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Cass R. Sunstein

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# IF PEOPLE WOULD BE OUTRAGED BY THEIR RULINGS, SHOULD JUDGES CARE?

Cass R. Sunstein\*

*At first glance, judicial anticipation of public outrage and its effects seems incompatible with judicial independence. Nonetheless, judges might be affected by the prospect of outrage for both consequentialist and epistemic reasons. If a judicial ruling would undermine the cause that it is meant to promote or impose serious social harms, judges might have reason to hesitate on consequentialist grounds. The prospect of public outrage might also suggest that the court's ruling would be incorrect on the merits; if most people disagree with the court's decision, perhaps the court is wrong. Those who adopt a method of constitutional interpretation on consequentialist grounds are more likely to want to consider outrage than are those who adopt an interpretive method on nonconsequentialist grounds (including some originalists). The epistemic argument for judicial attention to public outrage is greatly weakened if people suffer from a systematic bias or if public outrage is a product of an informational, moral, or legal cascade. There is also an argument for banning consideration of the effects of public outrage on rule-consequentialist grounds: judges might be poorly suited to make the relevant inquiries, and consideration of outrage might produce undue timidity. But in rare (but important) cases, judges legitimately attend to outrage and its effects as a way of ensuring against futile or perverse outcomes. An understanding of the consequentialist and epistemic grounds for judicial attention to public outrage also bears on the appropriate understanding of political representation; it offers lessons for the decisions of other public officials, including presidents, governors, and mayors, who might be inclined to make decisions that will produce public outrage.*

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\* Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. I am grateful to many people for their valuable comments on previous drafts; I single out Barry Friedman, Bernard Harcourt, Daryl Levinson, Anup Malani, Gerald Neuman, Jedemiah Purdy, Adam Samaha, and Adrian Vermeule for detailed reactions and suggestions. Participants in workshops at Harvard Law School and the University of Chicago Law School provided exceptionally valuable help. A version of this article was also presented as the annual Foundation for Law, Society, and Justice lecture at Oxford University, and I am most grateful for the many superb comments and criticisms I received on that occasion. Matthew Robson and Miriam Seifter provided excellent suggestions and research assistance.

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## INTRODUCTION

Judicial rulings can, and sometimes do, provoke public outrage. If the Supreme Court ruled that states must recognize same-sex marriages, national politics would undoubtedly be affected, and a movement for a constitutional

amendment would be all but inevitable. If the Court said that the Establishment Clause forbids the use of the words “under God” in the Pledge of Allegiance,<sup>1</sup> the Court would face a great deal of public outrage. If the Court struck down measures designed to reduce the risk of terrorism, especially in a period in which that risk is acutely felt, significant parts of the public would be outraged as well. Many judges are drawn, on occasion, to interpretations of the Constitution that would outrage large segments of the public. How, if at all, should courts think about, or deal with, the prospect of outrage?

A detailed literature attempts to show that the Supreme Court’s decisions are generally in line with public opinion and that, in light of the Court’s actual practices, the “counter-majoritarian difficulty”<sup>2</sup> is far less difficult than it might seem.<sup>3</sup> To this extent, a degree of “popular constitutionalism,”<sup>4</sup> captured in a measure of public control of constitutional meaning, seems to be alive and well. The Court rarely embarks on courses of action that are wildly out of step with the strongly held views of citizens as a whole.<sup>5</sup> But there can be no question that the Court’s decisions can provoke public outrage, and that the Court sometimes works to reduce the likelihood and intensity of that outrage.<sup>6</sup>

The most famous example is *Naim v. Naim*,<sup>7</sup> in which the Court refused to rule on the constitutionality of a ban on racial intermarriage, largely because it feared that its ruling would provoke outrage, in a way that might diminish the Court’s own authority.<sup>8</sup> It is reasonable to speculate that the Court’s refusal to decide the constitutionality of the use of the words “under God,” in the Pledge of Allegiance, had similar motivations.<sup>9</sup> The invocation of the “passive

1. The Court avoided this issue in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

2. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962).

3. For an early treatment, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (arguing that the Court’s decisions generally follow the public opinion of the majority). For a recent and broadly compatible discussion, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). For instructive analysis of the general problem, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003). For a valuable collection, see PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., forthcoming 2008).

4. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

5. See Dahl, *supra* note 3.

6. Compare BICKEL, *supra* note 2, at 111-98 (supporting the use of justiciability doctrines to assist the Court in exercising the “passive virtues”), with Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964) (book review) (criticizing the use of justiciability doctrines to avoid principled decision making).

7. 350 U.S. 891 (1955).

8. See BICKEL, *supra* note 2, at 174.

9. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

virtues,” including justiciability doctrines, is often understood as an effort to ensure that the Court’s timing is “prudent,” in the sense of reducing the danger that judicial decisions will produce public reactions that will compromise the Court’s goals.<sup>10</sup>

This Article addresses the normative question of whether judges should attend to outrage, not the positive question of whether they do so. With respect to anticipated public outrage, the positive issues have received sustained attention, whereas the normative issues have been explored only episodically.<sup>11</sup> My principal goal is to investigate whether and why anticipated public outrage should matter to judicial decisions.<sup>12</sup> At first glance, an affirmative answer seems quite jarring; many people believe that courts should interpret the Constitution without attention to the possible objections of the public.<sup>13</sup> On a conventional view, the central goal of constitutional law, or at least judicial review, is to impose a check on public judgments, and sometimes to override those judgments even if they are intensely held. It would be odd to say that the Supreme Court should not protect free speech or should allow racial discrimination if and because it anticipates that the public would be outraged by protection of free speech or by bans on racial discrimination. The idea that the Court should anticipate and consider the effects of public outrage seems inconsistent with the role of an independent judiciary in the constitutional system.

Questioning the conventional view, I shall suggest two reasons why public outrage might matter—and in the process attempt to explain the Court’s occasional reluctance to trigger outrage, as embodied in the use of justiciability doctrines, narrow rulings, and deference to elected officials. The first reason is *consequentialist*; the second is *epistemic*. The consequentialist claim is that if a ruling would turn out to have terrible effects, judges should take those effects

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10. See BICKEL, *supra* note 2.

11. The most sustained treatment is given in BICKEL, *id.*, with the emphasis on the “passive virtues” as a response, in part, to the problem of public outrage. As we shall see, however, Bickel did not provide firm underpinnings for the Court’s consideration of public disapproval of its decisions, and he was hence left vulnerable to the charge of opportunism. See Gunther, *supra* note 6 (criticizing the use of “passive virtues” as unprincipled).

12. There is an obvious relationship between this topic and the general one of “popular constitutionalism,” which sees “We the People” as a kind of tribunal of last resort. See KRAMER, *supra* note 4. I offer a few remarks on this relationship below. Some strands of popular constitutionalism, of course, have a strong normative feature, *see id.* at 248 (arguing that the Supreme Court is “our servant and not our master”), but the focus is not on outrage and its effects.

13. This view can be found, in one or another form, in RONALD DWORIN, JUSTICE IN ROBES (2006); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004); and Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989). We might take this view as standard while acknowledging that many people believe that doctrines of justiciability are properly used to limit the Court’s intervention in deference to public reaction. See BICKEL, *supra* note 2. To the extent that this belief is widely held, as it seems to be, the argument here might be seen as an effort to explain how it is best defended.

into account. This claim depends on an admittedly controversial assumption, to the effect that in deciding how to rule, judges should pay attention to the consequences of their decisions. It is tempting to reject that assumption and to think that judges should rule as they see fit even if the heavens would fall.<sup>14</sup> But if the heavens really would fall, perhaps judges should not rule as they see fit.

