DOUBLE-CONSCIOUSNESS IN CONSTITUTIONAL ADJUDICATION

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Constitutional theorists are familiar with epistemic and consequentialist reasons why judges might allow their decision making to be shaped by strongly held public opinion. The epistemic approach treats public opinion as an expert indicator, while the consequentialist approach counsels judges to compromise legally correct interpretations so as not to antagonize a hostile public. But there is also a third reason, which we can think of as constitutive. In limited circumstances, the fact that the public strongly holds a given view can be one of the factors that together constitute the correct answer to a constitutional question. In those circumstances, what the public thinks must be an ingredient in the judge's own view of the right answer.

Les théoriciens du droit constitutionnel connaissent bien les raisons épistémiques et conséquentialistes pour lesquelles un juge permettrait à l'opinion publique fortement ancrée d'influencer son processus décisionnel. Dans l'approche épistémique, l'opinion publique est considérée comme un indicateur expert, tandis que dans l'approche conséquentialiste, on conseille les juges de compromettre les interprétations qui sont correctes d'un point de vue juridique afin d'éviter de contrarier un public hostile. Il y a également une troisième raison, que nous pouvons considérer comme étant constitutive. Dans certaines circonstances, le fait que l'opinion publique soit solidement ancrée peut être un des facteurs qui, ensemble, constituent la bonne réponse à une question d'ordre constitutionnelle. Ce que pense le public, dans de telles circonstances, doit être un des éléments formant l'opinion du juge quant à la bonne réponse.

I. INTRODUCTION

In a recent essay, Cass Sunstein offers useful terms for distinguishing between two reasons why judges might hesitate before ruling that constitutional law requires a result that the public strongly opposes.[1] One reason is epistemic and the other consequentialist. The epistemic reason, boiled down, is that if

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1 Cass R. Sunstein, "If People Would Be Outraged by Their Rulings, Should Judges Care?" (2007) 60 Stanford Law Rev. 155 [Sunstein].

a large number of people believe a given view to be correct, one should think hard before concluding that they are mistaken. The consequentialist reason, also boiled down, is that even if a judicial ruling is legally correct, it could still be unpopular enough to provoke a public backlash that would damage both the specific cause served by the court's ruling and the general climate of obedience to legal institutions.[2] In this essay, I suggest that there is also a third reason why some strongly held public views should figure in constitutional adjudication. We can call this third alternative the constitutive reason.

The constitutive reason for considering public opinion is that the strongly held view of the public is sometimes an ingredient of the right answer to a constitutional question, just like text, precedent, history, structure, social science, and normative theory. This constitutive reason differs from the epistemic and consequentialist reasons. Unlike the epistemic reason, which sees public opinion as a possible *indicator* of the legally correct answer, the constitutive reason sees public opinion as a possible *creator* of that answer. Unlike the consequentialist reason, which calls on judges to compromise what they know to be the legally correct answer in light of extralegal considerations, the constitutive reason calls on judges to pay attention to strong public opinion as part of figuring out what the correct answer is in the first place. It is a factor to be considered inside the process of constitutional reasoning, not an external condition against which the result of such reasoning must be balanced.[3]

Another way to put the point is to say that strong public opinion is sometimes a source of authority in constitutional law. Public opinion can be a constitutive factor in constitutional reasoning, I suggest, for the same reason that other sources of authority, like text and precedent, can be such factors: in appropriate cases, treating it as a source of authority vindicates values that

2 *Ibid.*

3 It might seem that this position entails an infinite regress. If public opinion on a constitutional issue is an input in constitutional interpretation, then people must know what public opinion is on that issue before they can decide on the proper content of constitutional law — but until people have a view of the proper content of constitutional law, there can be no public opinion on the issue to be consulted. This problem would only arise, however, if public opinion on constitutional issues were the product of reflective decision makers following a series of prescribed analytical steps, one of which was the consultation of public opinion. It isn't. Perhaps my suggestion would be self-contradictory if millions of citizens became self-conscious constitutional interpreters at a level more reflective than is often achieved today by professional judges and academics, but it seems unlikely that that will happen. My contention that public opinion should be considered an input in constitutional interpretation is addressed to reflective interpreters. Because they are few, they can take broader public opinion as an input without triggering a regress. On other limitations of the idea of the public's having views on constitutional issues, or interpreters being able to discern those views, see *infra* Part III at 11-15.

should shape constitutional decision making.[4] Specifically, attention to the views of the demos can enhance democratic autonomy, the rule of law, and the legitimacy of the constitutional system.

One should not get carried away. Paying attention to public opinion can also disserve constitutional values, including the rule of law. Moreover, given the frequency with which the public has no clear constitutional view on an issue, the limited competence of judges to gauge public opinion, and the likelihood that considerations rooted in other authorities like text and precedent will outweigh public opinion in particular cases, public opinion should rarely change a constitutional outcome. But the foregoing caveats do not cover all circumstances. After all, the consequentialist, backlash-fearing argument, which persuades many theorists that judges should sometimes stop short of what the law truly demands, presumes that there are cases in which the public has a view different from that of the judges, that judges are aware of the divergence, and that judges should alter their behaviour accordingly.[5] If there are in fact cases where these conditions obtain, it may be better to think of the public's strongly held view as one of the elements constituting the right answer rather than as something with which the right answer must compromise.

