The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making

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Students of constitutional law provide two kinds of explanations for judicial decisions. Law professors traditionally emphasize the internal or constitutional law foundations for judicial rulings. These include the constitutional text, past precedent, the original understanding of the persons responsible for constitutional language and fundamental constitutional values.[1] Political scientists more commonly focus on the external and institutional foundations for judicial decisions. These include life tenure, the structure of partisan composition, the behavior of those persons responsible for staffing the federal judiciary, and broader cultural forces.[2]

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1. For one account of the different forms of constitutional arguments, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1992).

2. For the variety of institutional and external forces that political scientists claim influence judicial decision making, see Howard Gillman et al., American Constitutionalism: Volume I: Structures of Government 14-18 (2013).

Internal and external explanations for judicial decision-making as much complement as conflict with each other. Black letter law matters.[3] Scholars have identified various "jurisprudential regimes," accepted modes of analysis in particular areas of constitutional law, which limit the influence of judicial policy preferences and political pressures on judicial decision-making.[4] Howard Gillman, in his acclaimed *The Constitution Besieged*, documents how late nineteenth century judges who favored laissez-faire sometimes sustained what they thought were misguided state regulations when such laws could be justified within the dominant constitutional ethos of the Republican Era, which regarded as constitutional any state law that was designed to promote the public welfare and was based on real differences between the social class being regulated and the social class that remained unregulated.[5] Judicial values matter as well. Jurisprudential regimes structure but do not compel most judicial decisions. All the Justices in *Muller v. Oregon*, regardless of their beliefs about the merits of laws limiting the hours women worked, agreed that real differences between men and women provided a sufficient constitutional foundation for such regulations.[6] The Justices on the Fuller Court, however, disputed whether real differences between bakers and other workers provided a sufficient foundation for laws limiting the hours that bakers worked.[7] Most Americans before the Civil War acknowledged that Congress could not prohibit slavery within a state,[8] but attitudes about the morality of slavery influenced constitutional decisions on whether Congress could prohibit slavery in American territories.[9]

Scholars have proposed three different theories about what values influence judicial decision making. Some theories claim that Justices with life tenure are better positioned than elected officials to champion constitutional protections for powerless minorities. Frank

3. For a general discussion on this point, see Mark A. Graber, *Looking off the Ball: Constitutional Law and American Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS (2010).

4. Herbert M. Kritzer & Mark J. Richards, *Jurisprudential Regimes and Supreme Court Decisionmaking: The* Lemon *Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827 (2003); Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 305 (2002).

5. HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 61-62 (1993).

6. *See generally* Muller v. Oregon, 208 U.S. 412 (1908).

7. Lochner v. New York, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting).

8. *See* ABRAHAM LINCOLN, FIRST INAUGURAL ADDRESS—FINAL TEXT, 4 COLLECTED WORKS OF ABRAHAM LINCOLN 263 (Roy P. Basler ed., 1953).

9. *See* Scott v. Sandford, 60 U.S. 393, 529-633 (1856) (McLean, J., dissenting).

Michelman maintains, "[j]udges perhaps enjoy a situational advantage over the people at large in listening for voices from the margins."[10] A second family of theories suggests that Justices are more sensitive to the concerns of the most fortunate American citizens. Robert Dahl thinks, "it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruiting in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[11] The third family of theories emphasizes how judicial values align with those of most elected officials. Finley Peter Dunne's Mr. Dooley articulated the most famous expression of this view when, commenting on the *Insular Cases*,[12] he wrote, "no matter whether th' constitution follows th' flag or not, th' supreme coort follows th' iliction returns."[13]

Elite polarization, conflict extension and electoral volatility confound these theories about the values underlying most judicial decisions and the probable direction of judicial decision making. Claims that Supreme Court Justices are unlikely to be "substantially at odds with the rest of the political elite" border on the trivial or absurd during periods of elite polarization and conflict extension, when the political elite is divided between those persons who hold the most liberal and those persons who hold the most conservative positions on almost all constitutional issues of the day. Judicial decisions in these circumstances either side with some elites against others or take positions between the contending elite voices. Justices when elites are polarized bitterly dispute what constitutes "listening for voices from the margins." Liberal elites presently claim that the Supreme Court's decision in *Romer v. Evans* striking down a state constitutional amendment prohibiting any official measure banning discrimination against gays and lesbians[14] protected a powerless minority by preventing the state of Colorado from "singling out a certain class of citizens for disfavored legal status or general hardships,"[15] or so Justice Kennedy claimed in his majority opinion. Conservative elites complain that the decision in *Romer* sided with "the knights rather than the villeins"[16] of

10. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1537 (1988).

11. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957).

12. *See generally* Downes v. Bidwell, 182 U.S. 244 (1901); BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006).

13. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

14. Romer v. Evans, 517 U.S. 620 (1996).

15. *Id.* at 633.

16. *Id.* at 652 (Scalia, J., dissenting).

American constitutional politics, or so Justice Scalia claimed in his dissent. Common claims that the Supreme Court follows the election returns are unhelpful during periods of electoral volatility and divided government. Justices who follow the 2000, 2002, 2004, and 2010 elections make conservative decisions. Justices who follow the 2006, 2008, and 2012 elections make liberal decisions. Whether Justices who follow all election returns in the twenty-first century should make a mix of liberal and conservative decisions or more often split the difference between Republicans and Democrats is unclear. Common claims that the Supreme Court is a "majoritarian institution"[17] rarely specify whether the majority in question consists of the voters in the most recent presidential election,[18] voters in the most recent Senate election, voters in the most recent House election, voters in the most recent state elections, or American citizens as measured by some public opinion poll. Different answers to the "which election" and "when" questions, for the last several decades, yield very different predictions about what judicial values will determine the direction of future judicial decision making.

This Article offers a more sophisticated account of elite theory that incorporates the crucial insights underlying claims that Justices with life tenure will protect minority rights and claims that the Supreme Court follows the election returns. Justices tend to act on elite values because Justices are almost always selected from the most affluent and highly educated stratum of Americans. During times when American elites support the rights of a particular unpopular minority, a Supreme Court staffed by elites is likely to be more supportive of those rights than elected officials more dependent on popular majorities for their office. Elections have the most impact on judicial decision making during periods when politically polarized elites dispute what minorities and minority rights merit constitutional protection. Put simply, the direction of judicial decision making at a given time reflects the views of the most affluent and highly educated members of the dominant national coalition.

The values that animate the elite members of the dominant national coalition help explain the direction of judicial decision making for the last eighty years. During the mid-twentieth century, most Re-

17. *See, e.g.*, LUCAS A. POWE, THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008, at ix (2009)

18. Assuming, of course, popular majorities and electoral majorities did not differ (similar qualifications can be made of the other majorities noted in this sentence).

publican and Democratic elites held more liberal positions on most constitutional issues than less fortunate and less affluent Democrats or Republicans. This elite consensus minimized the impact of partisan control of the White House and the partisan composition of the Court on most matters of constitutional law. Such Republican appointees as William Brennan and Earl Warren frequently joined such Democratic appointees as William O. Douglas and Thurgood Marshall in advancing such causes as racial equality and free speech. At times, grumbles about judicial activism emanated from the Democrat Felix Frankfurter and the Republican John Harlan. By the turn of the twenty-first century, that consensus had dissipated. Most Republican elites presently take far more conservative positions on most constitutional issues than the average Republican. Most Democratic elites take far more liberal positions on most constitutional issues than the average Democrat. One consequence of this elite polarization is that partisan control of the White House and the partisan composition of the Court have extraordinary influence on most matters of constitutional law. At present, the four most liberal members of the Roberts Court are the four Justices appointed by a Democrat. The five most conservative Justices on that Court were appointed by a Republican. The Supreme Court has often made fairly centrist decisions on the constitutional issues of the day for the past twenty years only because Justices O'Connor and Justice Kennedy more resemble a common type of Republican party elite that roamed the political jungles during the 1980s but is now largely extinct. Should elites remain polarized and either Justice Kennedy retire or a President of one party have the opportunity to replace a Justice appointed by a President of the other party, the result is likely to be either a court that is more liberal on most constitutional issues than the average Democrat voter or a court that is more conservative on most constitutional issues than the average Republican voter.

A closely divided bench composed of polarized elites is vulnerable to what might be called constitutional yo-yos, dramatic swings in judicial policy making on numerous policy issues. Assume electoral politics remains fairly volatile for the near future, with Presidents of one party frequently replacing Presidents of the other party. If we also assume that Justices leave the bench at regular intervals, albeit

longer intervals than had previous been the norm,[19] the median justice on the Supreme Court may well flip each decade between a Democrat more liberal than the average Democrat and a Republican more liberal than the average Republican. The result will be a Supreme Court that lurches back and forth between making relatively extreme liberal and relatively extreme conservative decisions on the most important constitutional issues of the day. Judicial majorities in odd numbered decades might strike down all restrictions on abortion, sustain all affirmative action policies, and insist on a strong separation between church and state, while a change of one justice in even numbered decades will lead to a tribunal that might sustain all restrictions (and bans) on abortion, strike down any use of race in admissions or employment processes, and insist that government accommodate religion.

These potential constitutional yo-yos threaten both the majoritarian and the constitutional values that traditionally enjoy a precarious balance in the American constitutional regime.[20] Elite polarization undermines majoritarianism by grossly exaggerating the impact of elections and public opinion on judicial decisions. Small fluctuations in public opinion and in voting behavior may induce judicial decisions that lurch back and forth between relatively extreme liberal and relatively extreme conservative opinions, even when most citizens prefer centrist positions on issues ranging from the constitutional status of abortion to the constitutional status of capital punishment. This volatility undermines constitutionalism by inhibiting such constitutional purposes as providing credible commitments to crucial stakeholders, maintaining the rule of law, and developing a national commitment to a set of fundamental constitutional aspirations.[21] For these reasons, judicial minimalism during times of elite polarization and electoral volatility has particular merit, even if such an approach to the judicial function may disserve constitutional values during other political periods.

19. *See generally* Justin Crowe & Christopher F. Karpowitz, *Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice*, 5 PERSP. ON POL. 425 (2007).

20. *See* ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT 6-8 (5th ed. 2010) (noting the tension between "the will of the people and the rule of law"); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONALISM INTERPRETATION 45-78 (4th ed. 1960).

21. For a general discussion of constitutional purposes, see GILLMAN ET AL., *supra* note 2, at 7-10.

The following pages document how elite opinion structures the path of judicial decision making and how the present structure threatens both majoritarianism and constitutionalism. Part I examines scholarly and popular claims that the Supreme Court has special capacities to protect minorities, is tethered to elite opinion, or religiously follows the election returns. Each theory explains some important judicial decisions, but fails to explain other equally important judicial decisions. All are often elaborated so as to be almost unfalsifiable. Supreme Court Justices, no matter how they decide most cases, protect some minorities, advance values held by some elite faction, and support the constitutional vision of some recent electoral winners. Part II proposes that Supreme Court commentary pay special attention to those elites most likely to gain federal judicial appointments. This approach combines insights from elite theory (Justices are elites who hold elite values), electoral theory (elections determine what elites are appointed to the federal bench), and minority rights theory (whose voices from the margins do those particular elites hear). Unlike conventional elite theory, the theory outlined in this paper explains which elite values the Supreme Court articulates during times of elite polarization, namely those elite factions that most influence the judicial selection process. Part III details how this version of elite theory explains the pattern of judicial decision making during the mid-twentieth century. Warren Court activism took place during a time of elite consensus. Such judicial decisions as *Brown v. Board of Education*[22] and *Engle v. Vitale*[23] reflected the tendency of both Republican and Democrat legal elites to hold more liberal values on racial and religious issues than less affluent and less well-educated Republicans and Democrats. Part IV details how the changes in the structure of elite opinion that began to occur during the last decades of the twentieth century changed voting patterns on the Supreme Court. The present polarization on the Supreme Court reflects the present polarization of elite opinion. Most Justices hold either the relatively extreme liberal opinions typical of highly educated, affluent Democrats or the relatively extreme conservative opinions typical of highly educated, affluent Republicans. The extremist tendencies of most American elites have nevertheless been held in check only be-

22. *See generally* 347 U.S. 483 (1954) (overruling Plessy v. Ferguson holding that separate facilities for blacks and whites are inherently unequal).

23. *See generally* 370 U.S. 421 (1962) (holding voluntary non-denominational school prayer to violate the Establishment Clause).

cause a representative of a rapidly becoming extinct species of elite moderate has held the median position on the Supreme Court for the past twenty years. As a result, that tribunal has often announced centrist solutions to political and constitutional controversies that polarized elected politicians cannot achieve. Whether that center can hold is doubtful. The median justice of the near future is likely to be a more typical contemporary Republican elite or a more typical Democrat elite. So staffed, the Supreme Court will either hand down relatively extreme opinions on almost all constitutional questions or, should Americans continue to experience electoral volatility, oscillate between relatively extreme liberal and relatively conservative positions on the constitutional issues of the day. Part V discusses how a court composed of an unstable group of polarized elites undermines popular sovereignty and the rule of law. Judicial decisions in these circumstances neither reflect the more centrist commitments of the voting public nor articulate durable constitutional values. Judges can mitigate the baneful combination of elite polarization and electoral volatility, the Article concludes, only by practicing strong forms of judicial minimalism. Even if judicial activism is often justified in light of a judicial obligation to articulate fundamental constitutional truths, Justices considering whether to hand down broad constitutional rulings should have a greater degree of confidence than they can have at present that their decisions will not be overruled within the decade.

"Extreme" or "relatively extreme" in this Article refers only to sociological facts about where a particular belief belongs on the spectrum of public opinion at a given time, not to the normative merits of either extreme or moderate views. Persons who hold such views as "abortion ought never be regulated" or "abortion ought never be legal" are "relative extremists" at present only because most contemporary Americans hold the more centrist opinion that abortion ought to be legal but heavily regulated. Such relatively extreme pro-life or pro-choice opinions may be sound morality or constitutional law. History may vindicate one side to the debate over abortion just as history has vindicated the relative extremists of past eras who thought slavery ought to be abolished, women ought to have the same rights as men, government should not mandate the one true religion, and criminal defendants should have rights to an attorney.