The epistemic reason involves humility. Judges cannot always know whether they are right, even about the meaning of the Constitution, and intense public convictions may provide relevant information about the correctness of their conclusions. Whether public convictions are pertinent depends in part on their foundations and in part on the prevailing method of constitutional interpretation. If the prevailing method makes constitutional adjudication turn on disputable judgments of fact or morality, the beliefs of the public may indeed be relevant. It is important, however, to know whether these public beliefs are a product of a systematic bias or of cascade effects. If so, there is much less reason to consider them, because they lack epistemic credentials.

To assess the consequentialist and epistemic reasons for considering public outrage, it is necessary to distinguish between invalidations and validations of decisions of the elected branches. As we shall see, the two raise different considerations. If courts invalidate a law, and the consequences of the invalidation are bad, the public has no means of response (short of a constitutional amendment). It follows that if courts wrongly invalidate a law, the result is likely to stick. For these reasons, the strongest arguments for considering outrage apply in the context of invalidations. By contrast, courts have far less reason to consider outrage before validating democratic decisions; if the public greatly objects to a law, it can respond by changing that law through democratic means. Statutory interpretation generally belongs in the same category as validations.

There is, however, a plausible rule-consequentialist argument for asking judges not to consider public outrage even in the context of invalidations. Judicial judgments about outrage may be unreliable, and consideration of outrage may produce excessive judicial timidity. While plausible in the abstract, this argument depends on contestable empirical assumptions and may turn out to be wrong. If it is clear that a decision would outrage the public and that such outrage would be both intense and very harmful, courts have reason to hesitate before invalidating the decisions of the elected branches.

The Court's seemingly opportunistic use of justiciability doctrines, and puzzlingly narrow and shallow rulings, are often best defended in this light. I shall ultimately conclude that while the epistemic arguments for considering

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14. I use this phrase as a placeholder for real disaster. I explore below some of the complexities in deciding what sorts of bad consequences should be considered in constitutional adjudication.

the effects of outrage turn out to be fragile, the consequentialist arguments justify judicial hesitation in some admittedly unusual (but important) domains.

A recurring issue is whether judges have enough information to be confident about either their judgments on the merits or their assessments of the existence and effects of outrage. It is helpful to begin by assuming that they have such information and seeing how the analysis proceeds on that (admittedly unrealistic) assumption. Once the assumption is relaxed, the analysis must be changed. There is little reason for courts to attend to public outrage if judges lack information about the likely effects of their rulings but have a great deal of information about the proper interpretation of the Constitution. Those who want courts to attend to public outrage are likely to believe that judges are not at sea in assessing consequences—and more fundamentally to accept the view, associated with James Bradley Thayer, that judges do not have special or unique access to constitutional meaning.<sup>15</sup> For those who accept Thayer's position, attention to public outrage, or to public judgments more generally, might well be justified on epistemic grounds.

While my focus is on public outrage and its consequences, the discussion will bear on several other questions, some of them quite large. Nearly every public institution is barred from taking account of certain considerations that plainly ought to matter from a consequentialist perspective. The ban on consideration of certain factors often operates as a legal or moral taboo; but why? The most plausible answer is that in some settings, the overall consequences are much better if institutions refuse to take account of certain consequences. A larger implication of this answer is that in both the private and public spheres, "role morality"—the particular moral principles associated with particular social roles—is most sensibly justified on rule-consequentialist grounds. As we shall see, the argument for refusing to consider outrage and its effects is best defended on those grounds.

If the analysis of the consequentialist and epistemic arguments has force, it should also have general implications for those who favor "popular constitutionalism"<sup>16</sup> and for those who are skeptical about the institution of judicial review on democratic grounds.<sup>17</sup> Some of the best arguments for popular constitutionalism, and for challenges to judicial review, may well be epistemic in character; perhaps the citizenry has a better understanding, under some circumstances, of how the founding document should be construed.<sup>18</sup> But I shall raise serious questions about both consequentialist and epistemic arguments for considering outrage. By understanding the limitations of those arguments, we shall be in a better position to assess the claims of those who

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

16. See KRAMER, *supra* note 4; JEREMY WALDRON, *LAW AND DISAGREEMENT* (2004).

17. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006).

18. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

favor popular constitutionalism and those who question judicial review in the name of democracy.

A general lesson is that no conclusions about the proper response to outrage and its effects, popular constitutionalism, or judicial review can be established in the abstract, or through large-scale claims about the goals and nature of self-government. A great deal depends on empirical assumptions and on the real-world capacities of various institutions.

As we shall see, the epistemic argument for considering outrage is based on the general idea that large groups of people are highly likely to be right, at least if most group members are likely to be right. This idea helps to explain recent enthusiasm for the “wisdom of crowds.”<sup>19</sup> With respect to constitutional interpretation, however, crowds may not be so wise, because they may suffer from a systematic bias, or because their judgments may be a product of informational cascades or group polarization, often induced by what we might call *meaning entrepreneurs*. An understanding of the problems introduced by systematic biases, and by cascade and polarization effects, bears both on popular constitutionalism and the risk that large groups may be quite mistaken.

This Article comes in five parts. Part I discusses invalidations and consequentialist arguments for considering public outrage. Part II explores the possibility that when outrage is anticipated, judges should take it into account for epistemic reasons. Part III turns to the case of validations, with brief reference to the question of statutory interpretation. Part IV discusses approaches to constitutional interpretation that seem to counsel against considering outrage. Originalism is the main example here, but those who emphasize “moral readings” of the Constitution might also be skeptical of the idea that judges should consider outrage. Part IV also explores minority outrage. Part V briefly discusses the relevance of the consequentialist and epistemic arguments for others exercising public authority, including presidents, legislators, governors, mayors, and jurors. A primary claim in Part V is that when officials consider public outrage, they might be humble rather than cowardly, acting as they do because they believe that their own judgments are imperfectly reliable.

## I. INVALIDATIONS AND CONSEQUENCES

Let us begin with cases posing the question whether anticipated public outrage should play a role in a judge’s decision whether to vote to invalidate a decision of the elected branches, whether state or federal, on constitutional grounds. As we shall see, such cases present the strongest arguments for considering outrage, because the public cannot easily correct judicial

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19. For a popular presentation, see JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004); for a more academic treatment, see SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).



invalidations that produce bad consequences. Throughout I shall assume that a strong majority of the public, rather than a minority, is outraged; I shall turn to the case of minority outrage in due course.<sup>20</sup>

### A. *The Problem*

Suppose that a member of the Supreme Court, Justice Bentham, is convinced after due deliberation of the following propositions:

1A. *The ban on same-sex marriages is a violation of the Equal Protection Clause.*

1B. *The ban on polygamous marriages is a violation of the Due Process Clause.*

1C. *The use of the words "under God," in the Pledge of Allegiance, is a violation of the Establishment Clause.*

1D. *Capital punishment is inconsistent with the Eighth Amendment.*

1E. *The President may not commit troops to a military conflict without either a formal declaration of war or an authorization to use force from Congress.*

1F. *Racial segregation in a high-security prison is a violation of the Equal Protection Clause.*

Suppose that all six of these propositions are at issue in cases before the Court (it is an exciting term). In all six cases, the Court is deadlocked 4-4; Justice Bentham has the deciding vote. True to his name, Bentham supports propositions 1A-1F with close reference to consequentialist considerations; he has chosen his theory of constitutional interpretation on consequentialist grounds, and he applies his theory in a way that takes account of consequences.<sup>21</sup> Suppose finally that Bentham believes that if he votes as his convictions suggest, there will be extremely serious public opposition, going well beyond disagreement to outrage. In all six cases, he believes that the Court's decision will become highly relevant to national politics, and that those who side with the Court, and even those who do not vigorously oppose it, will suffer badly.

