral argument to do so.[527] For instance, Justice Kavanaugh asked the Hamilton Electors' lawyer—Lawrence Lessig—about the "avoid chaos principle of judging," which "suggests that if" the constitutional issue is "a close call," the Justices "shouldn't facilitate . . . chaos."[528] Justice Alito picked up on a similar theme.[529] Echoing pragmatic arguments advanced by the lawyers for Colorado and Washington, Alito warned, "[W]here the popular vote is close and changing just a few votes would alter the outcome or throw it into the House of Representatives, . . . the rational response of the losing political party would be to launch a massive campaign to try to influence the [E]lectors"—giving way to "a long period of uncertainty about . . . the next President" and threatening a broader legitimacy crisis.[530]

In the end, the Roberts Court drew on all three modes of analysis in its *Chiafalo* decision—with Justice Kagan leveraging both legal and popular fit in her majority opinion and Justices Alito and Kavanaugh probing pragmatic

525 *Id.*
526 Bradley, *supra* note 213, at 60.
527 Transcript of Oral Argument at 21, 33, *Chiafalo v. Washington* (No. 19-465).
528 *Id.* at 33.
529 *Id.* at 21 (warning of potential "chaos").
530 *Id.*

concerns at oral argument. While no single mode of analysis settled the outcome in *Chiafalo*, the Justices combined legal fit (especially doctrine), popular fit (the broad set of state laws on the books), and pragmatic fit (avoiding chaos) to craft a statesmanlike approach to a challenging constitutional question in a difficult political environment. With this exercise of practical statesmanship, the Justices built a cross-ideological consensus around an approach that wrote a well-established constitutional norm—a norm that was consistent with the Constitution's text, the Supreme Court's caselaw, longstanding political practice, and widely held popular constitutional views—into our nation's constitutional law.[531]

CONCLUSION

Writing in the middle a politically divisive age, Alexander Bickel captured the ethos of constitutional statesmanship in his final work, *The Morality of Consent*. With Americans divided over Watergate and the Vietnam War, Bickel feared the death of moderation and warned of a society "seized by a dictatorship of the self-righteous."[532] In response, Bickel called on constitutional interpreters to "resist the seductive temptations of moral imperatives" and "fix" their "eye[s] on that middle distance where values are provisionally held, are tested, and evolve within the legal order."[533] For Bickel, constitutional law could, at best, provide "an imperfect justice."[534] Living in a polarized age of our own, Bickel's words continue to resonate today—serving as an inspiration for my account of constitutional statesmanship.

Perhaps constitutional statesmanship will always be an elusive ideal. Even so, theorists shouldn't shy away from trying to understand *both* its allure *and* its dangers.

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[531] Whittington, *supra* note 155, at 943.
[532] BICKEL, *supra* note 184, at 142.
[533] *Id.*
[534] *Id.*