Nevertheless, the sociological status of particular constitutional beliefs has normatively relevant consequences. Judicial decisions that articulate what some Justices and their elite supporters regard as nor-

matively desirable constitutional values may have less normatively desirable consequences. Backlash is one such unfortunate possibility. Many commentators insist that some Supreme Court decisions promoting what the commentator agrees are fundamental human and constitutional rights have inspired a contrary political mobilization that resulted in what the commentator claims is a less just status quo.[24] This paper suggests that severe constitutional instability may be another untoward consequence of commitments to judicial activism in the wrong time and place. Advocates of same-sex marriage and the right to bear arms may well be championing compelling constitutional values. Whether those and other constitutional values are best served by aggressive judicial decisions that may not survive the next series of elections is a question that may haunt Americans if we continue to live in a regime structured by elite polarization, conflict extension and electoral volatility.

I. LIFE TENURE, ELITE STATUS, AND ELECTORAL RETURNS IN ISOLATION

A general consensus exists that judicial values have at least some influence on judicial decision making some of the time. Leading political scientists write as if voting on the Supreme Court is determined almost entirely by values and policy preferences. Jeffrey Segal and Harold Spaeth, the most prominent proponents of the attitudinal model of Supreme Court decision making, bluntly state, "Justices make decisions by considering the facts of the case in light of their ideological attitudes and values."[25] Those law professors and judges who scorn social science efforts to discount the influence of law on judges nevertheless recognize that an empirical theory of judicial decision making cannot altogether ignore judicial values. Herbert Wechsler in his famous "Neutral Principles" lecture recognized that constitutional decisions "involve a choice among competing values"[26] in those numerous cases in which "the language of the Constitution, of

24. *See generally* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013) (discussing the backlash surrounding gay marriage). For an argument against backlash, see generally Robert Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

25. JEFFRETY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 110 (2002).

26. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

history and precedent . . . do not combine to make an answer clear."[27] Even Justice Scalia thinks that one virtue of originalism is that "the inevitable tendency of judges to think the law is what they would like it to be will . . . cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values."[28]

Questions about what judicial values influence judicial decisions have received far less scholarly attention than questions about whether values in general influence judicial decisions. Political scientists debate the extent to which Justices base constitutional decisions on the same balance of policy preferences and values as do other official decision makers, but do not consider whether Justices as a group have the same policy preferences and values as other official decision makers or a specific group of official decision makers.[29] Law professors debate the extent to which law mandates that Justices make certain decisions on their best understanding of such values as equality and liberty.[30] They rarely explore whether judicial understandings of such values as equality and liberty resemble those of other governing officials or some group of citizens. One consequence of these debates is we know a good deal more about how beliefs about free speech influence Supreme Court decisions in First Amendment cases than why some Justices value speech more than others and why, at least in the twentieth century, most Justices valued speech more than the average citizen and elected official.

Three theories about judicial values are nevertheless fairly explicit in the literature on Supreme Court decision making. The first maintains that Justices who have life tenure are more likely than average citizens and elected officials to protect minorities. The second maintains that Justices, who are almost always well-educated affluent lawyers, are likely to hold those values widely held by other well-educated affluent lawyers. The third suggests that Justices will follow the electoral returns, either because they are appointed by electoral winners or, if they are appointed by officials who have since become elec-

27. *Id*. at 17.

28. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

29. *See generally* Post & Segal, *supra* note 24; Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the* '*Legal Model*' *of Judicial Decision Making*, 26 L. & SOC. INQUIRY 465 (2001).

30. *See* RONALD DWORKIN, TAKINGS RIGHTS SERIOUSLY 149 (1978) (calling for a "fusion of constitutional law and moral theory"). *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

toral losers, because they fear the consequences of challenging electoral winners.

A Life-Tenured Supreme Court Protects Minorities. One popular theory of Supreme Court decision making claims that Justices recognize a special judicial responsibility to protect minority rights. Chief Justice Harlan Fiske Stone in *United States v. Carolene Products Co.* called for "more search judicial inquiry" when official actions were motivated by "prejudice against discrete and insular minorities."[31] Subsequent commentary maintained that this famous footnote four asserted both a normative theory about the values that should motivate Justices and an empirical theory about the values that actually did motivate Justices. "The great and modern charter for ordering the relation between judges and other agencies of government," Owen Fiss writes, "is footnote four of *Carolene Products*."[32] Judges and scholars agree. "Under our constitutional system," Hugo Black stated in *Chambers v. State of Florida*, "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[33] Professor Geoffrey Hazzard expressed much conventional wisdom when he stated, "The institution of judicial review protects minority 'rights' against 'faction.'"[34]

Life tenure provides two good reasons for thinking that Supreme Court Justices will act on different values than elected officials and that these differences will often lead courts to be sensitive to the needs of politically vulnerable populations. Justices who do not have to seek reelection are far freer to protect unpopular persons and groups than persons who depend on popular support for their offices. American Justices who have made unpopular decisions have never lost their jobs or lives. At worst, such decisions have not been implemented. Moreover, Justices who have served for decades are likely to have different values than recently elected officials. For this reason, the Supreme Court is likely to protect former members of a majority coalition should they become politically vulnerable minorities.[35]

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31. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).
32. Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979).
33. Chambers v. Florida, 309 U.S. 227, 241 (1940).
34. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1277 n.200 (1991).
35. *See generally* TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (discussing the insurance function of judicial review).

Many important Supreme Court decisions have protected politically vulnerable minorities. Such cases as *Brown v. Board of Education*[36] and *Loving v. Virginia*[37] ruled that racial majorities could not establish a racial caste system in the United States. "Measures designed to maintain White Supremacy," Chief Justice Warren stated in *Loving*, constitute the "invidious racial discrimination" prohibited by the equal protection clause of the Fourteenth Amendment.[38] Constitutional criminal procedure provides even clearer instances of courts listening to the politically powerless. Elected officials have almost no incentive to adopt policies protecting the rights of ordinary criminals. Even during the decade when successful candidates for the presidency asserted that "some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country,"[39] the Supreme Court of the United States first declared and then refused to overrule decisions forbidding prosecutors from introducing in criminal trials illegally obtained evidence[40] and requiring that police warn all persons they arrested that they have a right to keep silent and a right to an attorney.[41] While Richard Nixon was president, the Justices declared unconstitutional every state statute authorizing capital punishment.[42] As Amy Lerman notes, during the 1960s and 1970s, "the Supreme Court bolstered the due process rights of the accused, even as the public by and large preferred to strengthen prosecutorial power."[43]

The primary problem with claims that Justices protect minority rights or have "special capacities to listen to voices from the margins" is that such capacities seem to have lain dormant throughout much of American constitutional history. More often than not, federal and state courts have sided with employers rather than employees.[44] Victoria Hattam and William Forbath detail how judicial resistance to legislation aimed at improving working conditions led mainstream un-

36. *See generally* 347 U.S. 483 (1954).

37. *See generally* 388 U.S. 1 (1967).

38. *Id.* at 11.

39. *See* President Richard Nixon, Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida (Aug. 8, 1968).

40. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

41. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

42. Furman v. Georgia, 408 U.S. 238 (1972).

43. Amy E. Lerman, *The Rights of the Accused*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 41 (Nathaniel Persily, Jack Citrin, & Patrick J. Egan eds., 2008).

44. *See* Benjamin Levin, *Blue-Collar Crime: Conspiracy*, *Organized Labor*, *and the Anti-Union Civil Rico Claim*, 75 ALB. L. REV. 559, 582-84 (2012).

ions at the turn of the twentieth century to eschew political action, preferring to secure gains through collective bargaining consistent with the common law of contract.[45] With rare exceptions, nineteenth century courts were far more attentive to the concerns of slaveholders and white supremacists than the plight of slaves and free African Americans. The antebellum Supreme Court declared unconstitutional federal laws banning human bondage in the territories.[46] The postbellum court imposed sharp constitutional limitations on federal power to promote racial equality in the south[47] and blessed the rise of Jim Crow segregation in *Plessy v. Ferguson*.[48] *Bolling v. Sharpe*[49] is the first instance when the Supreme Court declared a federal policy unconstitutional that championed the rights of the sort of "discrete and insular minority" that much progressive theory suggests courts are institutionally designed to protect.

Claims that the Supreme Court protects minorities also suffer from a falsification problem. All parties to constitutional debates throughout American history have claimed to be members of the sort of politically disadvantaged group that needs judicial protection. Slaveholders and antebellum southerners claimed to be powerless minorities.[50] When Supreme Court Justices in the nineteenth century complained about the tyranny of the majority, their concern was with laws passed by the less affluent many that took property from the more fortunate few.[51] Justice O'Connor in *City of Richmond v. J.A. Croson* insisted that white contractors disadvantaged by affirmative

45. *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 128-76 (1991); VICTORIA HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES 3-30 (1993).

46. *See* Scott v. Sandford, 60 U.S. 393 (1856).

47. The Civil Rights Cases, 109 U.S. 3 (1893).

48. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that based on the Fourteenth Amendment, a Louisiana-based law mandating that African Americans can only sit in separate but equal railway cars was constitutional).

49. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that African American children are deprived of equal protection found in the Fifth Amendment when segregated in public schools).

50. *See generally* JESSE T. CARPENTER, THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861: A STUDY IN POLITICAL THOUGHT (1930) (examining the "minority philosophy" in the South during the antebellum period).

51. The Supreme Court referenced that in strong examples like in the taxation of railroads there are rights beyond the control of the state and that if the government "recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all time to the absolute disposition and unlimited control of even the most democratic depository of power . . . ." The Court then says that "[t]he theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere." *See* Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. 655, 662 (1874).

action were powerless victims of a local African American majority.[52] Other contemporary minorities arguably include Christian parents who object to certain materials in the public school curriculum, Muslims who are victims of ethnic profiling, atheists who object to references to "God" in the Pledge of Allegiance, and billionaires who wish to make large campaign contributions. No Supreme Court Justice supports all these persons, all of whom claim to be minority victims of the majoritarian processes.

The Supreme Court and Elites. Robert Dahl and others suggest that the Supreme Court is more responsive to elites than to powerless minorities, that "a Court whose members are recruited in the fashion of Supreme Court justices would [not] long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[53] Lucas Powe observes, "justices are . . . subject to the same economic, social, and intellectual currents as other upper-middle-class professional elites."[54] Lawrence Baum maintains that Supreme Court Justices make those decisions that they believe will be approved by elite lawyers, journalists, and interest group leaders. Baum and Neil Devins speak of the "Greenhouse effect, whereby Justices shift their views to reflect the left-leaning values of media and academic elites."[55] Most Justices, understandably, do not claim that they represent the most fortunate Americans, but such criticisms are often heard in judicial dissents. The Court, Justice Scalia complains, "has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected."[56]

Common sense and scholarly analysis provide good reason for thinking that judicial decisions often reflect elite sentiment. Virtually every judge who has ever sat on the Supreme Court in American history has had more education and more wealth than the average American at the time.[57] The materials Supreme Court Justices read when deciding cases are almost exclusively prepared by other educated, af-

52. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989).

53. Dahl, *supra* note 11, at 291.

54. POWE, *supra* note 17, at ix.

55. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1543 (2010); *see* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 142 (2006) (discussing the Greenhouse effect).

56. Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *see* Lawrence v. Texas, 539 U.S. 558, 601-02 (2003) (Scalia, J., dissenting).

57. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 48-49 (5th ed. 2008).

fluent elites.[58] Supreme Court Justices tend to socialize almost exclusively with their highly educated, affluent peers.[59] Baum and Devins, who have looked at elite influence on Supreme Court decisions at great length, conclude that

> Because the individuals and groups most salient to the Justices are overwhelmingly from elite segments of American society, it is the values and opinions of elites that have the greatest impact on the Justices. This is one important reason why Court decisions typically accord with the views of the most educated people better than they do with the views of the public as a whole. More to the point, the Justices advance their personal preferences by attending both to their preferred vision of legal policy and to the reference groups that matter most to them. Consequently, although the Justices will not diverge sharply from policy positions they strongly favor, the departures they do make are more likely to reflect their personal reference groups than the popular will.[60]

Many important Supreme Court decisions reflect the influence of elite attitudes. Such Marshall Court decisions as *McCulloch v. Maryland*[61] and *Gibbons v. Ogden*[62] expressed the Federalist/National Republican vision of federal power to promote commercial prosperity held by most early nineteenth century commercial elites.[63] During the late nineteenth century, when most American elites favored reconciliation with the South, the Supreme Court was generally hostile to racial equality.[64] As American elites began to reject theories of

58. *See* Baum & Devins, *supra* note 55, at 1566-68.

59. *See* BAUM, *supra* note 55, at 89-90.

60. *See* Baum & Devins, *supra* note 55, at 1580-81.

61. *See generally* M'Culloch v. Maryland, 17 U.S. 316 (1819) (holding that Maryland cannot tax a branch of the Bank of United States because the Bank is a means employed by the government, which is executing its constitutional powers).

62. *See generally* Gibbons v. Ogden, 22 U.S. 1 (1824) (holding that when affecting commerce, conflicting state claims of sovereignty over bodies of navigable water are subordinate to the legislation of Congress and that any concurrent power is limited power vested in the sovereignty of Congress).

63. *See* GILLMAN ET AL., *supra* note 2, at 96-97.

64. *See* Paul Finkelman, *Civil Rights in Historical Context: In Defense of* Brown, 118 HARV. L. REV. 973, 1003-05 (2005) (reviewing MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004)). *See generally* Williams v. Mississippi, 170 U.S. 213 (1898) (holding that as the Fourteenth Amendment of the Constitution prohibits the discrimination of citizens by the government based on race, the constitution and laws of Mississippi setting requirements for voter registration including poll taxes and literacy and a grandfather clause to bypass strict requirements for whites were constitutional as they did not discriminate against races); Plessey v. Ferguson, 163 U.S. 537 (1896) (upholding Louisiana laws requiring blacks and whites to sit in separate but equal cars during intrastate travel because the legislation is reasonable); DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2002).

scientific racism, the Supreme Court became more supportive of racial equality.[65] Baum and Devins point to numerous contemporary judicial decisions on constitutional issues ranging from flag burning to affirmative action, where persons with post-graduate degrees are far more likely to prefer the policy made by the Justices than less educated Americans.[66]

The data Baum and Devins use to support claims that Justices advance elite values nevertheless raises questions about their thesis. While elites showed greater tendencies to support contemporary Supreme Court decisions than other Americans, on no issue for which Baum and Devins presented data did a clear majority of persons with post-graduate degrees support a decision that was opposed by a majority of persons who lacked a post-graduate degree.[67] More than half of all persons with and without post-graduate degrees opposed the Supreme Court's decisions on school prayer, affirmative action and flag burning. Judicial decisions on homosexual relations and juvenile death penalty are favored by majorities with and without post-graduate degrees. In short, claims that Justices promote elite values do not explain why the Justices frequently disagree with elite majorities and why, when they do agree with elite majorities, they typically agree with (smaller) popular majorities.