In cases 1A-1D, he believes that many officials will refuse to accept the Court's decision, and the Constitution will be amended to overturn the Court's decision. In case 1E, troops have already been committed, and Bentham thinks that from the standpoint of national security and protection of lives of

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20. See *infra* Part IV.C. Of course it is also true that, in many cases, much of the public will be unaware of the Court's decisions, or largely indifferent to them even if aware. The focus here is on those unusual cases in which the public is both aware and intensely interested.

21. These statements raise obvious complexities; I return to them below. To understand Bentham's dilemma for purposes of the inquiry I am exploring here, it is not necessary to know exactly why Bentham has decided in favor of propositions 1A-1F.

American soldiers, invalidation would be worse than unfortunate. In case 1F, Bentham believes that if he votes in accordance with his commitments, so as to require immediate desegregation, officials will refuse to obey, and segregation will continue. Let us stipulate that Bentham thinks that all of these consequences would be very bad. How should Bentham vote?

To orient the discussion, let us begin with two simplifying assumptions (eventually to be relaxed). First, Bentham has no doubt at all about the correctness of his views in the six cases. He is certain, and he is certain that he has excellent reason to be certain, that he is right about the proper interpretation of the Constitution (putting outrage and its effects to one side). Second, Bentham has no doubt about his predictions about the consequences of the Court's decision. He happens to have an entirely accurate crystal ball, and he knows what will happen if the Court does as he thinks best, as a matter of principle. Bentham is aware that different consequences might play a different role in his assessment about what to do. Perhaps a constitutional amendment, overturning the Court's decision, is acceptable, whereas a significant increase in the risk to national security is much less so. I will return to these questions shortly; let us simply stipulate that Bentham has good reason to think that if he votes as he sees fit, very bad consequences will follow.

For Bentham, the ultimate conclusion is straightforward. In cases that are rare but important, he will attend to outrage and its effects. Unsurprisingly, Bentham is a committed Benthamite; his own theory of interpretation is consequentialist, and he is entirely willing to consider the consequences of his rulings, including those consequences that stem from public outrage. He is aware that some judges adopt theories of interpretation on nonconsequentialist grounds, but he thinks that if the consequences of a judicial ruling would be especially bad, all judges should be prepared to take them into account.

Bentham does take the possibility of rule-consequentialism very seriously. He knows that if judges investigate consequences in particular cases, the consequences might be very bad. He is aware that a clear, firm rule might reduce the costs of decisions and the costs of error, as compared to a situation in which judges make case-by-case assessments of the consequences. Bentham is willing to listen to the proposition that on rule-consequentialist grounds, he should not consider outrage and its effects, because such consideration might lead to undue judicial timidity, encourage strategic behavior, or otherwise distort the judicial process. In the end, however, Bentham rejects the rule-consequentialist argument, concluding that in unusual cases, consideration of outrage is appropriate and he will support use of the passive virtues, narrow rulings, and deference to elected officials.

These are Bentham's conclusions. Let us see how he arrives at them.

## B. Kantian Adjudication

Some judges do not attend to outrage at all. Perhaps Bentham (notwithstanding his name) will be willing to consider a practice of *Kantian adjudication*: even if the heavens will fall, the Constitution must be interpreted properly. Indeed, Kantian adjudication appears to be the informal working theory of judges and lawyers, so much so as to make it plausibly outrageous for judges to defer to outrage. Though actual judicial practices suggest a far more complicated picture,<sup>22</sup> the idea of Kantian adjudication seems to capture the conventional view about how courts should approach public outrage and its potentially harmful effects. Many and probably most judges and lawyers believe that public outrage is neither here nor there, and that judges' solemn duty is to interpret the Constitution as they see fit; one of my goals here is to see on what grounds this conventional belief might be best defended.

According to those who endorse Kantian adjudication, the proper interpretation of the Constitution has nothing to do with what the public believes or wants. The role of the Court is to say what the law is (using the appropriate interpretive method), and its conclusions on that point should be unaffected by the public's will.<sup>23</sup> Indeed, a sharp separation between law and politics might be thought to depend, crucially, on a commitment to Kantian adjudication. Compare the domain of statutory interpretation. Suppose that Bentham believes that the Endangered Species Act of 1973<sup>24</sup> compels the termination of a popular and nearly completed project,<sup>25</sup> or that Title VI of the Civil Rights Act of 1964<sup>26</sup> permits affirmative action;<sup>27</sup> suppose too that both of these rulings will provoke public outrage. At least at first glance, it would seem implausible to say that Bentham should alter his votes about statutory meaning to avoid such outrage. (We will return to the question why this is so.<sup>28</sup>) Bentham should consult the standard sources of statutory meaning, above all the enacted text, and the risk or reality of outrage is immaterial.

In the context of potential invalidations, the argument for Kantian adjudication might seem even more forceful. Why should judges uphold unconstitutional measures—for example, racial discrimination or detention without due process of law or restrictions on free speech—merely because the public would be outraged if they struck down those measures? Deference to

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22. See *supra* notes 2-11.

23. See Scalia, *supra* note 13, at 1180.

24. 16 U.S.C. §§ 1531-1544 (2000 & Supp. 2004).

25. Cf. *TVA v. Hill*, 437 U.S. 153 (1978) (enjoining such a project under the Endangered Species Act).

26. 42 U.S.C. §§ 2000d to 2000d-7 (2000).

27. Cf. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (upholding affirmative action plan).

28. See *infra* Part III.

public outrage seems hopelessly inconsistent with the role of judges in a constitutional system.

But for two reasons, there is a serious question whether judges should be unconditionally committed to Kantian adjudication. The first reason is that even Kantians typically believe that moral rules can be subject to consequentialist override if the consequences are sufficiently serious.<sup>29</sup> If total catastrophe really would ensue, judges should not rule as they believe that principle requires. Suppose that the consequence of a ruling consistent with 1E would be to endanger national security; perhaps judges should refuse to issue that ruling. Consider in this regard Justice Jackson's suggestion that his conclusion that courts should not enforce the military order to detain Japanese-Americans on the West Coast need not be taken to "suggest that the courts should have attempted to interfere with the Army in carrying out its task."<sup>30</sup>

Or suppose that the consequence of a ruling consistent with 1A would be merely to hasten a result that would have taken place without the Court's invalidation, while also heightening political polarization, promoting the electoral prospects of those who reject same-sex marriage, increasing hostility to gays and lesbians, and eventually leading to a constitutional ban on same-sex marriage. In this way, a ruling consistent with 1A would prove self-defeating in the particular sense that it would greatly decrease the likelihood that same-sex marriages would ultimately be recognized.<sup>31</sup> Even a committed Kantian adjudicator might well hesitate to rule in the way indicated by 1A.