In Part II of this article, I briefly describe the epistemic and consequentialist reasons for judicial deference to strong public opinion. In Part III, I describe the constitutive reason. Then, in Part IV, I suggest that the status of strong public opinion as a potential authority in constitutional adjudication reflects a difference between constitutional law and other legal domains. Specifically, the difference reflects constitutional law's distinctive need, or at least its heightened need, to negotiate the constant tension between democracy and the rule of law. That negotiation requires constitutional judges to exercise a kind of double-consciousness. In appropriate cases, what the public thinks the answer to a constitutional question is should inform a judge's own view of the right answer.

4 That set of values is obviously contested, but the fact of contest does not alter the present analysis. See *infra* Part III at 8-11. See also Richard Primus, "When Should Original Meanings Matter?" (forthcoming, Michigan Law Rev. 2008).

5 See Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1965) at 111-98 (describing the "passive virtues") [Bickel].

II. NONCONSTITUTIVE OPINION

The Epistemic Reason

One of the best reasons for judges to pay attention to the views of the broader public is simple epistemic modesty. No one knows everything, and everyone makes mistakes. Judges, like other people who need to make decisions, should accordingly pay attention to the conclusions of other people who have considered a relevant question and are likely to be correct. And as famously formalized by Condorcet, there is a set of conditions under which the very fact that a large majority of people holds a view is evidence that the view is correct.[6] That said, this idea has important limits. Large groups can exhibit biases and various other pathologies of judgment, and many questions are more likely to be answered correctly by small communities of experts than by the public at large.

It is not necessary here to sort through various kinds of questions that might be important in constitutional cases and determine which, if any, are more likely to be answered correctly by the public at large than by other available sources (like, say, the books in the judge's library, or the report of a special master). What is important for present purposes is something about the status of the answers strong public opinion would supply if judges were to consult it. Specifically, what is important is that the epistemic argument for deference to public opinion regards public opinion as a possible indicator of, rather than a constituent factor in, a correct constitutional decision.[7]

Suppose, for example, that a judge believes that the constitutionality of the death penalty turns to some degree on whether the threat of capital punishment deters homicides.[8] Suppose further that a large majority of the public believes capital punishment to have significant deterrent value. If dominant public opinion is correct, the judge who looks to public opinion as a check on her own intuitions will be well-served. But the deterrent effect of the death penalty is an empirical question whose answer is independent

6 See Christian List & Robert E. Goodin, "Epistemic Democracy: Generalizing the Condorcet Jury Theorem" (2001) 9 J. of Political Philosophy 277 at 283-88.

7 Often, epistemic concerns would direct deference not to public opinion at large but to the collective opinion of a community with relevant expertise. Whether the opinion consulted is expert opinion or general public opinion, however, the gist of the matter is the same for the present purpose of contrasting an epistemic approach to deference with a constitutive approach. Expert opinion can help identify, but does not help constitute, correct legal answers.

8 This is one of Sunstein's own examples. See Sunstein, *supra* note 1.

of the public's collective guess. Accordingly, a judge who knew the public to be mistaken about the deterrent effects of the death penalty would have no epistemic reason to consider the public's view. What matters in this judge's jurisprudential framework is whether the death penalty actually *is* a deterrent. Whether the public believes it to be a deterrent matters only insofar as it assists the judge in figuring out whether it really is a deterrent or not.

The Consequentialist Reason

Now consider a different way in which judges might factor public opinion into their decisions. Suppose that the Constitution, properly understood, forbids the state to prohibit marriages between persons of different races, or between persons of the same sex. Suppose further that judges believe that a judicial attempt to enforce what the Constitution requires would lead to noncompliance, erosion of respect for the law, or violence. In varying ways, different theorists have argued that it might make sense for judges to avoid the social costs of confrontation by declining to rule in accordance with their own best sense of what the Constitution requires.[9]

This analysis takes it as given that the public's view is inferior to the judges' as a matter of constitutional law.[10] The Constitution requires X, and the judges know that the Constitution requires X, but the judges also know (or at least confidently believe) that the public strongly opposes it. Maybe the public does not care that X is constitutionally required, or maybe the public believes that the judges are wrong as a matter of constitutional law. But if the public holds that latter view, it errs. By hypothesis, the situation we now consider is one in which, as a matter of constitutional interpretation, the judges are right and the

9 See Bickel, *supra* note 4 at 174 (discussing several examples including that of antimiscegenation statutes); see also Lawrence Gene Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms" (1978) 91 Harvard Law Rev. 1212 (arguing that in light of the institutional limitations on courts, judges should sometimes stop short of enforcing the full extent of constitutional law).