The claim that the Supreme Court champions elite values suffers from the same lack of specificity that weakens claims that the Supreme Court protects minorities. Most constitutional struggles feature American aristocrats on all sides. Slaveholders were part of the American elite, but so were the Boston Brahmins who provided support for John Brown.[68] Abraham Lincoln and Stephen Douglas were elite members of the Illinois bar. The Civil Rights movement pitted

65. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 210-11 (2004). *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that segregation of children based on race, even when physical location and facilities may be equal, is unconstitutional based on the Equal Protection Clause of the Fourteenth Amendment); Sweatt v. Painter, 339 U.S. 629 (1950) (holding that the Equal Protection Clause of the Fourteenth Amendment was violated when an African American applicant was denied admissions to the University of Texas Law School based solely on race because a newly opened school only for blacks was not an adequate comparable level of education); Smith v. Allwright, 321 U.S. 649 (1944) (holding that because the United States is a constitutional democracy, law grants the rights of citizens to participate in elections without state restriction of race).

66. *See* Baum & Devins, *supra* note 55, at 1573.

67. *Boumediene v. Bush* was supported by exactly half of persons with a post-graduate degree and opposed by two-thirds of persons who lacked such a degree. *See* Baum & Devins, *supra* note 55, at 1573.

68. *See* BRIAN MCGINTY, JOHN BROWN'S TRIAL 44 (2009).

northern elites against southern elites. Robert Dahl, who penned the seminal statement of elite theory,[69] also published an exceptionally influential study in political science maintaining that the United States is governed by different elite factions, each of which holds sway over some but not all policy arenas. *Who Governs* contended, "individuals who are influential in one sector of public activity tend not to be influential in another sector; and, what is probably more significant, the social strata from which individuals in one sector tend to come are different from the social strata from which individuals in other sectors are drawn."[70] To the extent American politics is structured by what Dahl characterized as "dispersed inequalities,"[71] the most important question for thinking about judicial review is not whether the Court advances elite values, but which elite values does the Court advance. Little research has been done on that precise question.

The Supreme Court and Election Returns/Public Opinion. Much commentary asserts that Supreme Court Justices hold and act on the same values that motivate elected officials and the general public. The strong version of regime theory in political science maintains that Justices carry out the policy agenda of the dominant national coalition. Bradley Joondeph states, "the Court tends to function more as a policy-making partner of the ascendant political majority—or at least an influential segment of that majority—than as an independent check on the political process."[72] Terri Peretti endorses a regime politics approach that focuses on how "elected officials enlist the Court as a partner in their electoral and policy aims."[73] Prominent law professors insist that Justices work within parameters marked out by public opinion. Michael Klarman declares, "the Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection."[74] Barry Friedman's history of judicial power chronicles how "the Supreme

69. Dahl, *supra* note 11, at 291.

70. ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY 169 (1961).

71. *Id.* at 228.

72. Bradley W. Joondeph, *Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal*, 48 SANTA CLARA L. REV. 523, 553 (2008).

73. Terri Peretti, *Constructing the State Action Doctrine*, *1940-1990*, 35 L. & SOC. INQUIRY 273, 275 (2010) ("[R]ather than a check on majority power, the federal courts often function as arenas for extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition.").

74. Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 17-18 (1996).

Court went from being an institution intended to check the popular will to one that frequently confirms it."[75]

Good reasons exist for thinking that judges are likely to hold or at least articulate the values of political winners and popular majorities. Both social science evidence and common sense provide overwhelming support for the notion that elected officials seek to appoint persons to the bench they believe share their constitutional vision. Henry Abraham declares,

> Whatever the merits of the other criteria attending presidential motivations in appointments may be, what must be of overriding concern to any nominator is his perception of the candidate's *real* politics. The chief executive's crucial predictive judgment concerns itself with the nominee's likely future voting pattern on the bench, based on his or her past stance and commitment on matters of public policy insofar as they are reliably discernible. All presidents have tried, thus, to pack the bench to a greater or lesser extent. They will indubitably continue to do so.[76]

Judicial majorities pull punches rather than risk reprisal on matters on which the judges disagree with popular sentiment. "I am not fond of butting against a wall in sport," John Marshall told Joseph Story when explaining why he refused as a circuit court judge to strike down a Virginia law forbidding African American seamen from entering the state.[77] The forces that influence popular opinion also influence Justices. Benjamin Cardozo observed, the "great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by."[78]

Many important Supreme Court decisions are best explained, at least in part, by election returns or popular opinion. Shortly after President Grant appointed two Republican Justices to the Supreme Court, the 5-3 judicial majority that declared unconstitutional the Legal Tender Acts passed during the Civil War[79] became a 5-4 majority that claimed Article I authorized the United States to make paper money legal payment for all debts.[80] John Marshall in *Marbury v. Madison*[81] would have almost certainly ordered the Jefferson Admin-

75. Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 4 (2009).
76. Abraham, *supra* note 57, at 53.
77. 2 Charles Warren, The Supreme Court in United States History 86 (1922).
78. Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).
79. *See generally* Hepburn v. Griswold, 75 U.S. 603 (1869).
80. Knox v. Lee, 79 U.S. 457, 501(1871).
81. 5 U.S. 137 (1803).

istration to give Marbury his judicial commission had the Federalist Party retained strong control over both houses of Congress in the 1800 national election.[82] The unanimous Supreme Court decision in *United States v. Nixon*[83] was no doubt influenced by the strong popular tide against Richard Nixon during his last months in office.

The main problem with drawing too tight connections between Supreme Court decisions and election returns or popular opinion is that both approaches to judicial decision making predict far less judicial activism than has historically been the case. If the Supreme Court religiously followed election returns, we might expect the Justices to declare federal laws unconstitutional only when the coalition that passed those laws has been electorally deposed. This is not the case. Tom Keck's study of judicial decision making at the turn of the twenty-first century observed that, "Though this Court never included more than two Democratic appointees, more than 70% of its judicial review decisions were issued by bipartisan coalitions, and more than 80% invalidated statutes that had been enacted with substantial Republican legislative support."[84] The Religious Freedom Restoration Act (RFRA) and the American Disabilities Act (ADA) are two good examples of statutes whose fate was not forecast by strong regime politics models of constitutional politics. Both were passed by overwhelming bipartisan legislative majorities. A unanimous Supreme Court declared RFRA unconstitutional.[85] The five most conservative Justices on the Rehnquist Court struck down crucial provisions of the ADA,[86] a statute that President Bush declared to be an "historic act" that "made the United States the international leader on this human rights issue."[87] Public opinion polls are similarly weak predictors of judicial decision making. Although nearly two-thirds of all Rehnquist Court decisions were consistent with the trend of public opinion (where such a trend could be determined), only two-fifths of that tribunal's decisions declaring federal laws unconstitutional and less than three-fifths of decisions declaring state laws unconstitutional reflected

82. McCloskey, *supra* note 20, at 25-28.

83. 418 U.S. 683 (1974).

84. Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 Am. Pol. Sci. Rev. 321, 336 (2007).

85. Boerne v. Flores, 521 U.S. 507, 534-35 (1997).

86. Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

87. President George Bush, Remarks on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=18711&st=disabilities&st1=.

public opinion.[88] Among the important decisions that bucked public opinion were those prohibiting prayer exercises in public schools[89] and striking down laws banning flag-burning.[90]

Claims that the Supreme Court follows election returns or public opinion either suffer falsifiability problems or are simply not helpful when the election returns or public opinion are not moving in clear directions. Americans for nearly fifty years have experienced this relative political instability. Thirteen of the seventeen national elections held between 1980 and 2012 resulted in divided government. The period between 1936 and 1948 is the last in which a party won more than three consecutive presidential elections. Even when one party controlled all branches of the national government, the ruling majority in Congress often had a quite different ideological bent than the President of the United States. Conservative Southern Democrats during the New Deal Era controlled crucial Congressional committees even as liberals exercised greater power in the White House.[91] Under these conditions, commentators will almost always be able to find some election returns consistent with particular Supreme Court decisions and some election returns inconsistent with those decisions. Americans in 1984 elected a President who ran on a strong pro-life platform but in 1986 returned control of the Senate to the party committed to keeping abortion legal. Depending on which election return one selected, persons attempting to forecast the Supreme Court's decisions in *Webster v. Reproductive Health Services*[92] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[93] would have predicted that the Supreme Court would overrule *Roe v. Wade*,[94] overrule decisions permitting states not to fund abortion,[95] or find some middle ground on abortion that was escaping both political parties. Should the Roberts Court declare unconstitutional recent state laws requiring women seeking abortion to have ultrasounds before undergoing that procedure,[96] the Justices can be said to be following the 2012 presidential

88. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 44 (2008).
89. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).
90. *See, e.g.*, United States v. Eichmann, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989); MARSHALL, *supra* note 88, at 24.
91. *See* NICOL RAE, SOUTHERN DEMOCRATS 12-13 (1994).
92. 492 U.S. 490 (1989).
93. 505 U.S. 833 (1992).
94. 410 U.S. 113 (1973).
95. *See, e.g.*, Harris v. McCrae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).
96. *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 578 (5th Cir. 2012).

election. Should those laws be sustained, the Justices can be said to be following the 2012 House of Representatives election.

II. LIFE TENURE, ELITE STATUS, AND ELECTORAL RETURNS IN COMBINATION

Common claims that life-tenured judges protect powerless minorities, promote elite values, or follow the election returns often sound better in theory than they work in practice. Good reason exists for thinking that life tenured Justices will be more inclined than elected officials to protect the unpopular, that Justices who hail from Ivy law schools and earn six-digit salaries in bad years will be more inclined than less educated or affluent Americans to act as an American aristocracy, or that Justices appointed by elected officials will follow the election returns. The problem is that for every instance that supports one of these theories, an equally prominent counterexample exists. Worse, each common claim about judicial values suffers from falsification problems. Most cases before the Supreme Court pit one minority against another, one elite against another, and the winner of some recent elections against the winner of other recent elections. Commentary on judicial review, for this reason, must be more specific. Scholars must detail which minorities Justices protect, which elites they represent, and what election returns they follow.

The most basic problem with the three above explanations for judicial decision making is that each fails to take the insights of the others into account. Elite theorists explore how affluent well-educated judges make decisions, not how those decisions are made by affluent well-educated judges who, after being appointed by electoral winners, enjoy life tenure. This myopic approach is mistaken and not just because not all factors are considered as discrete influences on the Supreme Court. Students of intersectionally point out that the experiences of a lesbian black woman cannot be broken down into discrete race, gender, and sexuality components.[97] For similar reasons, theories of judicial making should focus on how life tenured Justices who are appointed to office by political winners interpret the Constitution in light of their elite values. Rather than engage in a contest to determine which variable explains the most judicial decisions, scholars will

97. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine*, *Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (1989).

be better off detailing how life tenure, elite status, and election returns combine to structure the direction of constitutional law.

Life tenure, elite status, and election returns in combination help explain some problems that plagued each factor in isolation as an explanation for judicial decision making. Consider the ways in which judicial decision making during the nineteenth century seems inconsistent with common claims that courts are structured to protect powerless minorities.[98] That difficulty vanishes when changing conceptions of elite understandings of powerlessness are taken into account. Most elites during the nineteenth century thought affluent property holders were the paradigmatic politically vulnerable minority. James Madison in 1829 declared,

> [P]ersons now and property are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property, are the objects, for the protection of which Government was instituted. These rights cannot well be separated. The personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right. The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse. . . . In republics, the great danger is, that the majority may not sufficiently respect the rights of the minority.[99]

These elite attitudes explain why the affluent, well-educated Justices who sat on the Supreme Court during the nineteenth century concluded that corporations were citizens,[100] adopted a railroad friendly interpretation of the commerce clause,[101] and tended to prefer the rights of slaveholders to the rights of alleged slaves.[102] The course of Supreme Court decision making changed, unsurprisingly, when in the minds of most elites the poor person of color replaced the successful capitalist as the "discrete and insular minorit[y]"[103] most vulnerable to the prejudices of popular majorities.

Greater attention to the structure of elite competition helps alleviate other difficulties with common single-factor theories of judicial policymaking. The elites who contested the constitutionality and mo-

98. *See supra* notes 44-48 and accompanying text.

99. 9 JAMES MADISON, *Speech in the Virginia Constitutional Convention*, *in* THE WRITINGS OF JAMES MADISON 360-61 (Gaillard Hunt ed. 1910).

100. Santa Clara Cnty. v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886).

101. Wabash, St. Louis Pac. Ry. Co. v. Illinois, 118 U.S. 557, 589-93 (1886).

102. *See generally* Prigg v. Pennsylvania, 41 U.S. 539 (1842) (holding a Pennsylvania statute granting procedural protections to escaped slaves to violate the Constitution).

103. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

rality of human bondage were not equally situated politically. Jacksonian presidents routinely appointed southerners and northern doughfaces to the federal bench.[104] Abolitionists did not win elections and, as a result, were underrepresented on the federal bench. John McLean was the only antislavery advocate who served on the Supreme Court before the Civil War and his antislavery tendencies developed only after he was appointed in 1830.[105] Such decisions as *Prigg v. Pennsylvania* and *Dred Scott v. Sandford*[106] reflected elite Jacksonian beliefs that slaveholders were a politically vulnerable minority that required special judicial protection.[107] When the elites who staffed the Supreme Court changed, the course of judicial decision-making changed. Five of the nine Justices on the court that decided *Dred Scott* hailed from slave states. Seven of the nine Justices on the court that decided *Brown v. Board of Education* hailed from states that had no slaves before the Civil War. Just as *Dred Scott* reflected the southern tilt of the Jacksonian elite, so did *Brown* reflect the liberal racial sentiments of northern elites during the mid-twentieth century.[108]

The Supreme Court is most likely to protect the rights of those minorities whose voices are heard by the most elite members of the dominant national coalition, but the nature of that elite changes in ways that are important for the course of judicial decision making. During some political eras, elections make little difference because elites from both parties are more likely to agree with each other on major constitutional issues than they are to agree with the average member of their political coalitions. The Warren Court, as we shall see, was a product of the elite consensus that developed during the 1950s and 1960s. During other periods, elections made a big difference because the disagreements between the elite members of the two major parties were far greater than the disagreements between the more plebian members of the two major parties. The contemporary Rob-

104. *See* ABRAHAM, *supra* note 57, at 77-93; Frank Otto Gatell, *Samuel Nelson*, *in* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 817, 817-19 (Leon Friedman & Fred L. Israel eds., vol. 2 1969); Frank Otto Gatell, *Robert C. Grier*, *in* THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 873, 873 (Leon Friedman & Fred L. Israel eds., vol. 2 1969).