The second and more fundamental reason is that it is not clear that the principle of Kantian adjudication makes much sense, at least if it is defended on Kantian grounds. The core Kantian claim is that people should be treated as ends, not as means.<sup>32</sup> One person should not lie to another, or trick another into doing his bidding, because lies and tricks treat people as mere instruments, and do not give them the respect that they deserve. Is Kantian adjudication necessary to ensure that people are treated as ends rather than as means?

Perhaps the answer is affirmative. Suppose that Justice Brandeis hesitates to invalidate a law banning same-sex marriage, because he believes that the public will react intensely, in a way that will produce overall harm. The plaintiffs might ask: if Justice Brandeis fails to invalidate the law, not on the ground that he believes it to be constitutional, but to avoid other adverse consequences, is he not treating us as means to other ends? Why should our rights be sacrificed because their vindication would produce bad consequences? Justice Brandeis might respond that in taking account of the effects of his

29. For an overview, see Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 898-901 (2000).

30. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

31. I note below some complexities in the question whether this consequence is relevant, and whether this self-defeating sense is the right one.

32. For a good discussion, see Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFF. 325 (1986).

ruling, he is not treating anyone as a means. He is concerned with the protection of rights, and he fears that rights, properly conceived, might ultimately be undermined if he rules in the plaintiffs' favor. To assess that concern, we would have to understand exactly what sorts of adverse consequences he fears. I will take up that question shortly. For now, the simple point is that whether Justice Bentham is violating Kantian strictures is likely to depend on why he hesitates to protect the rights in question.

The most natural defense of Kantian adjudication lies in the thought that the judiciary must remain faithful to the law; whatever judges might think of Kant, their duty is to say what the law is (and hence to disregard public disapproval, however intense). In the end, this conclusion may be right, but as stated, it is a conclusion in search of an argument. I shall ultimately suggest that Kantian adjudication is best understood as a kind of moral heuristic,<sup>33</sup> justified on rule-consequentialist or systemic grounds. The claim must be that certain people in certain roles ought not to consider certain consequences, because consideration of such consequences would likely lead to bad consequences. If, for example, the Supreme Court decided voting rights cases by asking whether one or another decision would have good consequences by helping the best political candidates, the social consequences would not likely be good. In short, the intuitive judgment that certain consequences, or all consequences, are off-limits to certain officials might itself have to be justified on consequentialist grounds. But to say this is to get ahead of the story.

### C. Interpretive Theories and Consequences

If Bentham is inclined to consider the effects of outrage, there is an immediate puzzle: What is the theory of constitutional interpretation that gives rise to Bentham's judgments in cases 1A-1F? Is it a consequentialist theory? Does Bentham hold it *because* of its consequences? A consequentialist had better give an affirmative answer. At first glance, any judgment about whether judges should consider outrage and its effects turns on the underlying theory of interpretation.

To come to terms with this point, we should distinguish between Bentham's theory of interpretation and Bentham's theory of adjudication. We could imagine a judge who has a consequentialist theory of both interpretation and adjudication, that is, a judge whose views about constitutional interpretation depend on the consequences and who is alert to consequences in deciding how, exactly, to rule. Justice Stephen Breyer and Judge Richard A. Posner appear to fall in this category.<sup>34</sup> Their accounts of interpretation are

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33. See Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005).

34. See STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005) (invoking consequences to assess theory of interpretation); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003) (same).

based on consequences, and they also think that judges should attend to consequences in particular cases.<sup>35</sup> By contrast, we could imagine a judge who has a nonconsequentialist theory of interpretation, believing (for example) that originalism is the only plausible approach (and for nonconsequentialist reasons),<sup>36</sup> but also agreeing that consequences matter when a judge is deciding whether and how broadly to rule. An originalist might believe, for example, that the meaning of the Constitution is settled by the original understanding, while also believing that it is legitimate to rule narrowly in cases in which wide rulings would have unfortunate effects.

We could imagine a judge who believes that consequences are irrelevant both to interpretation and to adjudication. Such a judge might believe that originalism provides the right theory of interpretation, or that interpretation calls for moral readings, while also believing that judges should not consider consequences in deciding how broadly to rule. We could even imagine a judge who adopts a theory of interpretation on consequentialist grounds, but who believes that consequences are irrelevant to judicial rulings, once the appropriate method is applied.<sup>37</sup> Perhaps this approach could be justified on rule-consequentialist grounds, with the thought that case-by-case inquiries into consequences, even in unusual cases, would increase the burdens of decisions while increasing the number of errors.

It should be clear that Bentham is not an originalist; but why not? Suppose that Bentham rejects originalism because in his view, it would produce unacceptable consequences.<sup>38</sup> Suppose that Bentham also believes that the Court should usually be reluctant to strike down acts of the elected branches, because a presumption of validity will lead to good consequences.<sup>39</sup> Suppose finally that the other ingredients of Bentham's own approach to interpretation are somewhat eclectic. Perhaps he is inclined to require the executive to be able to show clear legislative authorization for many actions involving national security.<sup>40</sup> Perhaps he believes that the Court properly takes a somewhat aggressive role in protecting traditionally disadvantaged groups and in protecting the most intimate of choices.<sup>41</sup> Suppose that Bentham is ultimately prepared to justify his approach, however eclectic it may be, in terms of its

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35. See BREYER, *supra* note 34; Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 90-102 (2005).

36. See Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207 (2006) (book review) (arguing that a form of originalism is required by the very notion of interpretation).

37. See Gunther, *supra* note 6, for an account of why this view might be coherent.

38. See BREYER, *supra* note 34.

39. See VERMEULE, *supra* note 17, at 21-24.

40. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN L. 1 (2004).

41. See JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006).

consequences. If so, consideration of public outrage seems at first glance reasonable and perhaps even obligatory, at least if that outrage would lead to bad consequences.

#### *D. Passivity, Minimalism, and Deference*

If Bentham is inclined to consider public outrage in cases 1A-1F, he is likely to ask: what are my options here? Perhaps Bentham can refuse to address the merits at all, postponing them for another day. In case 1C, for example, Bentham might look for some ground, such as standing or ripeness, that would allow him not to express a view on the underlying issues.

To see why, consider Alexander Bickel's influential discussion of the "passive virtues."<sup>42</sup> Bickel insisted that the Court's role was not to uncover the Constitution's original meaning but to identify and to announce certain enduring values—to discern principles that would properly organize constitutional life. Bickel believed that courts were in a unique position to carry out that role. In his view, "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."<sup>43</sup> Bickel was no originalist. He did not believe that judgments about those matters would be static; he fully recognized the Court's creative role.<sup>44</sup> At the same time, Bickel thought that a heterogeneous society could not possibly be governed by an array of judicially announced principles. In his view, "[n]o good society can be unprincipled; and no viable society can be principle-ridden."<sup>45</sup>

On some occasions, Bickel argued, the Court should give the political processes relatively free play, by neither upholding nor invalidating its decisions. The Court's task in judicial review is to maintain both "guiding principle and expedient compromise"<sup>46</sup>—and to do so by staying its hand in the face of strong popular opposition, however indefensible the opposition might be. Notably, Bickel did not specify the precise grounds on which the Court should stay its hand. Was the ultimate concern the preservation of the Court's own authority, the risk that judicial rulings would prove self-defeating, the threat of rebellion and violence, or something else? In any event, a judgment about the consequences of excessive intervention would undoubtedly motivate its hesitation.