10 Here and at several other junctures, I write as if I were making heroic assumptions about the public's having a constitutional view or about how it arrives at that view (or, if there is a difference, about the reasons why it holds a view). I do not actually intend to endorse these assumptions. As I noted earlier, the formation of constitutional views among the public at large rarely proceeds by reflective processes like those that we associate with idealized or self-conscious methods of reasoning. See *supra* note 3. Indeed, as I discuss in *infra* Part III at 11-15, it is rarely coherent to attribute a constitutional view to "the public." Even more rarely does the public hold a constitutional view because it endorses some particular course of reasoning supporting the conclusion. Nonetheless, I sometimes write as if the public did hold a constitutional view as a result of an analytic reasoning process. My argument should not be affected by the unlikelihood of these conditions because the point each time is to engage in a thought experiment about the status of such a public view.

public is wrong. The hard question in this scenario is what the judges should do in the face of misguided but powerful public opposition.

Insofar as the reasons for paying attention to public opinion are epistemic, judges should ignore public opinion when that opinion is wrong. But if the concern is consequentialist, then powerful public opposition can supply reasons in the decision-making process even when the public errs. Suppose that the public firmly and fiercely believes that the death penalty is a constitutionally appropriate form of punishment because it deters homicides. Suppose also that a judge knows, confidently and correctly, that capital punishment actually has no such deterrent effect. In this scenario, it makes no sense for the judge to take the public's belief that capital punishment deters homicide into account when considering how the deterrent value of capital punishment bears on the constitutionally correct decision. But the fact that the public has reached its constitutional view erroneously is irrelevant when the judge asks himself whether declaring the death penalty unconstitutional would provoke a violent backlash. If the judge's reason for tempering his ruling is the wish to avoid violence, then he should take the public's opposition into account even though the public's constitutional reasoning is inferior to his own.

The epistemic-modesty reason for consulting public opinion supplies reasons for judicial action only to the degree that public opinion might point to factually true propositions. The consequentialist reason, by contrast, describes a way in which strong public opinion can provide a reason for judicial action irrespective of its truth-value. Note, however, that when judges consider public opinion in this latter vein, they are deciding whether to depart from the constitutionally correct answer in light of extra-constitutional considerations. They already know the right answer: the right answer, as a matter of constitutional law, is that capital punishment in the present hypothetical scenario is unconstitutional. The question is whether recalcitrant public opinion should prevent them from enforcing that right answer.

III. CONSTITUTIVE OPINION

I suggest that strong public opinion can play a third role. In some cases, the fact that the public holds a given view can be a constituent factor in constitutional analysis. In other words, the public's belief that X is constitutional can be a reason why X really is constitutional, just as a clause or a judicial precedent can be such a reason. The public's belief in such a case is neither an indicator of the correct answer nor a condition with which the right answer must come

to terms. It is one of several factors that together *constitute* the right answer.

I expect this claim to be controversial. Many of us have the intuition that law, and especially constitutional law, should not bend and sway with public opinion. To a considerable extent that intuition is warranted, and I am certainly not arguing that judges should decide constitutional cases in accordance with whatever the majority of people wants. I am arguing that if we think carefully about what makes something a valid consideration in deciding a constitutional case, we should conclude that strong public opinion fits the criteria about as well as some other interpretive tools that are widely accepted elements of constitutional adjudication. It is, therefore, hard to see why public opinion should be categorically excluded from the calculus. All things considered, public opinion may bear on few litigated questions, and even on those questions, it will be a decisive factor in even fewer. But it will sometimes have a role.

First- and Second-Order Authority

The possibility that the public's view on a question can help constitute the right answer to that question should be familiar in various non-legal contexts. In the television game of Family Feud, for example, where a contestant tries to guess the most popular response to a question, the right answer clearly depends on the choices that other people have made. The same is true in any number of coordination games.[11] In these situations, the subjective choices of many different people together create an objectively best answer, or even an objectively correct one.

Several constitutional doctrines often reproduce this phenomenon. One thing a court might be doing when it asks whether a defendant has a reasonable expectation of privacy is asking whether most people would have expected privacy under a given set of circumstances.[12] One way to decide whether a punishment is cruel or unusual is to ask whether most people would deem it so.[13] One way to decide whether printed matter is obscene is to apply

11 A famous example involves asking people in New Haven, Connecticut where they would try to meet a friend in New York City, if the two friends trying to meet had no way to communicate with one another. A large majority of respondents chose the information booth in Grand Central Station. That location is therefore the right answer; precisely because it is the location that most people would try, it is the location where one friend is most likely to find the other. This example and several terrific others are described in Thomas C. Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1963) at 55-57.

12 See *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990).

13 See *Roper v. Simmons*, 543 U.S. 451 (2005); Cf. Barry Friedman, "Dialogue and Judicial Review"

a community standards test.[14] To be sure, judges might mistake their own senses of privacy, cruelty, or obscenity for those of the community. But the aspiration to track the community's standards shows that the law can make its requirements depend on what the public thinks.

In the foregoing examples, public opinion helps constitute, rather than simply indicate, the content of constitutional law. Crucially, however, it does not play that constituent role by virtue of some independent authority that it has as public opinion. Instead, it shapes constitutional law at the invitation of another form of constitutional authority like text or judicial doctrine. For example, judges who consult strong public opinion to give content to the Cruel and Unusual Punishments Clause of the United States Constitution are acting on the authority of the text of the Eighth Amendment. That text, as they understand it, directs them to consult public opinion, and public opinion is salient only because the text makes it so.[15] Public opinion here is a constituent factor in constitutional adjudication, but it is a second-order constituent factor.