105. ABRAHAM, *supra* note 57, at 78-79.

106. 60 U.S. 393 (1856).

107. *See supra* note 49 and accompanying text.

108. *See* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 443-44 (2005).

erts Court, as we shall see, is a product of the elite polarization that structures contemporary American constitutional politics.

III. ELITE CONSENSUS AND THE WARREN COURT

The Warren Court is Exhibit A for every prominent theory of judicial decision making discussed in this paper. The Justices made numerous decisions, from *Brown v. Board of Education* to *Gideon v. Wainwright*[109] that apparently demonstrated how life tenured Justices had special capacities "to listen to voices from the margins."[110] Owen Fiss declares,

> In the 1950's, America was not a pretty sight. Jim Crow reigned supreme. Blacks were systematically disenfranchised and excluded from juries. State fostered religious practices, like school prayers, were pervasive. Legislatures were grossly gerrymandered and malapportioned. McCarthyism stifled radical dissent, and the jurisdiction of the censor over matters considered obscene or libelous had no constitutional limits. . . . Trials often proceeded without counsel or jury. Convictions were allowed to stand even though they turned on illegally seized evidence or on statements extracted from the accused under coercive circumstances. There were no rules limiting the imposition of the death penalty. These practices victimized the poor and disadvantaged, as did the welfare system, which was administered in an arbitrary and oppressive manner. The capacity of the poor to participate in civic activities was also limited by the imposition of poll taxes, court filing fees, and the like.
>
> These were the challenges that the Warren Court took up and spoke to in a forceful manner. The result was a program of constitutional reform almost revolutionary in its aspiration and, now and then, in its achievements.[111]

The Warren Court also consistently sided with elite opinion on such matters as the place of religion in public life when most affluent, well-educated citizens disagreed with their less fortunate fellow citizens. John Jeffries and James Ryan point out,

> [T]he controversy over school prayer revealed a huge gap between the cultural elite and the rest of America. People generally may have supported school prayer and Bible reading, but the leadership class did not. Elite support for the Supreme Court's secularization

109. 372 U.S. 335 (1963).
110. Michelman, *supra* note 10, at 1537.
111. Owen Fiss, *A Life lived Twice*, 100 YALE L. J. 1117, 1118 (1991).

> project was clearly visible in the activities of law professors and deans, in the prominent newspaper editorials endorsing Engel and Schempp, and most importantly in the views of mainline Protestant leaders, who overwhelmingly supported the prayer decisions and opposed efforts to overturn them. The contrary opinions of many of the Protestant faithful, especially conservative evangelicals, were less visible and less influential than the announced positions of religious organizations and leaders.[112]

Finally, the Warren Court followed the national election returns. Lucas Powe writes,

> [T]he Court was a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s. . . . The Warren Court demanded national liberal values be adopted in outlying areas of the United States . . . . In the criminal procedure area, it took the lead as the branch of government most familiar with the problems and most capable of supervising the solutions. The Court's belated welfare decisions were an assault on both national and local bureaucracies, but in moving toward constitutionalization, the Court was several years behind the Great Society in creating new rights.[113]

A broad elite consensus on civil rights and civil liberties helps explain why life tenure, elite status, and election returns in isolation each accounts for the path of Warren Court decision making. During the 1950s and 1960s, American elites in both the Republican and Democratic parties tended to support racial equality, limiting the influence of religion in public life, broad free speech rights, and providing greater protections for poor persons and persons of color suspected of crimes.[114] Theories that the Court follows elite opinion and theories that courts respond to elections reached similarly accurate conclusions about mid-century constitutional politics because the Republican and Democratic elites empowered by election returns had reached similar conclusions on civil liberties and rights issues. Moreover, because Democratic and Republican elites agreed on the powerless minorities that need judicial protection, theories that courts protect powerless minorities reached the same accurate conclusions about judicial behavior during the 1950s and 1960s as theories that emphasized elite status or election returns.

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112. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 325 (2001).

113. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 494 (2000).

114. *See infra* notes 120-34 and accompanying text.

The Elite Consensus. Political science during the New Deal/Great Society Era made sharp distinctions between elite and mass political behavior. Such classics as *The American Voter* concluded that educated Americans knew more about politics than average citizens, participated more, and were more effective participants.[115] Mainstream commentators maintained that American politics were pluralistic, characterized by a wide variety of interest groups competing for power.[116] Nevertheless, as E.E. Schattschneider noted, "in the pluralist heaven . . . the heavenly chorus sings with a strong upper-class accent."[117] Unlike less fortunate citizens, affluent, well-educated Americans had the capacities necessary to be good democratic citizens. "The resources of time, money, and civic skills," disproportionately possessed by elites, the leading study of political participation in the United States concluded, "make it easier for the individual who is predisposed to take part to do so."[118]

Many prominent commentators did not worry about class differences in political knowledge and political participation. They believed that mass political participation threatened the American democratic order. Leading social scientists worried that the average American did not know enough about American politics to participate effectively and, worse, that many less fortunate citizens harbored attitudes antithetical to democracy. Ordinary Americans, studies found, were far less likely than elites to be committed to such democratic values as free speech and equal protection.[119] Other studies suggested that ordinary citizens had authoritarian personalities and were obedient to authorities in ways that made Americans particular susceptible to dictatorial appeals.[120] After finding that one-third of American voters had "totalitarian" attitudes, Herbert McClosky fretted that "a large proportion of the electorate has failed to grasp certain of the underlying ideas and principles on which the American political system

115. ANGUS CAMPBELL ET AL., THE AMERICAN VOTER: AN ABRIDGMENT 251-54 (1964).

116. DAHL, *supra* note 70, at 5; *see also* DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION, at vii (1951).

117. E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 35 (1960).

118. SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 334 (1995).

119. HERBERT MCCLOSKY & ALIDA BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES 243-44 (1983).

120. *See* T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY 759-62 (1950) (demonstrating the connection between the success of social control and subordinates taking pleasure in obedience); STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974) (studying the tendencies of human nature to obey).

rests."[121] What kept American democracy afloat was elite commitment to democratic values. *It Can[ ] Happen Here*[122] was the implicit theme of much scholarship.

Herbert McCloskey and Alida Brill's *Dimensions of Tolerance* was a particularly influential statement of the gap between elite and mass commitments to democratic rights and other civil liberties. The work proclaimed, "Social learning, insofar as it affects support for civil liberties is likely to be greater among the influentials (that, is political elites) of the society than among the mass public."[123] McCloskey and Brill based this conclusion on a survey of ordinary citizens, community leaders, and legal elites that asked numerous questions about constitutional principles. They discovered that leaders were far more likely to be libertarian on rights issues than ordinary citizens and that legal elites were far more likely to be libertarian than community leaders. The latter conclusion was particularly important. They stated:

> It can be safely presumed, we believe, that the legal elite is closer to other elites, and surely closer to than the mass public, to the implicit norms of the political culture; that they are more intensely involved with them; and that they respond to those norms with greater consistency. If civil liberties values, as we have argued, are difficult to learn, the legal elite has more occasion to encounter them than other samples, has greater knowledge of them, and is more often compelled to reflect upon their merits and shortcomings. By the very nature of their vocation and activities, the members of the legal elite would also be in the best position to understand the reciprocal obligations that a belief in civil liberties imposes upon the individuals who claim them for themselves.[124]

Studies of the new civil liberties issues that emerged in the 1970s initially reached similar conclusions. Attitudes on such issues as abortion and the Equal Rights Amendment (ERA) were more rooted in class than gender. Kristin Luker's study of abortion politics depicted battles over reproductive choice as being fought between women who sought to be political and economic elites and women who preferred a traditional homemaker role.[125] "Abortion," studies concluded, "is part

121. Herbert McClosky, *Consensus and Ideology in American Politics*, 58 AM. POL. SCI. REV. 361, 364-65 (1964).

122. *See generally* SINCLAIR LEWIS, IT CAN'T HAPPEN HERE (1935) (describing how Americans voted for a fascist, who eventually establishes a dictatorship in the United States).

123. MCCLOSKY & BRILL, *supra* note 119, at 233.

124. *Id.* at 247.

125. *See generally* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984) (examining the issues, people, and beliefs on both sides of the abortion conflict).

of a larger cultural conflict between certain strata of the upper-middle class—the highly educated professionals, scientists, and intellectuals—and the mass of Americans who comprise the working and lower-middle classes."[126] One study of abortion found abnormally high levels of pro-choice support among almost all American elites.[127] Jane Mansbridge's study of the politics of the ERA similarly described a battle between different women's groups composed of women from different classes.[128] Women in the labor force and women who had homemaker roles, she detailed, differed far more among themselves on gender issues than women as a whole and men.[129]

Elite status trumped ideology and partisanship. Affluent, highly educated Republicans on many civil rights and liberties issues had more opinions in common with affluent, highly educated Democrats, than either shared with less fortunate fellow partisans. In many instances, education and social class were more important factors than whether a respondent identified as a conservative or liberal. A particularly influential article in the 1964 *American Political Science Review* concluded,

> If American ideology is defined as that cluster of axioms, values and beliefs which have given form and substance to American democracy and the Constitution, the political influentials manifest by comparison with ordinary voters a more developed sense of ideology and a firmer grasp of its essentials. This is evidenced in their stronger approval of democratic ideas, their greater tolerance and regard for proper procedures and citizen rights, their superior understanding and acceptance of the "rules of the game," and their more affirmative attitudes toward the political system in general.[130]

The author, Herbert McClosky, found that, regardless of partisan predisposition, elites were more likely than ordinary voters to express basic commitments to democratic principles, less likely to express racist attitudes, far more likely to support the rights of persons suspected of crime and less likely to want to restrict speech rights. Speech rights were a particular matter on which elites differed from ordinary voters. "Not only do [elites] exhibit stronger support for democratic values

126. Peter Skerry, *The Class Conflict over Abortion*, 52 PUB. INT. 69, 70 (1978); *see* MARK A. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 144-45 (1996).

127. Robert Lerner et al., *Abortion and Social Change in America*, 27 SOC'Y 8 (1990).

128. *See generally* JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986) (arguing that the ERA failed because it did not result in substantive changes in the position of women).

129. *Id.* at 216-17.

130. McClosky, *supra* note 121, at 373.

than does the electorate," McClosky noted, "but they are also more consistent in applying the general principle to the specific instance. The average citizen has greater difficulty appreciating the importance of certain procedural or juridical rights, especially when he believes the country's internal security is at stake."[131]

Judicial Decision Making and the Elite Consensus. The conclusions social scientists reached during the 1950s and 1960s help explain the direction of judicial decision making through much of the middle to late twentieth century, even though owing to the balkanization of the political science discipline, almost all of the scholars doing the research exhibited little interest in public law. The Justices Democratic and Republican Presidents appointed to the Supreme Court from 1930 to 1980 were drawn from the affluent, educated elite that were the most liberal segment of American society at that time. In virtually every area of law in which the Justices declared significant federal or (more often) state measures unconstitutional, public opinion surveys demonstrated that elites were more likely than average citizens to favor the policy made by the Supreme Court and legal elites were more likely than other elites to favor the direction of judicial policy making.

Consider several questions that McCloskey and Brill asked respondents during the survey research they conducted for *Dimensions of Tolerance*.[132] One concerned attitudes on free speech. "Should demonstrators be allowed to hold a mass protest march for some unpopular cause?" Three-fifths of ordinary citizens maintained that the demonstration should be banned "if the majority is against it." More than nine-tenths of all legal elites surveyed responded that the demonstration should take place, "even if most people in the community don't want it." The Supreme Court in such cases as *Cox v. Louisiana*[133] and *Shuttlesworth v. Birmingham*[134] sided with the legal elite, holding that civil rights protestors had constitutional rights to hold demonstrations promoting unpopular causes in the south. McClosky and Brill asked about "forcing people to testify against themselves in court." Three-fifths of ordinary citizens thought compelled testimony "may be necessary when [people] are accused of very brutal crimes."

131. *Id.* at 366.

132. McCLOSKY & BRILL, *supra* note 119, at 246.

133. *See generally* 379 U.S. 536 (1965) (reversing appellant's conviction of violating a local regulation prohibiting public demonstrations).

134. *See generally* 394 U.S. 147 (1969) (permitting a demonstration that the local ordinance prohibited).

Almost nine-tenths of the legal elite asserted that compelled testimony "is never justified, no matter how terrible the crime." The Supreme Court in *Escobedo v. Illinois*[135] and *Miranda v. Arizona*[136] sided with the legal elite, insisting on strong constitutional safeguards against compelled testimony. The same stark differences appeared with McCloskey and Brill asked about religion. Three quarters of all average citizens declared that "the freedom of atheists to make fun of God and religion should not be allowed in a public place where religious groups gather." Three quarters of the legal elite insisted that such speech "should be legally protected no matter who might be offended." Supreme Court decisions on school prayer championed the secular values held by twentieth century American elites rather than the more religious worldview of ordinary citizens.[137]

This elite consensus also marked the boundaries of liberal Supreme Court activism during the Warren and early Burger years. In sharp contrast to the structure of public opinion on almost every other civil liberties issue, surveys found that affluent, educated Americans were somewhat less likely than ordinary citizens to favor economic equality.[138] George Lovell's study of the Civil Liberties Bureau of the Justice Department documents a similarly sharp division between what most elites and average citizens in the 1930s and 1940s thought were civil liberties.[139] Elite notions resembled those asserted in the famous footnote four of the *Carolene Products*, which called for heightened judicial scrutiny when a law "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or reflects "prejudice against discrete and insular minorities."[140] Civil liberties were free speech, freedom of religion, racial equality, and constitutional criminal procedure. Lovell found that ordinary people had far more capacious theories, many of

135. *See generally* 378 U.S. 478 (1964) (holding that the Sixth Amendment is violated when the accused is not permitted to consult an attorney at the point a police investigation process shifts from investigatory to accusatory).