Perhaps Bentham is unable to exercise the passive virtues so as to avoid addressing the merits. Even if so, Bentham might be able to address the merits in a way that reduces the magnitude and effects of public outrage. He might

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42. See BICKEL, *supra* note 2, at 111-98. *But see* Gunther, *supra* note 6 (objecting that the Court should be principled and that use of the passive virtues is too opportunistic).

43. See BICKEL, *supra* note 2, at 25.

44. *Id.* at 24-26.

45. *Id.* at 64.

46. *Id.*

ensure that the Court rules modestly or in a way that avoids theoretical ambition to the extent possible. Bentham might aim for a degree of narrowness, in the form of a decision that leaves many issues unresolved, or instead shallowness, in the form of a decision that is agnostic on some of the deepest questions.<sup>47</sup> In case 1A, for example, Bentham might say: “States must provide the incidents of marriage to same-sex couples; we need not decide whether (or we do not decide that) states must make marriage itself available.” In case 1B, Bentham might say: “States may not forbid religious institutions from performing and respecting polygamous marriages; we need not decide whether (or we do not decide that) states must perform and respect such marriages.” In either case, Bentham might attempt to avoid theoretically ambitious claims about the nature of “liberty” under the Due Process Clause, or the ideal of equality under the Equal Protection Clause. In short, a minimalist strategy, reducing or eliminating public outrage, might be tempting.

Bentham is most unlikely to want to join the view of those justices with whom he disagrees on the merits; he will not be inclined to commit himself to an interpretation of the Constitution that he rejects as a matter of principle. Nor will Bentham want to misstate the actual grounds for his conclusion.<sup>48</sup> But suppose that he cannot invoke any basis for avoiding the constitutional question, and that he is certain that if public outrage and its effects are considered, the Court should greatly hesitate before ruling in favor of propositions 1A-1F. Perhaps he could write a concurring opinion that starts with these two sentences: “I am not convinced that the prevailing view is correct in its interpretation of the Constitution. But in view of the appropriately modest role of the judiciary in a democratic society, I concur in the judgment.”

To make this opinion plausible, Bentham would have to spell out, with some particularity, exactly what is entailed by the second sentence. He might gesture toward epistemic considerations, pointing to the need to pay respectful attention to the considered judgments of other branches<sup>49</sup> and his fellow

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

48. This point itself raises serious puzzles. If Bentham is a consequentialist, is it so clear that he will refuse to lie about the grounds for his judgment, even if lying would produce good consequences? One answer is that lies ultimately produce bad consequences; the publicity condition, requiring officials to act in ways that can be defended honestly and in public, might be understood as a way of ensuring against those bad consequences. See David Luban, *The Publicity Principle*, in THE THEORY OF INSTITUTIONAL DESIGN 154 (Robert E. Goodin ed., 1996). Another answer is that notwithstanding his name, Bentham may believe that lying is an intrinsic wrong, because it does not treat his fellow citizens with respect. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353-60 (1991). Note that Bentham is a consequentialist, not a utilitarian; he may therefore believe that treating people disrespectfully is an independent wrong, one that counts in the consequentialist calculus. See Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1038-39 (1996) (noting the possibility of considering rights violations as part of the assessment of consequences).

49. See *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (emphasizing the need to attend



citizens. He might add an explicit reference to consequentialist considerations, pointing to sharp social divisions and the potentially unfortunate effects of judicial intervention into a sensitive area.<sup>50</sup> To see how an opinion of this kind might be elaborated, we need to investigate some details.

### E. *Consequentialism*

Suppose Bentham believes that acts must be evaluated by asking whether they produce good consequences, all things considered. I have stipulated that Bentham's theory of constitutional interpretation is itself based on consequentialist considerations.<sup>51</sup> If Justice Bentham is a consequentialist, of course, he will not be much interested in public outrage as such. The question is whether that outrage will produce bad effects. If so, it would be especially odd for him to refuse to consider public outrage to the extent that it bears on the consequences of one or another ruling.

#### 1. *Futility, perversity, and overall harm*

We might imagine three reasons that outrage might lead to bad consequences.<sup>52</sup> First, it may render a judicial decision  *futile*. Suppose, for example, that in 1954, a ruling in favor of immediate desegregation would simply be ignored. An argument in favor of the controversial "all deliberate speed" formulation in *Brown v. Board of Education*<sup>53</sup> was that it was necessary to ensure that desegregation would actually occur and that the Court's ruling would ultimately be obeyed.<sup>54</sup> Second, outrage might make a judicial decision *perverse*, in the sense that it might produce consequences that are the opposite

to constitutional judgments of other branches).

50. See *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring) (fearing that deeming a Ten Commandments display a violation of the Establishment Clause would "encourage disputes concerning the removal of longstanding depictions of the Ten Commandments" and "create the very kind of . . . divisiveness that the Establishment Clause seeks to avoid"); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (referring to "a highly public debate over . . . the propriety of a widespread national ritual, and the meaning of our Constitution").

51. A straightforwardly consequentialist argument in favor of a distinctive approach to interpretation can be found in BREYER, *supra* note 34.

52. I borrow here from ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

53. 349 U.S. 294, 301 (1955).

54. For illuminating discussions of the controversy over the "all deliberate speed" formulation, see KLARMAN, *supra* note 3; RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR RACIAL EQUALITY* (2d ed. 2004); and J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954 TO 1978* (1979). Paul Gewirtz, *Remedies and Resistance*, 92 *YALE L.J.* 585 (1983), offers a valuable discussion of the role of public resistance, and outrage, in the selection of remedies.

of those intended by the Court. In the political domain, it is easy to think of illustrations, such as when an environmental regulation imposed on new polluting sources turns out to increase pollution by increasing the life and use of old polluting sources.<sup>55</sup> In the legal domain, we can imagine how a decision in 1962, requiring states to recognize racial intermarriage, might have fueled resistance to racial desegregation and thus disserved the goal of ensuring compliance with the Court's desegregation decisions and the Equal Protection Clause in general.<sup>56</sup> Third, outrage may render a judicial decision neither futile nor perverse, but might produce *overall harm*, as when the Court vindicates a constitutional principle in such a way as to endanger national security.<sup>57</sup> Some people insist that judges rightly interpret the Constitution with an eye toward consequences, above all to ensure that national security is not threatened by their rulings.<sup>58</sup>

## 2. *Judicial self-preservation*

If Bentham is concerned about the risk of futility, he will immediately focus on a distinctive consideration, involving the Court's own "capital." On one view, judges should attend to public outrage because of the particular risks to the judiciary itself. Lacking electoral legitimacy or a police force, judges are highly dependent on public acceptance of their authority. If the public is outraged, judicial authority might well be jeopardized. And indeed, most discussion of the "passive virtues," and of the Court's caution in its will on the public, has been focused on this consideration.<sup>59</sup>

Perhaps a controversial ruling, involving the words "under God" in the Pledge of Allegiance or same-sex marriage, would increase public attacks on the Court, making the judiciary a salient target in elections and spurring jurisdiction-stripping bills and other legislative efforts to reduce the Court's

55. See Howard Gruenspecht, *Zero Emission Vehicles: A Dirty Little Secret*, POLICY MATTERS (AEI-Brookings Joint Center, Washington, D.C.), Oct. 2000, available at <http://www.aei.brookings.org/policy/page.php?id=51> (contending that the requirement of low-polluting new vehicles will actually increase pollution in the short run, by extending the life of older, high-polluting vehicles).