I suggest that strong public opinion should sometimes be regarded as a first-order constituent factor. Where applicable—and I have more to say shortly about where that is—the views of the demos should be treated as a source of reasons in constitutional adjudication independently of whether textual, precedential, or some other kind of constitutional authority calls for the inclusion of those views. Public opinion here stands on its own bottom. Just as precedent is entitled to weight even though no constitutional text directs judges to consult precedent, strong public opinion—in cases where it has something to say—is entitled to weight even when no other form of constitutional authority so provides.

Criteria for Constitutional Authority

The reason why strong public opinion should have independent status as a source of authority in constitutional reasoning is, in essence, the same as the reason why text, precedent, and other familiar sources of authority properly

(1993) 91 Michigan Law Rev. 577 at 596-97, 602 & note 119.

14 See *Miller v. California*, 418 U.S. 915 (1974).

15 If instead of prohibiting "cruel and unusual" punishments, the text said "Those punishments that may be inflicted are those that were practiced in Virginia in 1789," public opinion would be of no consequence. (I omit prolonged consideration of whether a judge in the latter case would need to consult public opinion to determine the meaning of terms like "Virginia" or "1789." There is a sense in which such consideration would be necessary, but it is very close to the sense in which the interpretation of all language requires recourse to public opinion all the time).

have that status. Simply put, treating them as sources of authority shows respect for the values that should guide constitutional adjudication. Why, for example, does it make sense to treat the text of constitutional clauses as sources of authority? Because, depending on the circumstances, attention to the text can vindicate democratic decision making, uphold the rule of law, and, to the extent that citizens conceive of constitutional adjudication as a text-based practice, strengthen the public's identification with the governing regime, thus fostering the legitimacy of the constitutional system.[16] Democracy, the rule of law, and public identification with the regime are not the only values that should guide constitutional interpretation, but they are certainly in the set. By the same token, the reason that textual authority is only one of several factors in constitutional adjudication, rather than being the sole source of authority on all constitutional questions, is that textual interpretation is not always the best way to serve all of the constitutional values that bear on a given question.

The values that should animate constitutional adjudication are obviously contested, and at two levels. First, there is no generally accepted list of constitutional values. Second, even if there were such a list, people would disagree about the content of many, or all, of the values in the set. It is still the case, however, that the appropriate way to justify the use of any particular adjudicative method in constitutional law is by reference to an underlying constitutional value, and indeed defences of particular methods are routinely offered in just that way. Many originalists, for example, argue that originalism respects democratic decision making, which is a constitutional value. The fact that the content of "democracy" is contested means that it is not always simple to decide whether a particular decision-making method serves that value, and the fact that there is no closed list of constitutional values complicates the picture further. But there are also areas of relative consensus. Virtually all American constitutional lawyers, for example, believe that democracy, the rule of law, and public identification with the regime—on some understanding of those concepts—are constitutional values. Moreover, almost everyone agrees that certain procedures respect democracy (holding elections comes to mind) and that others do not (say, adhering to the preferences of the tallest person in town). To be sure, saying that something is a valid source of authority in constitutional adjudication if treating it as such vindicates underlying

16 On the capacity of text-based interpretation to uphold democracy and the rule of law, see Antonin Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997). On the idea of constitutional interpretation as a text-based social practice, see Keith Whittington, "The New Originalism" (2004) 2 Georgetown J. of Law & Public Policy 599 at 613 & note 61 (attributing the phrase to Howard Gillman).

constitutional values leaves many questions open. But they are the right questions. And sometimes, it is possible to answer them.[17]

Within this understanding of what makes something a source of constitutional authority, strong public opinion seems to qualify. Indeed, in cases where it is meaningful to say that the public has a clear and strongly held view, treating that view as a source of authority serves some of the same underlying values that attention to constitutional text sometimes can. Most obviously, keeping the content of constitutional law aligned with the public's strongly held views helps maintain the public's identification with the governing regime, thus supporting the legitimacy of the constitutional system. Treating the public's view as a factor in constitutional adjudication can also show respect for the value of democracy, if not quite for the value of democratic *decision making*. Finally, avoiding a showdown between the judicially interpreted Constitution and an angry public can help preserve the rule of law.[18] Indeed, the fear of damaging the rule of law is much of what motivates those theorists who advocate the passive virtues in cases where judicial opinion about what the Constitution requires departs significantly from what the public is willing to bear.

Public opinion will rarely, if ever, be the best guide to serving the whole set of values that should underlie constitutional adjudication. On the contrary, too much or the wrong kind of attention to public opinion would undermine some of those values. Notably, constitutional decision making that was overly driven by popular whim would eviscerate the rule of law. But the fact that attention to public opinion can disserve constitutional values cannot mean that public opinion should be excluded from constitutional adjudication entirely, because every source of constitutional authority comes with that hazard. Sometimes following precedent yields undemocratic decisions, and sometimes following text would yield decisions that destabilize our institutions. Accordingly, the practice of constitutional adjudication does not blindly follow any given source of authority in every case. Instead, judges should ask in each case whether this or that source of authority, if consulted, would serve or disserve the values that should guide constitutional adjudication. Sometimes, attention to strong public opinion can help to vindicate those constitutional values. In such cases, public opinion should be a factor in judicial decision making just like, and for the same reasons as, text, precedent, and the other established sources of

17 For an expanded analysis of these issues and an attempt to resolve at least some of them, see Richard Primus, *supra* note 4.