136. *See generally* 384 U.S. 436 (1966) (holding that no rule or legislation can abrogate a right secured by the Constitution).

137. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225-26 (1963) (holding daily mandatory Bible reading in school was unconstitutional); Engle v. Vitale, 370 U.S. 421, 433 (1962) (holding New York's laws officially prescribing the Regents' prayer are inconsistent with the Establishment Clause).

138. *See* McClosky, *supra* note 121, at 367.

139. *See generally* GEORGE LOVELL, THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA (2012) (discussing the practice of using civil rights language when expressing dissatisfaction with political and social conditions).

140. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

which centered on jobs and economic rights.[141] The Supreme Court during the New Deal/Great Society Era promoted the elite conception of civil liberties, protecting free speech, freedom of religion. racial equality, and the rights of persons suspected of crime, but rarely announcing rights to economic equality.[142] When the Justices did turn to rights to basic necessities during the late 1960s,[143] partisan differences among the Justices quickly emerged[144] and the effort to promote economic equality was soon abandoned.[145]

The pattern of liberal judicial decisions during the middle to late twentieth century was partly a consequence of liberal elites in government preferring federal Justices who shared their elite values. One consequence of the elite consensus that formed during the New Deal/Great Society Era was that Republicans and Democrats in the executive branch of the national government often employed similar criteria when making judicial nominations. Kevin McMahon details how racial liberals in the Roosevelt, Truman, and Eisenhower administrations sought to pack the federal judiciary with Justices they believed were committed to declaring Jim Crow institutions unconstitutional.[146] Wiley Rutledge and Robert Jackson, two Democratic appointees, were appointed in part because they had criticized the Supreme Court's decision in *Minersville School District v. Gobitis*,[147] which sustained a state law requiring public school children to salute

141. *See generally* LOVELL, *supra* note 139, at 70-106.

142. *See generally* ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997) (critiquing the Warren Court's rulings on welfare in the context of twentieth-century politics); Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997) (questioning liberal constitutional theorists' failure to promote equality in welfare).

143. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (holding that termination of welfare benefits prior to a fair hearing adversely affected a recipient's ability to seek redress); Shapiro v. Thompson, 394 U.S. 618, 621 (1969) (holding unconstitutional a state statutory provision that denies welfare assistance to residents of the state who have not resided within their jurisdiction for at least one year).

144. *See* Dandridge v. Williams, 397 U.S. 471, 487 (1970) (reversing judgment in favor of welfare recipients on grounds that it is not the Court's place to "second guess" the difficult responsibility of state officials to allocate resources).

145. *See* San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 54-56 (1973) (holding that where wealth was involved, the Equal Protection Clause did not require absolute equality or precisely equal advantages).

146. *See generally* KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN (2004) (arguing that Roosevelt's administration played a crucial role in the Supreme Court's increasing commitment to racial equality).

147. 310 U.S. 586, 598 (1940) (deciding the courtroom is not the area for debating issues of educational policy).

the flag.[148] William Brennan, a Republican appointee, had given several speeches attacking McCarthyism before being appointed to the bench.[149] Justices who had known liberal attitudes on some civil liberties issues, unsurprisingly, often had liberal attitudes on many other civil liberties issues.

More important, the elite consensus of the New Deal/Great Society Era meant that the Supreme Court was likely to be dominated by constitutional liberals as long as presidents did not make self-conscious efforts to pack the court with constitutional conservatives. With the exception of Truman's tendency to nominate Justices he thought would sustain anti-Communist legislation,[150] no Justice from 1932 to 1968 was nominated to the Supreme Court because either the President or crucial members of the Justice Department believed that person had narrow conceptions of free speech, religious freedom, racial equality, or constitutional criminal procedure.[151] Eisenhower, in particular, had few if any substantive litmus tests for federal judges.[152] More often than not, he and other Presidents of the time period looked to appoint a distinguished jurist, whose opinion on one or two issues might be ascertained with some reasonable degree of certainty. The public opinion surveys of the times suggest, however, that as long as Presidents fished in a pond in which only legal elites swam, they were likely to have a far more liberal catch than if they picked people randomly out of the phone book. In particular, if a potential judge's opinion on free speech, race, religion, or constitutional criminal procedure could not be determined on the basis of previous statements, the odds were high that the jurist shared the same liberal sentiments as did the vast majority of affluent, educated legal elites.

148. Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L.J. 23, 29-30 (2007).

149. *See* Ruth Bader Ginsburg, *Closing Remarks for Symposium on "Justice Brennan and the Living Constitution*," 95 CALIF. L. REV. 2217, 2217-18 (2007).

150. *See generally* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES (1999) (discussing what happens before the Senate hearings to show how Presidents go about deciding who will sit on the Supreme Court).

151. *See generally* ABRAHAM, *supra* note 57, at 163-231 (describing the relationship between the President and the selection of Justices to the Supreme Court); YALOF, *supra* note 150, at 20-96 (analyzing the selection criteria and political pressures affecting the decisions made by the Presidents, from Truman to Reagan).

152. *See* YALOF, *supra* note 150, at 42-44.

IV. ELITE POLARIZATION AND THE LATE REHNQUIST/ROBERTS COURT

The late Rehnquist and early Roberts Court seem prominent counterexamples to claims that life tenured Justices protect powerless minorities, promote elite values or follow the election returns. Recent judicial decisions supporting the National Rifle Association's interpretation of the Second Amendment[153] and striking down limits on corporate expenditures[154] hardly demonstrate a judicial capacity "to listen to voices from the margins." A Supreme Court majority became sensitive to gay and lesbian voices only after gays and lesbians achieved substantial success in electoral politics.[155] Several studies demonstrate both Republican and Democratic judicial appointees are willing to declare laws unconstitutional that were passed by bipartisan majorities.[156] No political party or elite faction champions the mix of liberal and conservative polices presently championed by the Supreme Court, a mix that includes constitutional protections for gun owners, persons sentenced to death or detained during the war against terrorism,[157] evangelical Christians,[158] gays and lesbians, and white college

153. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (holding that the Second Amendment right is fully applicable to the states); District of Columbia v. Heller, 554 U.S. 570, 594 (2008) (holding the Second Amendment protects an individual's right to keep and bear arms).

154. Citizens United v. Fed. Elections Comm'n, 130 S. Ct. 876, 883 (2010).

155. *Compare* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding the Texas statute that criminalized intimate sexual conduct between same-sex persons was a violation of the Due Process Clause), *and* Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that a law making it more difficult for one group to seek aid from the government is a denial of equal protection), *with* Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (holding that the act of consensual sodomy is not protected under the fundamental right to privacy or any right protected under the Constitution). *See generally* KLARMAN, *supra* note 24 (discussing the strength of the backlash against gay marriage in spite of its growing support).

156. *See* Matthew E. K. Hall, *Rethinking Regime Politics*, 37 LAW & SOC. INQUIRY 878, 885-86 (2012); Thomas M. Keck, *Party*, *Policy*, *or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 321 (2007) (examining when ideologically mixed coalitions invalidate bipartisan statutes).

157. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim); Boumediene v. Bush, 553 U.S. 723, 732-33 (2008) (holding that aliens detained at Guantanamo have the habeas corpus privilege, and declaring Section 7 of the Military Commissions Act of 2006 an unconstitutional suspension of the writ of habeas corpus); Roper v. Simmons, 543 U.S. 551, 568 (2005) (holding the Eighth Amendment prohibits imposition of the death penalty on juvenile offenders under the age of eighteen); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker).

158. *See generally* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding the University's denial of financial support to a student organization's publication pro-

applicants who claim to be victims of affirmative action.[159] In sharp contrast to the Court during the New Deal/Great Society Era, which was divided between liberals who wished to exercise judicial power on behalf of liberal causes and liberals who believed in judicial restraint,[160] the late Rehnquist/early Roberts Court is divided between a bloc of Justices who hold more liberal opinions on most constitutional issues than most Democrats, a bloc of Justices who hold more conservative opinions on most constitutional issues than most Republicans, and one or two Justices who hold more idiosyncratic opinions on the constitutional issues of the day.[161] The result is the first court in American history that consistently engages in both liberal and conservative activism.[162] Neither life tenure, nor elite status, nor the election returns in isolation can explain this development.

Life tenure, elite status, and election returns in combination provide a clearer window into the path of contemporary constitutional law. American politics for the past decades has been structured by increased elite polarization on almost all salient issues of the day. One consequence of this polarization is that the legal elites that Democrats appoint to the federal bench are highly likely to be more liberal on most constitutional issues than the average Democratic and the legal elites that Republicans appoint to the federal bench are highly likely to be more conservative on most constitutional issues than the average Republican. Justices Anthony Kennedy is the only justice presently on the Supreme Court who does not fit this mould. Kennedy's voting pattern resembles that of a country-club Republican, an elite type that flourished during the 1980s when Kennedy was appointed, but is rapidly vanishing from the political scene.

Elite Polarization. The structure of elite opinion has changed sharply over the past fifty years. Surveys taken in the mid to late twentieth century suggested that Republican and Democratic elites on many issues had more in common with each other than with other

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moting religious views was a denial of their right of free speech guaranteed by the First Amendment).

159. *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003) (holding use of racial preferences in undergraduate admissions violates the Equal Protection Clause of the Fourteenth Amendment).

160. *See* HOWARD GILLMAN ET AL., RIGHTS AND LIBERTIES 482 (2012).

161. *See id.* at 864. *See generally* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 11-12 (2005) (describing the political makeup of the Rehnquist and Roberts Courts).

162. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 548-49 (1997).

members of their party. Contemporary surveys find that Republican and Democratic elites now have less in common with each other than do ordinary Democrats and Republicans. Much to the frustration of many ordinary citizens, American politics seems stalemated on many issues because fewer and fewer elites either hold moderate opinions or are willing to compromise.

Contemporary public opinion is structured by two phenomena. The first is elite polarization. Affluent, educated Americans are disproportionately represented among both strong liberals and strong conservatives, while less affluent and educated citizens are more inclined to be political moderates. Morris Fiorina and Matthew Levendusky write,

> [W]hile systematic evidence indicates that American politics as conducted by the political class is increasingly polarized, the evidence also suggests that this development is not simply a reflection of an increasingly polarized electorate. The result is a disconnect between the American people and those who purport to represent them . . . . Contrary to a half-century of theory and research on the centrist tendencies of two-party politics, American politics today finds a polarized political class competing for the support of a much less polarized electorate.[163]

The second phenomenon is conflict extension. Geoffrey Layman and Thomas Carey describe "conflict extension" as "a growth in mass party polarization on multiple distinct issue dimensions." Party elites, they point out, are not simply more liberal or conservative in general than ordinary citizens, they are "more polarized on social welfare, racial, and cultural issues."[164] An affluent, educated Democrat is likely to be more liberal than the average Democrat on health care, affirmative action, and same-sex marriage. An affluent, educated Republican is likely to be more conservative than the average Republican on each of these issues. On almost all issues, elite Democrats take the liberal position and elite Republicans take the conservative position.

Two studies done by the Pew Research Group highlight the presence of elite polarization and conflict extension in American politics.

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163. Morris P. Fiorina & Matthew S. Levendusky, *Disconnected: The Political Class Versus the People*, *in* RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 49, 51-52 (Pietro S. Nivola & David W. Brady eds., 2002).

164. Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and* "*Conflict Extension*" *in the American Electorate*, 46 AM. J. POL. SCI. 786, 789 (2002).

The first survey was published in 2005.[165] The second was published in 2011.[166] Each survey offered a typology of American voters. Each survey detailed how, over time, strong conservatives had become more conservative on more issues and strong liberals had become more liberal on more issues. The most extreme typologies, both studies found, were disproportionately composed of affluent, educated Americans.

The Pew Research Group in 2005 observed that previous differences among strong political conservatives had largely vanished. Surveys in 1987 and 1994 documented the existence of two distinctive conservative groups: "Enterprisers," who held strong conservative views on economic issues, and "Moralists," who held strong conservative views on cultural issues.[167] By 2005, "Enterprisers" had adopted the cultural positions of "Moralists." The group Pew now labeled as "Enterprisers" was characterized by strong conservative values across the political spectrum. The Pew study declared,

> [T]his extremely partisan Republican group's politics are driven by a belief in the free enterprise system and social values that reflect a conservative agenda. Enterprisers are also the strongest backers of an assertive foreign policy, which includes nearly unanimous support for the war in Iraq and strong support for such anti-terrorism efforts as the Patriot Act.[168]

The defining values of Enterprisers were "anti-regulation and pro-business; very little support for government help to the poor; strong belief that individuals are responsible for their own well being[,]" and "[c]onservative on social issues such as gay marriage . . . ."[169]

Liberals were the exact opposite of Enterprisers. Pew found, "[liberals] are the most opposed to an assertive foreign policy, the most secular, and take the most liberal views on social issues such as homosexuality, abortion, and censorship. They differ from other Democratic groups in that they are strongly pro-environmental and

165. *The 2005 Political Typology*, PEW RES. CENTER, 1 (May 10, 2005), http://www.people-press.org/files/legacy-pdf/242.pdf [hereinafter PEW 2005].

166. *Beyond Red vs. Blue: Political Typology*, PEW RES. CENTER, 1, 4 (May 4, 2011), http://www.people-press.org/files/legacy-pdf/Beyond-Red-vs-Blue-The-Political-Typology.pdf [hereinafter PEW 2011].

167. *See* PEW 2005, *supra* note 165, at 8.

168. *Id.* at 53.