56. See *Naim v. Naim*, 350 U.S. 891 (1955) (declining to decide whether bans on racial intermarriage are unconstitutional). There are of course difficult issues about how to characterize the underlying goals, such that a particular decision would turn out to be perverse.

57. This is the fear expressed in Justice Jackson's dissent in *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting), and probably in the Court's opinion as well, see *id.* at 220 (majority opinion) ("[W]hen under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").

58. See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (arguing for a pragmatic approach to the Constitution in the context of national security, in a way that allows the executive wide room to maneuver).

59. See, e.g., BICKEL, *supra* note 2.

authority and independence. If the Court is concerned about its own place in the constitutional order, and wants to maintain its legitimacy and power, it might take account of outrage as a method of self-preservation.

It is reasonable to think that judicial self-preservation is only a small part of the picture, because the Court's own authority has proved remarkably robust over time, and because harmful effects on the Court's legitimacy are only a subset of the consequences that count. The Court might well be unduly sensitive to the risk to its own authority, in a way that will distort its rulings on the merits. But there can be little doubt that this risk has, on occasion, led to a degree of judicial hesitation. If a judicial ruling would compromise the Court's own role in the constitutional structure, it may well make sense to exercise the passive virtues or to proceed in minimalist fashion.

### 3. *Assessing consequences*

Bentham will be interested in the full set of adverse consequences, not simply the effects of outrage on the Court itself. If very bad things will happen as a result of a ruling consistent with 1A-1F, Bentham will be inclined to exercise the passive virtues, to proceed in minimalist fashion, and perhaps even to defer to the political process on the merits. But if Bentham attempts to investigate exactly what he should do, he will encounter an immediate problem: By itself, the idea of consequentialism is insufficiently informative. It does not tell him how to weigh the potential consequences or even to know whether certain outcomes count as good or bad.<sup>60</sup>

Unfortunately, Bentham's analysis of how to assess consequences cannot avoid a degree of complexity. There are two central conclusions. First, Bentham needs to make a range of supplemental judgments to get his consequentialism off the ground. Second, Bentham might well decide, for rule-consequentialist reasons, that some of his own personal convictions do not matter at all. Because of its relative complexity, Bentham's analysis might seem unfamiliar, but I believe that it tracks some of the informal analysis undertaken, in hard cases, by both lawyers and judges.

Suppose, as seems plausible, that *Roe v. Wade*<sup>61</sup> led to a great deal of political polarization, which would not have occurred if the Court had refused to recognize a right to choose abortion or if the Court had proceeded more cautiously.<sup>62</sup> If so, did *Roe* therefore have bad consequences on balance? That question cannot be answered without assigning weights to its various effects, including immediate legalization of most abortions in the United States. It is also possible that Bentham will conclude that for good consequentialist

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60. See DWORKIN, *supra* note 13.

61. 410 U.S. 113 (1973).

62. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

reasons, some consequences should not be considered at all. As I have suggested, Bentham might ultimately adopt a form of second-order or rule-consequentialism, through which he disregards certain effects of his decisions and even some of his own political convictions.

To see the difficulties here, suppose that in a case involving same-sex marriage, Bentham has three options: (1) vote in accordance with 1A, (2) refuse to rule on the merits, or (3) vote to uphold bans on same-sex marriage. Perhaps Bentham thinks that if he takes the first course, same-sex marriage will be outlawed by constitutional amendment, raising risks of both futility and perversity. Perhaps Bentham knows that if he refuses to rule on the merits, same-sex marriage will be widely permitted in the United States, and sooner rather than later. Perhaps Bentham believes that if he votes to allow bans on same-sex marriage, legislation permitting same-sex marriages will actually be passed relatively quickly; the Court's unfortunate ruling (as Bentham sees it, given his constitutional convictions) will actually promote the achievement of a situation that (in Bentham's view) the Constitution now requires.

How should Bentham assess this possibility? Perhaps Bentham believes that as a matter of principle, same-sex marriages ought to be recognized in a free society. But perhaps Bentham does not much care about his conviction on this point. What matters, to him, is only his belief that the existing Constitution is best interpreted to require states to recognize such marriages.<sup>63</sup> Because he is concerned with the best interpretation of the existing Constitution, Bentham might agree that it is also perfectly legitimate, and entirely appropriate, for a constitutional amendment to disallow same-sex marriages. Whether the prospect of such an amendment counts as a bad consequence cannot be resolved unless Bentham makes supplemental judgments of various sorts.

Bentham might believe, for example, that an amendment is not a relevant consequence, because his own personal views about same-sex marriage are immaterial; his legal judgments matter, not his personal views. If this is his belief, then there is no risk of either perversity or futility. To be sure, Bentham might be willing to consider public outrage in deciding on the appropriate remedy for a constitutional violation, if outrage is relevant to the effectiveness of any such remedy; hence outrage is highly relevant to judicial selection of remedies. But if outrage will culminate in an amendment, perhaps Bentham need not and should not pay attention. If this is so, it is because the ultimate fate of same-sex marriage is none of his concern. This is a plausible view, but it might ultimately require some kind of consequentialist defense—as, for example, in the view that judges will do best if they do not take account of the risk that their decisions will be rejected through amendment.

Bentham must make a range of additional judgments about what other consequences should count. Even if Bentham's preferred ruling on 1A does not

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63. Admittedly, this belief will be based partly on the consequences of failing or not failing to allow same-sex marriages.

produce an amendment, perhaps that ruling will mobilize opponents of the rights or interests in question and demobilize those who endorse those rights or interests, in a way that will disserve some of Bentham's deepest convictions.<sup>64</sup> Perhaps the ruling will alter the nation's political dynamics, promoting the interests of one party and undermining the interests of another. Perhaps the ruling will have no such effects, but perhaps it will sharply increase political polarization, leading to a great deal of hostility between those who approve and those who disapprove of the Court's decision.<sup>65</sup> Bentham must decide whether these consequences matter and, if so, how much weight to assign to them.

Or suppose more particularly that Bentham's crystal ball tells him that if he vindicates proposition 1A, same-sex marriages will occur, and be respected, in all states; that the nation will have an intense and hostile debate about the question; that the Republican Party will greatly benefit from the debate; and that a proposed constitutional amendment to ban same-sex marriages will ultimately fail. How is Bentham to assess these consequences? Perhaps he does not consider these consequences especially bad. Perhaps he does not much like consequences of this kind, but perhaps his commitment to the underlying principle is sufficiently strong that he is prepared to vindicate it so long as same-sex marriages will occur and be respected and so long as the proposed amendment will fail. Perhaps the increase in polarization, and the political consequences, are not sufficient to outweigh the desirable consequences that would follow from the ruling he favors. The simple point is that even if outrage leads to unintended or harmful consequences, Bentham cannot know that he should avoid outrage, because the good consequences might nonetheless outweigh the bad ones.