18 It could also undermine the rule of law. See *infra* Part III at 15-18.

constitutional authority.

Public Opinion and Democratic Legitimacy

A sceptic who agreed that constitutional adjudication should respect and foster democratic legitimacy might here interject that charging judges with incorporating public opinion into their decision-making methods is a terrible way to operationalize the value of democracy. The better course, the sceptic's objection might run, is to let the public shape the Constitution through formal democratic processes. To be sure, those formal processes are crucial to constitutional law, and I am not recommending that judges try to replace them with their own guesses about public opinion. But the formal processes are not able, or at least not always able, to do the necessary democratic work. When they are not, it is appropriate to seek other means.

The crudest form of the formal-process argument holds that the people express themselves democratically through the constitutional amendment process, such that judges respect democracy by following the enacted text as understood by the ratifying public.[19] The controversy over this claim is wide and deep.[20] Very briefly, however, this line of thinking makes no sense when the relevant constitutional amendment process is too cumbersome to be a reliable transmitter of popular will. One need not confuse democratic legitimacy with simple majoritarianism to recognize that some formal amendment processes are too demanding to let failure to amend the Constitution stand for popular satisfaction with the status quo. (Imagine a constitutional amendment process requiring a unanimous vote of all citizens to amend the Constitution. Now imagine a process requiring a 99 percent supermajority, and so on.) The formal rules of Article V of the U.S. Constitution, for example, furnish an extreme example of a cumbersome amendment process. It is among the most cumbersome of any extant national constitution,[21] and it is certainly too

19 For one significant articulation of this position, see U.S., Department of Justice, Office of Legal Policy, *Guidelines on Constitutional Interpretation* (1988).

20 See Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, & Judicial Review* (Lawrence, KS: University Press of Kansas, 1999); Paul Brest, "The Misconceived Quest for the Original Understanding" (1980) 60 Boston Univ. Law Rev. 204. These are the tip of an iceberg, but they are as good a tip as any.

21 See Donald S. Lutz, "Toward a Theory of Constitutional Amendment, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment" in Sanford Levinson, ed., *Our Undemocratic Constitution : Where the Constitution Goes Wrong (And How We The People Can Correct It)* (New York: Oxford University Press, 2006) at 261 (arguing, based on a proposed mathematical model, that the United States Constitution was the second-most difficult to amend of 30 national constitutions studied as of 1992).

cumbersome for the formal-process argument to make sense in the American context.[22]

A less crude version of the argument that formal democratic mechanisms already shape constitutional adjudication points out that judges are chosen by elected officials. For this reason, the social and political views of the judiciary rarely stray far from those of the dominant political coalition, which is itself a crude, but not terrible, proxy for the public.[23] To the extent that the judiciary shares the political values of the public, it will vindicate public opinion without even trying. This idea is more plausible.[24] It would be overly sanguine, however, to expect the judiciary's collective constitutional vision always to match that of the whole polity. Indeed, all discussion of what judges should do when faced with the prospect of serious public disapproval relies on the potential for there to be a gap between the public's view and the judiciary's, which sometimes there certainly is. The real question, then, is whether conscious attention to strong public opinion can better vindicate democratic values in constitutional decision making than would trusting to the foregoing mechanisms alone. I believe that it can, even if only sometimes.

The qualification "sometimes" is crucial. For one thing, it is only sometimes sensible to say that the public has a view on a given constitutional issue. Most individual citizens have no real view about most issues that constitutional courts adjudicate. For example, it is safe to bet that few Americans have considered and strongly held positions on whether local flow-control ordinances are dormant commerce violations.[25] At the same time, at the collective level, polities are composed of millions of people who, if they have a view at all, are bound to disagree with one another. Unless one means to take any majority or plurality view for the voice of the people, public opinion is usually too divided to direct a unique result in a constitutional case. For all of these reasons, trying to adjudicate most constitutional questions by consulting the views of the polity is like trying to adjudicate the limits of the United States Congress's Article I powers by reference to the text of the Twenty-Second Amendment: the source can yield no answer.

22 See Henry Paul Monaghan, "Doing Originalism" (2004) 104 Columbia Law Rev. 32 at 35 (describing the Constitution as "practically unamendable").

23 See Robert Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker" (1958) 6 J. of Public Law 279 at 285.

24 See generally Barry Friedman, "The Politics of Judicial Review" (2005) 84 Texas Law Rev. 257; Richard A. Primus, "Bolling Alone" (2004) 104 Columbia Law Rev. 975; Michael J. Klarman, "Bush v. Gore Through the Lens of Constitutional History" (2001) 89 California Law Rev. 1721 at 1749-50.