169. *Id.*

pro-immigration."[170] Liberals were "pro-choice," "supportive of gay marriage," and "most opposed to the anti-terrorism Patriot Act."[171]

Enterprisers and Liberals were by a significant margin the most educated and most affluent of the nine typologies Pew identified in 2005.[172] Twenty-seven percent of the persons Pew surveyed had graduated college, but 46% of all Enterprisers and 49% of all Liberals had a college degree.[173] Only one other typology (Upbeats—37%) was composed of more than one-third college graduates and only one other typology (Social Conservatives—28%) was composed of more than one-quarter college graduates.[174] The pattern was almost as stark with respect to income.[175] Twenty-four percent of the persons Pew surveyed had family incomes above $75,000, but 41% of both Enterprisers and Liberals earned that income.[176] Upbeats (39%) were almost as affluent as Enterprisers and Liberals.[177] Outside of Social Conservatives (30%), no other group identified had as many as one-sixth of all persons surveyed earning $75,000.[178]

On almost every issue surveyed, the greatest percentage of respondents taking the most conservative position were from the most affluent and highly educated group of Republicans and the greatest percentage of respondents taking the most liberal position were from the most affluent and highly educated group of Democrats.[179] This was particularly the case with issues that were being litigated. Enterprisers were far more likely to oppose (63%) and liberals most likely to support (82%) "programs designed to help blacks, women and other minorities get better jobs and education."[180] Liberals were the group most likely to support legal abortion (88%) and same-sex marriage (80%).[181] Enterprisers were the group most likely to oppose both (54% on abortion; 90% on same-sex marriage).[182] Enterprisers (and Pro-Government Conservatives) were most likely to support teaching creationism in public schools. Liberals were the group most

170. *Id.* at 58.
171. *Id.*
172. See *id.* at 64-65.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 70-71.
180. *Id.* at 70.
181. *Id.*
182. *Id.*

opposed.[183] Enterprisers and Disaffecteds were the group that most favored torturing terrorists for information.[184] Liberals were the group most opposed.[185]

The 2011 Pew survey complicated this story a bit (in part by not asking the same questions that were asked in 2005). The divides between different groups that tended to support Democrats remained the same. Members of the most affluent well educated group of Democrats tended to be far more liberal on all issues than members of other Democratic groups. Most Republicans, elite or otherwise, had become conservative across the board, at least on the issues most likely to come before the Supreme Court. Two new groups of highly educated, affluent Americans emerged: Post-Moderns and Libertarians. While Pew placed these groups in the center of their political typology, because members weaker tendencies to vote for either Democrats (Post-Moderns) or Republicans (Upbeats) than members of more partisan groups. Post-Moderns and Libertarians tended to take more extreme positions on the sorts of issues likely to come before federal courts than both members of less affluent and less well educated groups and members of other, more centrist groups.

Solid Liberals were the most highly educated group that Pew surveyed in 2011 and the most affluent of any group that had any tendency to support Democrats.[186] With very rare exception, Solid Liberals were more liberal on every issue likely to come before federal courts than any other Democratic group or Democrat leaning group.[187] Eighty-five percent of Solid Liberals supported gay marriage, as compared to 32% of Hard Pressed Democrats and 34% of New Coalition Democrats.[188] The difference between Solid Liberals and these other Democratic groups was only slightly less with respect to legal abortion.[189] Solid Liberals were more likely than any other group to favor liberal immigration laws, support health care reform, maintain that racial discrimination is the main barrier to Afro-American progress, and insist that government must do more to "give blacks equal rights with whites."[190] They and New Coalition Democrats

183. *Id.* at 71.
184. *Id.*
185. *Id.*
186. PEW 2011, *supra* note 166, at 105.
187. See *id.* at 99-100, 111.
188. *Id.* at 111.
189. *Id.*
190. *Id.* at 99-100, 111.

were far more likely than Hard-Pressed Democrats to support gun control.[191] Solid Liberals closely resemble other Democratic groups only in their view of labor unions. Members of all three Democratic groups had by a three-to-one margin of favorable views of that institution.[192]

Matters were less clear on the Republican side. The most conservative group, Staunch Conservatives, were only slightly better educated and affluent than the other solidly Republican group, Main Street Republicans.[193] One reason for this change from 2005 was that, unlike Democrats, who remain divided into distinctive ideological groups, most Republicans have become conservative on all important issues. The Pew researchers noted, "the classic division between economic and social conservatives is blurred," as members of the previously more affluent and less affluent groups "have coalesced into a single highly activated group of Staunch Conservatives."[194] Nevertheless, the slightly more educated and slightly more affluent Republican group remains the most conservative of the two solidly Republican groups in the country on all issues likely to come before courts.[195] Staunch Conservatives are more likely than Main Street Republicans to oppose the Obama health care plan (80%-47%), oppose gay marriage (85% – 72%), oppose legal abortion (72% – 64%) and favor gun rights (86% – 64%).[196] With the exception of abortion, only a miniscule number of Staunch Conservatives actually favor liberal policies on any of these issues (none of the Staunch Conservatives Pew surveyed thought health care reform had "mostly good effects").[197] Interestingly, Staunch Conservatives are moderates on First Amendment issues.[198] This may reflect the increasing tendency of government officials to restrict campaign finance, commercial speech, and hate speech, measures that limit conservative advocacy, rather than more traditional restrictions on communism and obscenity.[199]

The years between 2005 and 2011 witnessed the emergence of two relatively affluent and educated groups of independents. Post-

191. *Id.* at 111.
192. *Id.* at 108.
193. *Id.* at 1, 105.
194. *Id.* at 20.
195. *See id.* at 109, 111.
196. *Id.* at 111.
197. *Id.*
198. *Id.* at 88.
199. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 396 (1990).

Moderns, who leaned Democratic, were the second most educated group surveyed and almost as affluent as Solid Liberals. Libertarians, who leaned Republican, were the most affluent group surveyed and slightly more educated than Staunch Conservatives.[200] Post-Moderns and Libertarians also resembled Solid Liberals and Staunch Conservatives because members of these groups are more united than members of other groups on virtually all civil liberties issues.[201] On some issues, most notably those associated with racial politics, Libertarians and Post-Moderns, by comparison, were far more united in favor of conservative positions, than any group other than Staunch Conservatives.[202] On other matters, Libertarians and Post-Moderns were only less liberal than Staunch Liberals. Post-Moderns were the second most liberal group on censorship, gay marriage, abortion, and environmental issues.[203] Libertarians were the third most liberal group on these issues.[204] Libertarians were the second most conservative group on gun rights, labor unions, the merits of big versus small government, and the environment.[205] Post-Moderns were the only group composed of a substantially number of affluent, well educated citizens who had any tendency to be one of the three (of nine) centrist groups on any number of issues that Pew surveyed.[206]

Members of the most affluent and highly educated of the groups Pew surveyed were also the most united on the proper method of constitutional interpretation.[207] Solid Liberals (81%) and Post-Moderns (70%) were the only two groups whose members by substantial margins endorsed a living Constitution.[208] Staunch Conservatives (88%) and Libertarians (70%) were the two groups that most strongly favored originalism.[209] With the exception of Main Street Republicans (64% favored originalism), members of other groups were far more divided on questions of constitutional interpretation.[210] This finding

200. PEW 2011, *supra* note 166, at 105.
201. *Id.* at 108-11.
202. *Id.*
203. *Id.* at 111.
204. *Id.* at 108-09, 111.
205. *Id.* Similar differences appeared on foreign policy issues unlikely to come before courts. Post-Moderns were the second most liberal group when asked if peace was better achieved through diplomacy or military strength. Libertarians were the second most conservative. *See id.* at 100.
206. *Id.* at 108-11.
207. PEW 2011, *supra* note 166, at 109.
208. *Id.*
209. *Id.*
210. *Id.*

suggests that, a President who nominated a Democrat with a law degree for a federal judgeship was highly likely to place on the bench a Justice who shared William Brennan's approach to constitutional adjudication.[211] Similarly, a President who nominated a Republican with a law degree was highly likely to place on the bench a Justice who shared Justice Antonin Scalia's approach to constitutional adjudication.[212]

The Late Rehnquist/Early Roberts Courts. The changes in the structure of elite opinion over the past fifty years help explain the different divisions on the Warren Court and the late Rehnquist/early Roberts Courts. During the mid-twentieth century, Democratic and Republican legal elites both tended to have liberal opinions on the major constitutional issues being adjudicated before federal courts. Hence, the major divide on the court in that time period was between liberal proponents of judicial activism and liberal proponents of judicial restraint. During the early twenty-first century, most Democratic legal elites are Solid Liberals who take very liberal positions on almost every issue being adjudicated by federal courts and most Republican legal elites are Staunch Conservatives who take very conservative positions on almost every issue being adjudicated by federal courts. Hence, the major divide on the contemporary court is between Democratic appointees who are more liberal than the average Democrat and Republican appointees who are more conservative than the average Republican.

The contentious politics of judicial confirmation[213] may contribute to polarization on the Supreme Court. Contemporary Presidents often search for "stealth nominees," whose opinions on many constitutional issues are not well known, in order to avoid confirmation battles in the Senate.[214] Republican Presidents who adopt that strategy can be expected to select Enterprisers or Staunch Conservatives, given most affluent, educated Republican legal elites fall into those political typologies. Such judges are likely to be originalists who take

211. *See* William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 43 GUILD PRAC. 1, 2-3 (1986) (describing Brennan's approach to interpreting the Constitution).

212. *See* Scalia, *supra* note 28, at 856-57.

213. *See generally* MARK SILVERSTEIN, JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS (1994) (describing the evolving politics of judicial confirmations).

214. *See* Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, SUP. CT. REV., 2010, at 381, 438.

conservative views on almost all issues coming before the court, with the possible exception of some free speech matters. Democratic Presidents who adopt this strategy can be expected to select Liberals or Solid Liberals, given that most affluent, educated Democratic legal elites fall into those political typologies. Such judges are likely to be living constitutionalists who take liberal views on almost all issues coming before the court, with the possible exception of matters concerning labor unions. Republican "mistakes" are likely to be Libertarians, the other affluent, educated group whose members tend to vote Republican. Such judges will likely turn out to be originalists who vote with the conservatives on the bench except on matters of morality, immigration, and some issues of religion. Democratic "mistakes" are likely to be Post-Moderns, the other affluent educated group whose members tend to vote democratic. Such a judge will likely turn out to be a living constitutionalists who votes with the liberals on the bench, except on some racial issues and questions of national power.

The voting patterns on the late Rehnquist and early Roberts Courts are consistent with the patterns that would probably have resulted had Presidents, instead of vetting judicial appointees at great length, simply selected almost at random an elite lawyer who was a member of their party. Chief Justice Roberts, Chief Justice Rehnquist, Justice Scalia, Justice Thomas, and Justice Alito vote as Enterprisers/Staunch Conservatives. They are originalists who consistently take conservative positions on matters ranging from the role of religion in public life to the scope of national power. When these Justices cast liberal votes, the case before the court is likely to concern matters such as immigration on which Libertarians tend to have more liberal opinions than Enterprisers/Staunch Conservatives.[215] Justice Ginsburg, Justice Sotomayor, Justice Kagan, and Justice Breyer vote as Liberals/Solid Liberals. They are living constitutionalists who consistently take liberal positions on matters ranging from capital punishment to the war against terror. When these Justices cast conservative votes, the case before the court is likely to concern matters such as race and national power, on which Post-Moderns have more conservative opinions than Liberals/Solid Liberals.[216]

215. *See generally* Arizona v. United States, 132 S. Ct. 2492, 2497, 2510 (2012) (striking down crucial state restrictions in Arizona on illegal immigrants).

216. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602, 2609 (2012) (declaring that part of the Affordable Care Act violated the Spending Clause).

Justice Kennedy might be characterized as a libertarian, given his tendency to vote with liberals on some First Amendment issues[217] and privacy matters, but he and Justice O'Connor are better placed in a previously existing category of Republican elites.[218] Kennedy and O'Connor were appointed at a time when many Republican elites were best described as "country-club conservatives." Mark Tushnet points out that such affluent, educated Republicans were "sympathetic to claims about reproductive and gay rights and are opposed to what they see as the intrusion of religion into the public schools."[219] Country-club Republicans were also not as hostile to national power as those contemporary Staunch Republicans who often support the Tea Party.[220]

The divisions on the contemporary Supreme Court mirror these divisions among contemporary American elites. Public opinion surveys find that educated, affluent Democrats are far more likely than other Democrats to take liberal positions on all the major constitutional issues of the day and that educated, affluent Republicans are far more likely than other Republicans to take conservative positions on all the major constitutional issues of the day. Whether the issue concerns state sovereign immunity or school vouchers, on all matters in which the late Rehnquist and early Roberts Courts were divided, the most recent Democratic appointees took the more liberal position (joined by two liberal Republicans) and the most recent Republican appointees took the more conservative position. Moreover, the liberal and conservative blocs on the present Court seem more liberal and conservative than the average Democrat and average Republican. Consider abortion. Most Americans believe that abortion should be legal, but heavily regulated.[221] The political elites who control the Republican Party believe that abortion should be banned, while the elites who control the Democratic Party oppose almost all common restrictions on abortion.[222] Following in this vein, the Staunch Conservative on the contemporary court have never voted to strike down a restric-

217. *See* Lee v. Weisman, 505 U.S. 577, 579-80, 599 (1992); Texas v. Johnson, 491 U.S. 397, 398-99 (1989).

218. *See generally* Lawrence v. Texas, 539 U.S. 558 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

219. Mark Tushnet, *Understanding the Rehnquist Court*, 31 Ohio N.U. L. Rev. 197, 198 (2005).

220. *See* PEW 2011, *supra* note 166, at 10.

221. *See* H.W. Perry, Jr., & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641, 675 (2009).

222. *Id.* at 670-78.

tion on abortion and the Solid Liberals have never voted to sustain a restriction.[223] Justice Kennedy is the only member of the present Supreme Court who has voted to sustain and voting to strike down different abortion regulations.[224]

Electoral returns provide a less helpful guide to the direction of Supreme Court decision making during times of elite polarization, conflict extension and electoral volatility. Most Supreme Court Justices in these circumstances are likely to be relatively extreme liberal Democrats or relatively extreme conservative Republicans. When Republicans and Democrats alternate in power, the precise balance of power on the federal judiciary depends on the accidents of death, whether Justices retire strategically, and the voting pattern of the increasingly rare justice who is neither a Solid Liberal nor a Staunch Conservative. Consider the very different pattern of decisions that might have resulted had Justice Marshall retired during the Carter presidency and that liberal Democrat judicial appointee left office during President Obama's first term of office. The only prediction that can be made with some certainty is, if Americans continue to live in times of elite polarization, conflict extension, and electoral volatility, constitutional law is likely to be become less stable than at any previous point in American history.

V. THE COMING CONSTITUTIONAL YO-YO

Elite polarization, conflict extension, and electoral volatility threaten several enduring stabilities in American constitutional law. American constitutional law for more than two-hundred years has been structured by incremental change, relative issue autonomy, and the relative endurance of landmark decisions. These stabilities, in turn, are consequences of either relative electoral stability or, during periods of electoral volatility, elite consensus. Americans have never experienced an extended period when elites are polarized and parties alternate in control of the national government. Should these trends continue, the likely result is an erratic constitutional law that swings from one relative extreme on many issues to the other.