Or suppose Bentham's crystal ball shows that if he vindicates proposition 1D, capital punishment will cease in the United States for a long time; that the nation will have an intense and hostile debate about the question; that the Republican Party will greatly benefit from that debate; that a proposed constitutional amendment to allow the death penalty will ultimately fail; and that the Court itself will be subject to extremely harsh attacks for at least a decade. How should these consequences be assessed? Perhaps Bentham's commitment to the abolition of capital punishment, on grounds of constitutional principle, is very strong, and perhaps nothing in this catalogue of consequences outweighs that commitment. Why should human beings be executed, in violation of constitutional commands, merely because the nation will be more polarized, some politicians will win and others will lose, and the Court itself will come under assault?

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64. See ROSENBERG, *supra* note 62. Recall that Bentham is a consequentialist; his deepest convictions are a product of his judgments about the effects of various outcomes.

65. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (arguing *Roe v. Wade* produced polarization that reduced possibility of compromise solutions).

As I have suggested, Bentham might believe that certain consequences—such as the prospect of a constitutional amendment or the favorable effects for one or another party—ought not to be counted at all. Bentham himself is likely to think that this conclusion must itself be explained on consequentialist grounds. If one party would produce better consequences than another party, is it so clear that consequentialist judges should ignore that fact? (What if a particular outcome would ensure the defeat of the Nazi Party?) Under ordinary circumstances, consequentialists should be prepared to accept a second-order constraint on judicial consideration of political effects, on the ground that the overall consequences would be bad if judges asked whether their rulings would favor one or another political party.<sup>66</sup> Perhaps the same conclusion ought to hold for consideration of whether a constitutional amendment would ensue, on the ground that the overall consequences would be better if judges did not consider that question.

Bentham is likely to conclude that for good rule-consequentialist reasons, he should restrict the set of consequences to which he attends in deciding how to vote. The more general point is that the consequentialist needs an account of value to know whether the various consequences are good or bad, and to assess the magnitudes of the various effects. The difficulty and contentiousness of the assessment might well lead courts to adopt a general presumption or even a firm rule against considering the effects of public outrage. But notwithstanding this point, it seems clear that in some cases, of which 1A-1F are plausible examples, bad consequences are inevitable, and consideration of those consequences will tip the balance against deciding the case in accordance with the principles to which Bentham otherwise subscribes.

Thus far, then, use of the passive virtues, or of minimalism, will sometimes be the right response to the prospect of public outrage. And in some cases, Bentham might even be willing to defer to the political process so as to avoid especially bad consequences.

#### *4. Judicial fallibility in assessing consequences: of rule-consequentialism and system design*

If Bentham sits on the Supreme Court, however, he might well be nervous about certain forms of consequentialism. Let us relax a central assumption and assume that Bentham has no crystal ball. He likes to think that he is not at sea in deciding whether the public will be outraged, and he has a degree of confidence in his judgments about the likely consequence of that outrage in

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66. Compare the debate over *Bush v. Gore*, 531 U.S. 98 (2000). No one contended that a member of the Court could legitimately take account of whether George W. Bush or Al Gore would be a better president. It is interesting that pragmatic judges, insistent on taking account of consequences, implicitly ruled that consideration entirely out of bounds. See RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001). The puzzle for the committed consequentialist is: why?

particular cases. But Bentham knows that he may be wrong. He is entirely alert to human fallibility, including his own, and he is aware that even if his own judgments are fairly good, others are not so lucky.

There are three independent problems here. The first is a simple lack of information. A projection of the existence of outrage may be a shot in the dark. A projection of the effects of outrage may be more speculative still, not least because judges may rely on information sources that are themselves unrepresentative and therefore biased. The second problem is motivational. Desires often influence judgments,<sup>67</sup> and judges who favor certain results, or who are generally self-protective, may make erroneous judgments about the likelihood and effects of outrage. The third problem involves strategic or opportunistic behavior. If judges are willing to consider public reactions, and are known to be so willing, people will have an incentive to exaggerate their outrage and their likely response, producing a kind of “heckler’s veto” against judicial efforts to interpret the Constitution. Those who have a stake in the outcome, including political entrepreneurs, might well signal, to the Court and to the public, that they will do all they can to resist the Court’s decision.

Suppose that in light of the absence of crystal balls, Bentham thinks that consideration of the risk of public outrage will seriously complicate judicial judgments, without at the same time improving them from the consequentialist standpoint.<sup>68</sup> Bentham would be inclined to consider the following view: Even if *accurate* judgments about the effects of public outrage would be, at least in extreme cases, a legitimate part of judicial thinking, the risk of error means that courts should not consider public outrage at all. Consideration of outrage makes judicial decisions more difficult and unruly. And in the end, consideration of outrage might make decisions worse, not better, on consequentialist grounds.

Suppose that judges will exaggerate outrage or see it when it does not even exist. Suppose that judges will exaggerate the effects of outrage even when it does exist. Perhaps the natural human tendency toward self-protection will make judges risk-averse with respect to outrage. Perhaps they will give undue weight to the possibility that the Court will be sharply criticized in public (not itself an especially bad consequence) or face some kind of political reprisal.

Suppose too that because public attacks on the judiciary will be especially salient to judges in particular, consideration of outrage would produce undue timidity, in a way that will make judges less likely to do what they ought to do.<sup>69</sup> Perhaps the role of an independent judiciary would be seriously undermined by consideration of outrage. On rule-consequentialist grounds,

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67. An illustration is “confirmation bias,” by which people’s judgments about what is true are influenced by their desire to have their own beliefs confirmed. *See, e.g.,* Barbara O’Brien & Phoebe C. Ellsworth, Confirmation Bias in Criminal Investigations (Sept. 19, 2006) (unpublished manuscript), available at <http://ssrn.com/abstract=913357>.

68. *See* Gunther, *supra* note 6, at 5.

69. *See* Scalia, *supra* note 13 (defending firm rules on the ground that they stiffen the judicial spine when the stakes are high).

Bentham would be willing to consider a prohibition on such consideration. History suggests that Bentham might well be right to do exactly that; in the domain of free speech, judges have tended to overestimate the adverse consequences of allowing the airing of dissenting views, especially in wartime.<sup>70</sup> If judges consider outrage and its effects, they might be inclined to exaggerate the problem, thus adding to the excessive caution that judges might already feel when the stakes, and the heat, are high.<sup>71</sup>

There is another possibility. Bentham might ultimately reject the rule-consequentialist argument on the ground that he is only one person and hence powerless to ban consideration of outrage on his own. Even if this is so, a social planner, engaged in system-wide design, might support that ban. Such a planner might attempt to inculcate a strong norm, or even a taboo, against judicial consideration of outrage. Consider the question whether judges should ask whether one or another political party would be benefited by a judicial decision. In most imaginable circumstances, a social planner would not want judges to ask that question; consideration of the political consequences would make the legal system much worse. Perhaps a similar argument justifies a general ban on consideration of public outrage, especially if judges cannot reliably assess the question of consequences. If they cannot do so, consideration of outrage may increase the burdens of decisions while also leading, on balance, to worse results.

The rule-consequentialist argument certainly cannot be ruled out of bounds a priori. In some imaginable worlds, it would be convincing. But in our world, it is not at all clear that this argument can be made convincing, at least not in the abstract. Even if judges have fallible tools for considering public outrage, they are not wholly at sea. If the Court invalidated the use of the words “under God” in the Pledge of Allegiance, public outrage would be entirely predictable; so too if the Court required states to recognize same-sex marriage; so too if the Court dramatically restricted Congress’ powers under the Commerce Clause. At least in cases in which outrage and its consequences are easily foreseen, it is hard to rule its consideration off-limits on rule-consequentialist or systemic grounds. Cases 1A through 1F are plausible examples.