25 See *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mngmt. Auth.*, 127 S. Ct. 1786 (2007).

In some cases, however, a constitutional opinion can be held by a broad enough swath of the polity, and held with sufficient confidence and tenacity, to make it sensible to say that it is the public's view. I assume, for example, that the American public would oppose a bid by the federal government to declare Buddhism the nation's established religion or to replace all locally elected officials with people chosen by the Vice-President. Thirty years ago, the public would have similarly opposed a constitutional decision forbidding sex discrimination in the provision of marriage licenses. To return again to the analogy with textual interpretation, the fact that there are many questions that cannot be settled by reference to public opinion does not mean that public opinion never points toward a particular resolution of a constitutional question, just as the fact that the constitutional text leaves many questions unaddressed does not prevent text from pointing towards particular answers on many other questions.

Next, there is a question of institutional competence. Even when it would be sensible to say that the public has a view, judges have no special capability to discern it. As Justice Black once quipped, the United States Supreme Court lacks the means to commission a poll[26] (though I presume judges are also no less able to read polling data than other people are). Worse, judges might mistake their own views for those of reasonable people everywhere. If so, judges trying in good faith to treat public opinion as a source of authority might in practice just enact their own predilections.[27]

This problem with judicial competence, however, is not unique to adjudication based on public opinion. It also afflicts a fair amount of constitutional reasoning that looks to other and long-accepted sources of authority. Perhaps the best example comes from judicial uses of historical argument. Almost without exception, neither judges nor their clerks are trained in historical method, and judicial opinions (and briefs, and law-review articles) regularly contain arguments about the past that could not be taken seriously if measured by the standards of professional historians.[28]

26 See *Griswold v. Connecticut*, 381 U.S. 479, 519 (1965) (Black, J., dissenting).

27 It is also likely that at least some judges (and other people) *overestimate* the difference between their own views and those of the public. Many people exaggerate both their own enlightenment and the average person's benightedness, and judges are not immune from these tendencies. A judge in this position might well be led into the opposite error by allowing considerations of public opinion to enter into his deliberations: rather than giving too much weight to his own views, he might shrink more than is appropriate from ruling in accordance with his own best understanding of a case. Somehow, though, this possibility worries me less than the prospect of judges too quickly eliding the differences between their own views and the views of the people.

28 See Larry D. Kramer, "When Lawyers Do History" (2003) 72 George Washington Law Rev. 387.

Should constitutional law, therefore, exclude history as a source of authority? Almost no one takes this view, and properly not. What follows from the unfortunate fact of judges' limited competence as historians is not that constitutional adjudication should give up on historical argument entirely, but rather that judges should be careful and modest about their historical claims. Judges should strive to understand a little bit about critical historical thinking, and they should remain aware of their limited competence and of the inability of history as such to resolve many questions, and they should strive to avoid resting too heavily on uncertain historical ground.

The same can be true for the influence of public opinion. There is no reason, after all, to believe that judges are inherently less capable of thinking critically about public opinion than they are of thinking critically about history. Most of the time, judges' healthy awareness of the limits of their own knowledge of public opinion should prevent it from weighing too heavily in the disposition of a case. But when judges confidently and correctly know something about a strongly held view in the polity, that view could be part of the constitutional calculus.

Finally, it is important to remember that letting a factor be part of the constitutional calculus, or treating something as one of the sources of constitutional authority, is not the same thing as being governed by that factor or that authority even in the face of good countervailing reasons. Nothing in my argument means that judges should simply decide cases in line with dominant public opinion. This is not merely because there is no dominant public opinion on many issues, nor is it only because judges may not be able to discern dominant public opinion where it exists. It is also because even when judges can discern that public opinion strongly favours ruling X, other sources of constitutional authority may yield stronger reasons for ruling not-X.

All of those qualifications, however, apply to every other source of constitutional authority as well. Neither text, nor precedent, nor history, nor anything else speaks clearly and univocally to every constitutional issue. Much less does any such source determine right answers regardless of what all the other sources of authority have to say. What follows is that no single source of authority should decide every case. Just as obviously, it follows that a potential source of authority must not be entirely excluded if it comes with the foregoing problems.

Given all these considerations, judicial attention to public opinion will often be a bad way to vindicate the democratic values of constitutionalism. Rarely, I

would think, should it be a decisive factor in constitutional decision making. But in those circumstances where paying attention to strong public opinion would do the job of showing proper respect for democracy, public opinion should be regarded as one source of constitutive constitutional authority.

Public Opinion and the Rule of Law

The rule of law, like democratic legitimacy, is one of the values that should guide constitutional adjudication. Rule-of-law concerns help justify treating well-accepted sources of constitutional authority, like text and precedent, as constitutional authorities: under appropriate circumstances, looking for guidance to text and precedent can vindicate and enhance the rule of law. And under appropriate circumstances, the rule of law can also be served by looking to strong public opinion.