American constitutional law has historically tended to change incrementally. While Supreme Court decisions inevitably make at least some changes to the existing body of constitutional law, most deci-

223. *See generally* Gonzales v. Carhart, 550 U.S. 124 (2007).
224. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

sions do little more than slightly extend or modify existing doctrine. The constitutional law landscape is littered with far more decisions resembling *United States v. Jones*,[225] which relied heavily on the common law of trespass when declaring that police need a warrant when attaching a GPS system to a private car, than *Mapp v. Ohio*,[226] which upset longstanding prosecutorial practices when holding that the Fourth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment required states to exclude unconstitutionally obtained evidence from criminal trials. Judicial decisions overruling past cases are rare. Judicial decisions overruling landmark cases are rarer still.[227]

Different areas of constitutional law are often relatively autonomous from each other, characterized by what Karen Orren and Stephen Skowronek describe as "intercurrence."[228] Orren and Skowronek maintain that "the normal condition of the policy [is] that of multiple incongruous authorities operating simultaneously."[229] Constitutional doctrine on different subject matters, like "the institutions of a polity . . . are created . . . at different times, in the light of different experiences, and often for quite contrary purposes."[230] Instabilities in one area of constitutional law often have limited impact on other areas of constitutional law. The 1930s and 1940s witnessed dramatic changes in the constitutional law of national powers[231] and property rights,[232] but no changes in the constitutional law of capital punishment[233] or the right to bear arms.[234] The "revolutionary" Warren Court did not challenge previous understandings of property

225. 132 S. Ct. 945 (2012).

226. 367 U.S. 643 (1961).

227. *See generally* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS (5th ed. 2011) (providing a comprehensive collection of data and information on the U.S. Supreme Court).

228. KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 108 (2004).

229. *Id.*

230. *Id.* at 112.

231. *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (holding that the federal government can regulate economic activity); United States v. Darby Lumber Co., 312 U.S. 100 (1941) (holding that the federal government can regulate employment conditions).

232. *See generally* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding the constitutionality of a state's minimum wage legislation).

233. *See generally* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (holding that capital punishment does not violate the Constitution).

234. *See generally* Miller v. United States, 294 U.S. 435 (1935) (holding that a provision of the National Firearms Act of 1934 violated the Second Amendment of the United States Constitution).

rights[235] or gender equality[236] and had almost nothing to say on the constitutional law of separation of powers.[237]

Both secular trends in constitutional law doctrine and landmark judicial decisions tend to have fairly long staying power. Once the Justices begin to expand or narrow particular constitutional rights, the course of judicial decisions tends to go in the same direction for several generations. The Supreme Court from the end of Reconstruction until the early twentieth century repeatedly chipped away at the constitutional foundations of racial equality.[238] After *Guinn v. United States*,[239] the Justices for the next fifty years consistently made decisions that expanded constitutional protections for people of color.[240] With the notable exception of *Hepburn v. Griswold*,[241] which was overruled almost immediately,[242] the relatively rare judicial decision that dramatically alters existing doctrine proves relatively enduring. Landmark constitutional law cases are often modified or narrowed, but rarely overruled. Liberals regularly accuse conservatives of undermining the spirit of such decisions as *Mapp v. Ohio*,[243] *Miranda v. Arizona*,[244] and *Roe v. Wade*,[245] but those decisions, as well as every other landmark liberal decision of the 1950s, 1960s, and 1970s, remain standing today.[246]

The dynamics of partisan competition in the United States throughout much of American history supported these stabilities. Political scientists point out that American politics has historically been

235. *See generally* Ferguson v. Skrupa, 372 U.S. 726 (1963) (upholding a statute criminalizing "debt adjusting").

236. *See generally* Hoyt v. Florida, 368 U.S. 57 (1961) (upholding a jury selection statute that mandated men, and not women, to serve as jurors).

237. Leading textbooks in law and political science include no case on separation of powers decided when Earl Warren was Chief Justice. *See, e.g.*, GILLMAN ET AL., *supra* note 2, at 490-512; KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 249-347 (17th ed. 2010).

238. *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903); Plessy v. Ferguson, 163 U.S. 537 (1896); United States v. Reese, 92 U.S. 214 (1876).

239. 238 U.S. 347 (1915).

240. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

241. 75 U.S. 603 (1870).

242. *See* Knox v. Lee, 79 U.S. 457 (1871).

243. 367 U.S. 643 (1961). *But see* Leon v. United States, 468 U.S. 897 (1984) (creating a "good faith" exception to the exclusionary rule for violations of the Fourth Amendment).

244. 384 U.S. 436 (1966). *But see* Michigan v. Tucker, 417 U.S. 433 (1974) (holding that Miranda warnings are not constitutionally protected).

245. 410 U.S. 113 (1972). *But see* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989) (upholding a state statute that restricted various types of assistance to receiving an abortion).

246. For an admittedly outdated work on this point, see generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983).

characterized by long periods of relative partisan stability during which one party, Jeffersonian Republicans, Jacksonian Democrats, Reconstruction Republicans, or New Deal Democrats, controls most national institutions most of the time.[247] Either judicial doctrine is stable during those time periods or the course of judicial decisions is consistent because most Justices share whatever constitutional vision animates the dominant party. Constitutional doctrine from Reconstruction until the Civil War reflected the pro-business orientation of the dominant Republican Party.[248] The Supreme Court after the New Deal provided increasing support for persons of color at the same time that liberals in other national institutions provided increased support for persons of color.[249]

The structure of elite opinion throughout much of American history has also supported the incremental nature of most changes in constitutional law, the relative autonomy of different issue areas, and the relative durability of landmark cases. Elite consensus has often been the norm in American constitutional politics. From the very beginning of the Republic, elites often had more in common with each other than they did with the mass base of their parties, and this elite consensus provided foundations for a more stable constitutional law. Thomas Jefferson when seeking to make his first judicial appointment found that all qualified Jeffersonian lawyers in the deep south had strong ties to commercial establishments. Jefferson and Madison tended to appoint moderate national Republicans to the Supreme Court because educated affluent Jeffersonian lawyers were far more likely to be moderates who were supportive of the general trends of the Marshall Court than the average Jeffersonian voter.[250] For this reason, the transition from Federalist to Jeffersonian rule had less influence on the Supreme Court than other governing institutions.[251] When elite polarization occurred, the lack of conflict extension preserved the relative autonomy of most matters of constitutional law. During the years before the Civil War, Southern affluent educated lawyers held very different opinions on slavery than Northern affluent

247. *See generally* JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES (1983).

248. *See* GILLMAN ET AL., *supra* note 2, at 319-326.

249. *See* KLARMAN, *supra* note 65, at 173-96.

250. *See generally* RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971).

251. *See generally* Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 STUD. AM. POL. DEV. 229, 242 (1998).

educated lawyers. *Dred Scott*,[252] which held that Congress could not ban slavery in American territories, was one consequence of these sectional differences. Nevertheless, elite polarization on slavery was contained. The judicial majority in *Dred Scott* included Peter Daniel, the Justice who held the narrowest conception of national power to regulate the economy,[253] and James Wayne, the Justice who held the broadest conception of national power to regulate the economy.[254] Antebellum judicial alignments in slavery cases were different from judicial alignments in Contract Clause and dormant Commerce Clause cases, the two other constitutional issues frequently litigated before the Supreme Court in Jacksonian America. The Justices in the *Dred Scott* majority, for example, divided 3-2 when considering the state power to tax passengers on ships arriving from out of state.[255] The absence of conflict extension helps explain why a court that took southern positions on slavery issues adopted fairly centrist positions on the other constitutional issues of the day and did not break dramatically from previous precedent on these matters.[256]

Elite consensus explains the stability of American constitutional law during the late nineteenth century, the most electorally volatile period in American history. From 1880 to 1900, the parties rotated control over national executive and more than one-hundred seat swings in Congress were common. Nevertheless, most areas of constitutional law remained either unchanged or moved in a steady conservative direction.[257] Constitutional law exhibited almost none of the instabilities of electoral politics because the elite wings of both the Democratic and Republican Parties was located in the northeast and was committed to a pro-business constitutional vision.[258] The conservative Democrats that Grover Cleveland appointed to the Supreme Court differed little from the conservative Republicans that James Garfield, Chester Arthur, and Benjamin Harrison appointed to the

252. Scott v. Sandford, 60 U.S. 393 (1857).

253. *See, e.g.*, Seawright v. Stokes, 44 U.S. 151, 180-81 (1845) (Daniel, J., dissenting) (denying national power to build roads).

254. *See*, *e.g.*, Smith v. Turner, 48 U.S. 283, 410-11 (1849) ("The commerce power is] exclusively vested in Congress, [and] that no part of it can be exercised by a State.").

255. Justices Wayne, Catron, and Grieg thought the state tax unconstitutional. Chief Justice Taney and Justice Daniel disagreed. *See* Smith v. Turner, 48 U.S. 283 (1849).

256. *See* Cooley v. Bd. of Wardens, 53 U.S. 299 (1952); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. 369 (1853). *See generally* McCloskey, *supra* note 20, at 56-59.

257. *See* McCloskey, *supra* note 20, at 80-90.

258. *See* Gillman et al., *supra* note 2, at 322.

Supreme Court.[259] In *Pollock v. Farmer's Loan & Trust Co.*,[260] the only major constitutional case in that era in which the Justices divided 5-4, the majority in favor of striking down the national income tax was composed of three Republican appointees and two Democrat appointees. Three Republican appointees and one Democratic appointee dissented.

The Reagan Era provides another illustration of the structure of elite opinion stabilizing constitutional law. Reagan and his conservative allies sought to push American constitutional law sharply to the right.[261] Democrats after 1986, however, had the necessary votes to prevent Reagan from placing on the Supreme Court any Justice on record as favoring a substantial conservative judicial turn. Stymied by failed efforts to place such conservatives as Robert Bork on the bench, Republicans in the executive branch turned to "stealth" nominees, affluent, educated Republican lawyers who had not expressed firm opinions on most constitutional issues of the day.[262] During the late twentieth century, an affluent, educated Republican lawyer whose constitutional opinions were not yet public was at least as likely to fit the mold of a "country-club Republican," as what the Pew Foundation presently considers a Staunch Conservative. Thus, the end result of the stealth nominee strategy was a moderate with little interest in moving constitutional law to the right (Souter), a libertarian/moderate conservative interested in moving only some constitutional doctrines to the right (Kennedy), and a more doctrinaire conservative (Thomas). The Reagan judicial strategy failed in large part because the structure of elite opinion combined with the politics of judicial confirmation privileged the selection of Republicans more interested in stable constitutional law than a significantly more conservative constitutional law.

These foundations for a stable constitutional law have crumbled. Electoral volatility destabilizes constitutional law because Justices, when control of the institutions responsible for staffing the federal judiciary alternates, are frequently unlikely to share a common partisan constitutional vision. Elite polarization destabilizes constitutional law

259. *See* ABRAHAM, *supra* note 57, at 109-21.

260. 157 U.S. 429 (1895).

261. *See generally* YALOF, *supra* note 150, at 133 ("Reagan's Pursuit of Conservative Ideologies").

262. *See* Richard S. Myers, Reviews, 42 J. LEGAL EDUC. 619, 619 (1992) (reviewing MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT (1992)).

because Justices, when the affluent educated lawyers most likely to staff the federal bench are either more conservative then the average member of the more conservative party or more liberal than the average member of the more liberal party, are unlikely to share a common elite constitutional vision. The combination of electoral volatility and elite polarization, we have seen, is a recipe for a Supreme Court whose two largest blocs are Staunch Conservatives whose opinions are to the right of the average Republican and Solid Liberals whose opinions are to the left of the average Democrat.

Conflict extension further destabilizes American constitutional law. For much of the twentieth century, the relative autonomy of constitutional issues insulated most constitutional doctrines from substantial changes in other constitutional doctrines. Roosevelt's judicial appointees were as united as other New Deal liberals on the principle that Justices should not interfere with economic legislation,[263] but the Supreme Court until 1954 did not move dramatically to the left on civil rights and civil liberties issues because the liberals Roosevelt appointed to the Court were as divided on the merits of judicial protection for free speech rights and the rights of persons suspected of crime as other New Deal liberals.[264] While on the Court, for example, Justice Frankfurter destabilized Commerce Clause doctrine, but helped temporarily stabilize doctrine on the incorporation of the Bill of Rights.[265] By comparison, should President Obama appoint a liberal to the supreme bench solely for the purpose of providing greater support for health care legislation, he is highly likely to appoint a Solid Liberal who also favors the liberal position on same-sex marriage, affirmative action, and government power to regulate guns. Similarly, should the next Republican President appoint a conservative to the bench solely for the purpose of maintaining the right to bear arms, he or she is likely to appoint a Staunch Conservative who favors the conservative position on federal health care legislation, same-sex marriage and affirmative action. In short, unlike New Deal Justices and other jurists appointed to the Supreme Court during times of conflict

263. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby Lumber Co., 312 U.S. 100 (1941).

264. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Adamson v. California, 332 U.S. 46 (1947). For a general discussion of liberal divisions on free speech and other civil liberties issues, see generally MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM (1991); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989).

265. *See* cases cited *supra* note 231.

diffusion, judicial appointments in times of conflict extension are likely to want to move almost all of constitutional law in the same ideological direction.

Should Americans continue to live in a political environment structured by electoral volatility, elite polarization, and conflict extension, constitutional precedents are likely to be overturned at unprecedented rates. Consider the numerous areas of constitutional law that a liberal Justice appointed by President Obama to replace a conservative Justice would destabilize. Among the decisions that the new 5-4 liberal majority on the Supreme Court would likely consider ripe for reversal are past rulings finding regulatory takings, permitting ostensible neutral state aid to flow to parochial schools,[266] finding an individual right to bear arms protected by the Second and Fourteenth Amendments,[267] striking down campaign finance regulations,[268] imposing Commerce Clause and state sovereign immunity restrictions against the federal government,[269] and declaring unconstitutional some self-conscious uses of race for purposes of diversity when assigning pupils to public schools.[270] The replacement of a liberal Justice with a conservative would be as destabilizing. Should a Republican President have the opportunity to replace one of the four members of the liberal bloc on the Roberts Court, the decisions ripe for reversal include past rulings finding a public use when government transfers property from one private owner to another private owner,[271] declaring unconstitutional school prayer exercises,[272] striking down state restrictions on abortion and gay rights,[273] protecting detainees in Guantanamo Bay,[274] limiting state capacity to inflict capital punishment,[275] justifying the Affordable Care Act as a legitimate exercise of the federal taxing power,[276] and sustaining affirmative action policies.[277] Seventeen of the twenty-two Supreme Court cases de-

266. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
267. McDonald v. City of Chicago, 130 S. Ct. 3020 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).
268. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
269. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743 (2002).
270. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
271. Kelo v. City of New London, 545 U.S. 469 (2005).
272. Lee v. Weisman, 505 U.S. 577 (1992).
273. Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).
274. Boumediene v. Bush, 553 U.S. 723 (2008).
275. Roper v. Simmons, 543 U.S. 551 (2005).
276. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. ___ (2012).
277. Grutter v. Bollinger, 539 U.S. 306 (2003).

cided on constitutional grounds that were included in the chapter on the contemporary era in our casebook dedicated to civil liberties are highly vulnerable to reversal in the immediate future.[278]

Given the precarious balance on the federal bench and in electoral politics, the following constitutional yo-yo is not an unrealistic prediction. President Obama replaces Justice Kennedy with a Solid Liberal, whose voting pattern on the Court is similar to that of Justices Kagan and Sotomayor. The result is huge swaths of constitutional doctrine turn left. Public opinion, however, shifts a bit. The result is that a Republican wins the 2016 presidential election and, a year later, replaces Justice Breyer with a Staunch Conservative. The new 5-4 conservative majority turns huge swaths of constitutional doctrine rightward. Public opinion, however, shifts a bit to the left, and you can see how the rest of this story is going. The course of constitutional law becomes erratic, with minor changes in public opinion resulting in substantial shifts in constitutional doctrine.

Changes in elite opinion make less likely the appointment of a "stealth justice" who turns out either to have more centrist opinions or less ideological consistency across issues than either Solid Liberals or Staunch Conservatives. As recently as thirty years ago, many elite Republican lawyers were either traditionalists who held moderate/center-right views on many constitutional issues or libertarians who leaned to the left on some constitutional issues and to the right on others. Hence, when Democrats had the political power in the Senate to defeat such known Staunch Conservatives as Robert Bork, the Republican strategy of appointing an elite Republican lawyer was as likely to result in the moderate David Souter or libertarian Anthony Kennedy as the very conservative Clarence Thomas. The vast majority of elite lawyers in both parties now consistently hold more liberal or more conservative views on almost all issues than the average Democrat or Republican. Hence, stealth candidates in the future are more likely to be Solid Liberals or Staunch Conservatives who kept their proclivities private than Justices who might moderate the impending constitutional yo-yo.

278. *See generally* 2 HOWARD GILLMAN, MARK A. GRABER, KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM: RIGHTS & LIBERTIES 881-1053 (2012).

VI. TOO UNSETTLING?

If the above analysis is correct, American constitutional politics in conditions of electoral volatility, elite polarization, and conflict extension will witness severe and destabilizing doctrinal swings. This likely erratic course of constitutional law undermines values championed by proponents of constitutional settlements and constitutional unsettlements. Neither majoritarian nor distinctively constitutional values are promoted by constitutional doctrine that swings from extreme conservatism to extreme liberalism in short periods of time. Americans are likely to avert these constitutional yo-yos only if they enter a new period of electoral stability, elite consensus, or conflict diffusion. Alternatively, Supreme Court Justices might discover the temporary virtues of judicial minimalism. These saving alternatives require much strong sociological, jurisprudential, and normative foundations for the constitutional center than presently exist in the United States.

The Disease. The constitutional yo-yos threatened by the lethal combination of electoral volatility, elite polarization, and conflict extension will destabilize constitutional law more than even opponents of constitutional settlements stomach. These constitutional commentators insist that constitutional authority and judicial power be exercised in ways that keep certain fundamental regime questions unsettled.[279] Keeping constitutional question open, in their view, facilitates constitutional adjustments in light of changing public opinion, political trends, or social conditions. Constitutional yo-yos, however, are far more sensitive to small, transient changes in public opinion, political trends, or social conditions than any unsettlement theorist thinks advisable. Americans living in a regime where constitutional law swings wildly in different ideological directions enjoy neither the benefits promised by proponents nor opponents of constitutional settlements.[280]

American constitutional commentators are engaging in a vigorous debate over the merits of a stable constitutional law. Larry Alexander and Frederick Schauer urge their fellow citizens to adopt institutional arrangements that minimize substantial changes in consti-

279. *See generally* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001).

280. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

tutional doctrine. They maintain that "the settlement of contested issues is a crucial component of constitutionalism" and that "this goal can be achieved only by having an authoritative interpreter whose interpretations bind all others, and [that] the Supreme Court can best serve this role."[281] Louis Seidman is the leading champion of practices that keep constitutional doctrine unsettled. "An unsettled constitution," he writes, "helps build a community founded on consent by enticing losers into a continuing conversation."[282]

Electoral volatility, elite polarization, and conflict extension destabilize the constitutional regime, but do so in ways that do not promote the claimed virtues of an unsettled constitutional law. Seidman champions a flexible Constitution that responds appropriately to political and social developments. He asserts that "stability and predictability are best served by gradual shifts in constitutional obligation rather than by either rigid entrenchment or its inevitable partner, convulsive regime change."[283] An unsettled constitutional law when public opinion on capital punishment moves slightly to the left would also shift slightly to the left, perhaps as a consequence of judicial rulings requiring better legal representation for capitally sentenced prisoners and slightly increasing the categories of crimes and criminals not eligible for execution. Such relatively precise adjustments do not occur when constitutional politics is more polarized than the political community. In a constitutional universe divided between liberal Justices who believe capital punishment is always unconstitutional and conservative Justices who believe capital punishment is no different than any other sanction, small changes in public opinion either have no effect or an effect far beyond their scope. If a slight swing in public opinion causes no change in the ideological composition of the federal judiciary, capital punishment law remains the same. If a slight swing in public opinion causes a slight change in the ideological composition of the federal judiciary, then either the federal judiciary with a new 5-4 Solid Liberal majority declares capital punishment unconstitutional or the federal judiciary with a new 5-4 Staunch Conservative majority overrules almost every case imposing constitutional limits on state and federal efforts to impose the death penalty.

Small shifts in voting behavior in a society wracked by elite polarization and conflict extension cause dramatic shifts in almost every

281. Alexander & Schauer, *supra* note 280, at 1359.
282. Seidman, *supra* note 279, at 8-9.
283. *Id.* at 47.

constitutional doctrine, even when no change in public opinion has taken place on the vast majority of constitutional issues. Imagine the Obama Administration is blamed by some segment of the country for mishandling a foreign policy crisis and the Republican candidate rides these international concerns to the presidency in the 2016 national election. In 2017, that newly elected President replaces Justice Kennedy with a Justice who votes more similarly to Justice Alito. The resulting 5-4 Staunch Conservative majority in the next four years will shift the constitutional law of abortion, same-sex marriage, property rights, federal commerce power, school prayer, affirmative action, and other matters substantially to the right, even though public opinion has remained unchanged on these matters. Should that Republican President be caught with his or her hand in the till, Democrats gain control of the White House in 2020, and that Democratic President replaces Justice Antonin Scalia with a Justice who votes more similarly to Justice Kagan, the resulting 5-4 Solid Liberal majority will initiate a sharp constitutional swing of similar magnitude to the left. These swings are entirely unrelated to any change in public opinion or social conditions with respect to any constitutional issue. In conditions of elite polarization and conflict extension, any change in voting behavior for any reason is likely to result in dramatic changes in the constitutional law of almost every constitutional issue.

Perhaps nothing is particularly wrong with such sharp swings in American constitutional law. Such swings are possible in a country without a judicially enforceable constitution. If most elections are close contests between a committed liberal party and a committed conservative party, the legality of same-sex marriage and affirmative action, as well as the government's willingness to adopt certain health care programs and immigration policies, will swing as wildly as the election returns. If the point of constitutionalism is to mediate such public mood swings, so much the worse for constitutionalism. The people can always decide to mediate electoral mood swings on their own by voting for the status quo or building a party committed to more centrist policies.

This erratic course of fundamental rights and regime principles may nevertheless undermine constitutionalism. Constitutionalism normally requires some rule by the dead in order to empower officials and organize politics, establish the rule of law and make credible commitments, prevent self-dealing by governing officials, promote the public interest, assert national aspirations, and entrench those consti-

tutional compromises that preserve national unity.[284] Constitutional yo-yos threaten many of these constitutional purposes. Constitutions are poor means for asserting national aspirations when the constitutional status of same-sex marriage, federal regulatory power, and property rights changes substantially by the decade. Rule of law and credible commitment values are jeopardized when no one can be assured that basic constitutional norms will last past the next election.

Strong majoritarians have fair responses to these dire predictions. Democracies give the public the right to decide the weight of various constitutional purposes. Popular majorities, democrats think, are best positioned to determine whether a change in regime outweighs needs for credible commitments or an enduring policy on same-sex marriage. Moreover, the threat to constitutional values is not quite as dire as the above paragraphs may have suggested. Constitutional law deals exclusively with what Sandy Levinson has called the "constitution of conversation" and not with what he declares to be the "constitution of settlement."[285] The constitution of conversation consists of those clauses, such as the due process clause of the Fourteenth Amendment, whose meaning is disputable. By comparison, the constitution of settlement consists of those clauses, such as the inauguration day clause, whose meaning is indisputable. Thus, even if all of the constitutional law found in the traditional constitutional casebook is up for grabs in the next series of elections, most of the Constitution remains stable. The Supreme Court is not being asked to reconsider bicameralism, the four year presidential term, the basic processes by which a bill becomes law and the existence of a federal court system. To this we might add the enormous amount of constitutional law that does not seem to be the subject of dispute between liberals and democrats. This would include such cases as *Marbury v. Madison*,[286] *Brown v. Board of Education*,[287] *Gibbons v. Ogden*,[288] and *Gideon v. Wainwright*.[289] These stabilities in themselves are probably sufficient to preserve most vital constitutional purposes.

284. *See* 1 HOWARD GILLMAN, MARK A. GRABER, & KEITH E. WHITTINGTON, AMERICAN CONSTITUTIONALISM: STRUCTURES OF GOVERNMENT 7-10 (2013).

285. *See* SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 17-27 (2012).

286. 5 U.S. 137 (1803).

287. 347 U.S. 483 (1954).

288. 22 U.S. 1 (1824).

289. 372 U.S. 335 (1963).

The problem with this democratic majoritarian justification for constitutional yo-yos is that the impending destabilization of constitutional law is a consequence of the less majoritarian features of the American constitutional regime and not of a public that erratically shifts from relatively extreme conservative to relatively extreme liberal views on all issues of the day. The American public is not as polarized as the American elite.[290] The more centrist majority of Americans (or at least the more centrist median voter in the United States) is having increased difficulty maintaining relative centrist policies on most constitutional issues for two reasons. First, a constitutional system in which most national officials are selected in local elections has a tendency to generate Presidents and members of Congress more polarized than the general electorate.[291] Second, the practice of appointing highly educated, affluent, partisan lawyers to the Supreme Court in the present circumstances of elite polarization practically guarantees a court divided between Solid Liberals and Staunch Conservatives, even though less than a third of the public fit into either of those relative extreme categories. For both these reasons, the course of American constitutional law is unlikely to reflect consistently either the sentiments of the largely centrist median American voter or the ideals championed by any particular elite constitutional thinker.

The Cure. The best cure for constitutional yo-yos is a return to electoral stability, elite consensus, and conflict diffusion. History suggests that American constitutional law will avoid lurching from right to left only if one of these three foundations for constitutional stability is restored. Electoral stability assures that constitutional law consistently reflects the constitutional vision of a relatively enduring dominant national coalition. Elite consensus assures that constitutional law consistently reflects the common constitutional vision of highly educated, affluent Republican and Democratic lawyers. Conflict diffusion prevents polarization on particular issues from having a disproportionate impact on the entire corpus of constitutional law.

Judicial minimalism is the best preventative for constitutional yo-yos. Cass Sunstein, the leading proponent of that approach to the judicial function in constitutional cases, asserts, "[a] court that leaves

290. *See* sources cited *supra* notes 159, 217.

291. *See* MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 35-36 (2012); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 732-33 (2009).

things open will not foreclose options in a way that may do a great deal of harm."[292] Narrow judicial rulings also promote further democratic deliberation on complex constitutional issues. Sunstein writes, "minimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions." Justices committed to judicial minimalism do not declare capital punishment unconstitutional, insist that Congress has no right to regulate independent expenditures, rule that states may never use race in the admissions process, or defer anytime the federal government whispers the phrase "commerce clause" in oral argument. Instead, they support rulings limited to either the particular manifestation of a broader constitutional issue before the court or a fairly small subset of the broader constitutional problems. By deciding only, for example, that Congress may not pass this particular ban on independent expenditures, the Justices leave open the possibility that other bans might be sustained in light of more mature public deliberation, changes in social conditions or, frankly, changes in the composition of the court.

Judicial minimalism is particularly appropriate during times of electoral volatility, elite polarization, and conflict extension. Justices may justifiably issue broader rulings when either there is a general consensus among the voting public, measured by consistent support for a particular political coalition, or among persons who seriously reflect about legal matters, measured by a consensus among legal elite, that a particular constitutional direction best achieves American constitutional aspirations. Courts may be leading public opinion in these circumstances, but they are leading an opinion at least prone to follow the Justices. Justices who initiate or continue constitutional yo-yos realize none of the benefits of judicial activism while bringing about many of the defects. Constitutional decisions that are likely to be reversed or severely modified within a decade do not give the United States a distinctive constitutional character and they do not enable the court to play the role of "republican schoolmaster."[293] All such decisions are likely to do is move the Court further from the more centrist public and provide further irritation for an already over-irritated constitutional polity.

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292. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999).

293. *See generally* Ralph Lerner, *The Supreme Court as Republican Schoolmasters*, 1967 SUP. CT. REV., 1967, at 127, 127.

For better or worse, Justices are unlikely to act consistently with minimalist principles in the near future. Mark Tushnet has noted that "natter(ing) at justices" in law reviews has almost no effect.[294] Most Justices, one expects, enter office with the confidence that the most recent election is a harbinger of the future success of their preferred political coalition. If so, perhaps the best advice this Article can offer is that all of us who teach constitutional law ought to be prepared to rewrite our lectures on a regular basis.

294. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 155 (1999).