Clearly, consulting public opinion as part of the constitutional reasoning process could easily betray the rule of law as well. Part of the aspiration of the rule of law is government by stable, impersonal norms that do not vary with passing fads or with the popularity of particular litigants. But the rule of law is the name for a complex cluster of contested values,[29] and the relationship of this cluster to public opinion is multifaceted. For one thing, the rule of law does not require that law ignore popular opinion entirely. No one thinks that the use of reasonableness standards is contrary to the rule of law, even though such standards often look to community beliefs and practices for their content. (This is one important limitation on the idea that the rule of law means a law of rules.[30])

One component of the rule of law is public willingness to respect and obey legal institutions, and legal institutions can jeopardize that willingness by making demands that the public finds intolerable. This tension is precisely what underlies the consequentialist or passive-virtue reasons for which judges might take strong public opinion into account.[31] Within the consequentialist paradigm, a judge might hold back from doing what the law directs, thus compromising the rule of law in a particular case, in order to maintain the judiciary's standing with the public and thus preserve the rule of law more broadly. Perhaps such a choice should be regarded as a net loss for the rule

29 See generally Joseph Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979) at 210-19; Richard H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 97 Columbia Law Rev. 1.

30 Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 Univ. of Chicago Law Rev. 1175.

31 Bickel, *supra* note 5.

of law, but, depending on the circumstances, it might not be. Moreover, that calculus supplies a standard for the judge who must ask how much of the public must hold a view, and how fiercely the view must be held, for that view to figure in her considerations. The answer is "enough to do damage to the rule of law."

To be sure, there is reason for scepticism about whether judges can reliably predict the degree to which public reaction to their decisions will undermine the rule of law. Forecasting public behaviour is difficult, and judges might have to fight some structural biases in the attempt. For example, judges are much more aware of judicial activity than ordinary citizens, and judges who overestimate the attention that people are paying to the courts could easily overestimate the social disorder that unpopular rulings would provoke. Similarly, judges may overestimate both the need for courts to protect civil peace and their capacity to keep that peace when it is truly threatened. *Bush v. Gore*[32] may be an example of the former pathology: many defences of that decision stress the need to head off chaos,[33] but the price of milk did not rise in November and December of 2000. The famous story of the Warren Court's effort to secure unanimity in *Brown v. Board of Education*[34] may illustrate the second: given the massive and often violent resistance to desegregation, one wonders how much the Court actually bought with its statesmanship in that case.

These worries, however, apply to the consequentialist reason for taking strong public opinion into account just as well as they apply to the constitutive reason.[35] Whether they mean that judges should never be sufficiently confident in their reading of public opinion as to let such considerations inform their constitutional decision making is not a question that I propose to settle here. My point is merely that if there are circumstances in which rule-of-

32 *Bush v. Gore*, 531 U.S. 98 (2000).

33 See Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton: Princeton University Press, 2001) ("The decision averted what might well have been (though the Pollyannas deny this) a political and constitutional crisis").

34 *Brown v. Board of Education*, 347 U.S. 483 (1954). For an account of the Court's efforts to present a unanimous front in *Brown*, see Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Knopf, 1976) at 678-99.

35 It is here important to clarify that the contrast between "consequentialist" and "constitutive" reasons for attention to public opinion does not mean that nothing about the "constitutive" reason can be concerned with consequences. As the present discussion of the rule of law suggests, sometimes the constitutive analysis is concerned with consequences: a concern about public backlash is a concern about a potential consequence. What the contrast is supposed to highlight is that the "consequentialist" approach, as Sunstein uses the term, is about consequences that are supposed to be external to the process of constitutional reasoning itself.

law considerations should bring judges to consider strong public opinion, we should regard that consideration as internal to the process of making the right constitutional decision, not as a compromise requiring a departure from the right decision. After all, the rule of law is a legitimate and a routine consideration *within* the process of constitutional adjudication.

It should not be hard to see that rule-of-law concerns routinely enjoy that status. Consider three cases in which a judge's decision could be affected by rule-of-law considerations. In the first case, a judge fears civil unrest if he holds the highly popular Widget Act unconstitutional. In the second case, a judge thinks that textual and structural considerations support striking down the Widget Act, but she knows that such a holding would require her to overrule *Smith v. Jones*, which is regarded as settled precedent. And in the third case, a judge thinks that structure and precedent support striking down the Widget Act but that on a proper reading of constitutional text, the Act is valid. In each of these three cases, concern for the rule of law might persuade the judge to uphold the Widget Act: in the first case to avoid unrest, in the second case to respect *stare decisis*, and in the third case to vindicate the authority of the duly enacted Constitution.

If a judge were to give decisive weight to the constitutional text in the third case, we would not say that he had compromised the right constitutional answer in light of rule-of-law considerations. We would instead say that the judge had considered the relevant set of authorities and arrived at what he believed to be the best constitutional answer. If a judge were to give decisive weight to precedent in the second case, some critics of *stare decisis* would say that the judge had departed from the truly correct constitutional answer,[36] but few constitutional lawyers share that view. Instead, most of us would say that the judge in the second case had properly considered precedent as a source of constitutional authority, just as the judge in the first case had properly considered text. So why, in the third case, would it be a departure from the right constitutional answer, rather than a step toward finding it, if a judge were to value the rule of law by considering strong public opinion, rather than text or precedent?

The answer, if there is one, can only be that text and precedent just *are* appropriate sources of legal authority, and public opinion just *isn't*. But that is a hard proposition to support with reasoned argument. Note first that the claim derives rhetorical power from its categorical confidence, but it must

36 See Michael Stokes Paulsen, "The Intrinsically Corrupting Influence of Precedent" (2005) 22 Constitutional Commentary 289 at 298 ("A doctrine of *stare decisis* always works in opposition to correct interpretation of the Constitution").

immediately be qualified to take account of the role that strong public opinion routinely plays as a second-order authority when a decision turns on a reasonableness or community standards test. More fundamentally, there is no closed and universally accepted set of authorities in constitutional law. This is not to say that anything can be a valid factor in constitutional adjudication—many things, I am sure, cannot. ("This will increase my nephew's wealth" is not an acceptable consideration.) But excluding something as a potential source of authority requires a theory of constitutional decision making. Within the present theory, on which something is a legitimate source of authority in a given constitutional case if looking to it for reasons will vindicate the values that properly guide constitutional adjudication, certain limited consultations of strong public opinion cannot be ruled out.

IV. DOUBLE-CONSCIOUSNESS

I suspect that many readers will still be bothered by the argument of this essay, because there may seem something distinctly un-law-like in treating public opinion, even in limited circumstances, as a first-order source of authority in constitutional adjudication. Perhaps, however, this powerful intuition points not to an irresolvable conflict but to a paradox in the strict sense of an apparent contradiction that reflects a deeper truth. Perhaps, I suggest, the underlying explanation is that constitutional law is not quite like other forms of law in the relevant sense. If it is not, then criteria that determine what is "law-like" in other areas might mislead when applied too woodenly in the constitutional domain.

Consider a contrast with the law of contracts, a field whose interpretive tools are often (and often too quickly) imported into constitutional law. In some respects, looking to outside opinion is something that contract law shares with constitutional law. A contract, like a constitution, can make public opinion relevant to its construction by so providing in its text. Just as a constitution may require that searches and seizures be reasonable, a buyer may agree to purchase 100 widgets at a reasonable price, and in each case determinate content comes from the values and practices of a relevant community. More subtly, a judge in a contract case might ask what most people would understand by a given term, or whether reasonable people would agree to a particular arrangement, if doing so helps to clarify what it was that the parties actually agreed to. But in the language I used earlier, these are all examples of public opinion as second-order authority. The first-order authority is the bargain that the parties to the contract struck. Except to shed light on the intentions or reasonable

understandings of the parties, public opinion does not bear on the proper adjudication of contract disputes. No judge would say, nor ought to say, "the parties expected that the widgets would be delivered in the morning, but the public overwhelmingly prefers afternoon widget delivery, so I construe the contract to require delivery in the afternoon."

To be sure, a judge might refuse to enforce a contract providing for morning widget delivery if the public interest strongly required afternoon deliveries (e.g., because morning deliveries are a public health hazard). Considerations of public welfare bound and shape contract law all the time. Public welfare is not, however, the same thing as public opinion: the judge who would on public-policy grounds refuse to enforce a contract providing for morning widget delivery might well do so even if most people had no opinion at all about the attendant health and safety issues. Similarly, if public opinion were codified into statutes that require the nullification or reformation of certain contracts, then there is an attenuated sense in which public opinion shapes contractual adjudication, but only in the same attenuated sense in which public opinion eventually figures into every form of law in a democracy. In contrast, public opinion as such—the uncodified preferences of the demos, not as an epistemic indicator of justice or sound policy, but simply on its own bottom—is not a constitutive source of authority in contract adjudication.

Constitutional law is different. The high barriers to modifying its rules through normal electoral channels make constitutional law sit uneasily with democratic processes, thus requiring a constant negotiation between the values of democracy and constitutionalism. And the salience of at least some constitutional issues makes the need for negotiation hard to ignore. Democratic legitimacy is not the only value informing constitutional law, but it is constantly in play in a way that is not replicated in most other fields of law. The considerations that inform constitutional decision making should reflect this difference.

This may mean that constitutional law is in some sense less law-like than some other fields of law. More precisely, it may mean that we take those other fields as the paradigm defining what "law" is as such. But if so, we should not be surprised that there are differences between constitutional law and other domains of law. Constitutional law, especially in the most contested of cases, is not best described as a species of law on all fours with the construction of wills or the regulation of corporate securities. If it is less law-like, then it is also more something else. In a constitutional democracy, that something else fundamentally involves the attempt to have both democracy and the rule of

law at the same time. Hence the occasional need for double-consciousness, as the judge must make the public's view a factor within her own.

V. CONCLUSION

There are few litigated cases in which it is sensible to say that the public strongly holds a given constitutional view. There may be fewer still in which that constitutional view is not already overdetermined as the right answer on the basis of other, less controversial authorities like text and precedent. But in constitutional cases where there is such a thing as the polity's view, that view should be treated as one legitimate source of authority. Nothing is said here about how to balance this factor against other factors that properly inform constitutional decision making. That is a separate question and probably one that needs to be answered in the course of adjudicating particular cases.

The public's view in such cases is not a corrective to the court's view, nor is it a reason to compromise the correct constitutional answer. It is one of the elements in the process of proper constitutional adjudication. In cases where the text of a constitutional clause bears on the question, judges would err if they arrived at their conclusion without reference to the text; in cases where strong public opinion bore on the question, judges would err if they arrived at their conclusions without reference to that opinion. In other words, what the public thinks in such cases must be part of what judges think. That double-consciousness is a necessary aspect of constitutional adjudication.