The conclusion is that for consequentialist reasons, widespread public outrage is a legitimate consideration where it would clearly produce serious harm.<sup>72</sup> In rare but important cases, it is appropriate for judges to decline to

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70. See ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941); STONE, *supra* note 13.

71. Cf. Scalia, *supra* note 13, at 1180 (emphasizing the value of rules in allowing judges to stand firm when popular pressure is intense).

72. As I have noted, a judge needs to make supplemental judgments to decide what counts as such; recall here Justice Jackson’s suggestion that his conclusion that courts ought not to enforce the military order to detain Japanese-Americans on the West Coast need not be taken to “suggest that the courts should have attempted to interfere with the Army in carrying out its task.” *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J.,



resolve certain issues, or to rule narrowly and shallowly, if steps of this kind would make such harm less likely to occur. If this conclusion is not especially surprising in light of actual practice, all the better. We are now in a position to understand the grounds for that practice, and also the grounds on which it might be criticized.

##### *5. Kantian adjudication revisited and some speculations about institutional morality*

Let us return in this light to Kantian adjudication, captured in the view that judges should pay no attention to the risks of futility, perversity, or overall harm. Compare those who exercise the social role of doctors. In deciding what treatments to prescribe, doctors do not and should not ask whether extending the life of a particular patient will produce good consequences. Doctors are not permitted to prescribe ineffective treatments or to hasten death on the ground that the world would be better if certain patients died. Nor is it appropriate for lawyers, representing especially bad people, to collude with the prosecution to ensure a conviction and a stiff sentence. Defense lawyers are obliged to provide the best possible defense, and are not supposed to assess, in particular cases, whether the consequences might be better if their clients were convicted.<sup>73</sup>

Perhaps judges are analogous. Perhaps their social role requires them to rule consideration of certain consequences off-limits. Perhaps judges should think in the following way: *My job is to rule as the law requires. In the most extreme cases, I might consider resigning from the bench, or I might consider engaging in a form of civil disobedience. But while exercising judicial power, my sole responsibility is to the law.*

As we shall see, a central problem with this view is epistemic: judges might be unsure what the law requires, and public outrage might be relevant to that question. But the deeper problem is that a consequentialist justification is required for most judgments about what is appropriately considered by either private or public actors. Institutional morality, and role morality more generally, must be defended in terms of its effects. The reason that lawyers should not ask themselves about the consequences of helping a particular client is that the legal system, taken as a whole, is far better if lawyers do not so inquire.

To be sure, the question is not identical for doctors. Human beings should be treated as ends rather than means, and there is a legitimate Kantian objection to a medical decision to hasten a patient's death on consequentialist grounds.<sup>74</sup>

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dissenting).

73. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 6 (1975) (noting that once a lawyer-client relationship with a criminal defendant is established it is "appropriate and obligatory" for the attorney to put on a vigorous defense even if the attorney believes the client to be guilty).

74. Cf. Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence*,

But some consequentialists, as such, can agree that people should be treated as ends; treating people as means is a part of the set of (bad) consequences that count.<sup>75</sup> In any event, judges are more relevantly analogous to lawyers than to doctors. If their decisions really would be futile or perverse, or produce overall harm, they might well take those possibilities into account—unless rule-consequentialist arguments convincingly suggest otherwise. Kantian adjudication, and the distinction between following the law and civil disobedience, are best understood as products of an intuitive form of rule-consequentialism.

There is a broader point here about the moral obligations of those who find themselves in certain social roles. Nearly every public institution is barred from taking account of certain considerations that ought to matter from a consequentialist perspective. Jurors are not supposed to ask whether a particular verdict would contribute to an increase in Gross National Product or find a favorable reception among most of their fellow citizens. Panels for the National Academy of Sciences are asked to say what is true, whatever the consequences, and it would be outrageous to ask such a panel to distort scientific findings in order to avoid public outrage (or to obtain public favor). Members of public institutions—including juries, National Academy of Sciences panels, and regulatory agencies—are not supposed to ask whether one or another conclusion would help their preferred political party, even if members of such institutions believe that the consequences would be much better if their preferred party were helped.

The ban on consideration of certain factors often operates as a moral taboo; but why? In most settings, the overall consequences are much better if institutions refuse to take account of certain consequences. A virtue of assessing institutional morality in this way is that it permits us to explore whether, in fact, any particular taboo can be justified in consequentialist terms.<sup>76</sup>

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*Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (objecting on deontological grounds to convictions of innocent people, even if consequentialism calls for such convictions).

75. See Sen, *supra* note 48, at 1038-39 (arguing for a form of consequentialism that sees rights violations as relevant consequences).

76. Compare Bernard Williams's well-known suggestion that in certain domains those who make consequentialist assessments have "one thought too many." If someone makes such an assessment before deciding to save his wife rather than a stranger from a burning building, we might well conclude that he is having an excessive thought. See Bernard Williams, *Persons, Character, and Morality*, in MORAL LUCK: PHILOSOPHICAL PAPERS, 1973-1980, at 18 (1981). So too, it might be thought, for those in certain institutional roles. If a doctor asks whether a patient is benefiting society before undertaking a diagnosis, or if a judge thinks about the consequences for the unemployment rate of a certain ruling, excessive thinking is taking place. It is worth considering the possibility that Williams's claim is correct, but only for reasons of system design: the consequences are best if spouses do not think that way, and so too for doctors and judges. For a critique of Williams's position, see Elinor Mason, *Do Consequentialists Have One Thought Too Many?*, 2 ETHICAL THEORY &

### 6. *Judicial hedometers and consequentialism writ (very) large*

Outrage is an extreme reaction to a judicial ruling, and it is distinctly associated with a risk of bad consequences. But it is easy to imagine other reactions. Perhaps people would not be outraged; perhaps they would be disgusted, dismayed, frustrated, or disappointed. Alternatively, they might have a range of positive reactions to a ruling. They might be happy, gratified, relieved, thrilled, or exhilarated. Perhaps those positive reactions will produce an array of valuable consequences.<sup>77</sup> If the Court invalidated certain restrictions on the rights of property owners, surely many property owners would be pleased,<sup>78</sup> and their positive reactions might have desirable economic effects. (Perhaps the consequences would be good for economic growth.) When the Court struck down the ban on same-sex relations,<sup>79</sup> many people were undoubtedly elated.

Suppose that all judges had in their chambers a well-functioning “hedometer”—a device that could produce accurate measures of people’s affective reactions to judicial decisions. Should judges consider the hedonic consequences of their rulings, either in themselves or because of their eventual effects? Or suppose that judges could consult contingent valuation studies, in which people stated their willingness to pay for certain judicial decisions.<sup>80</sup> People are willing to pay significant amounts to ensure the existence of pristine areas and animals; “existence value” is an established part of the practice of contingent valuation.<sup>81</sup> Surely people would also be willing to pay significant amounts to ensure the existence of certain legal outcomes; these too have an

MORAL PRAC. 243 (1999).

77. Cf. BREYER, *supra* note 34 (defending validation of affirmative action on the ground that it would promote inclusion and active democracy). Justice Breyer’s point is not that the reaction to the Court’s decision would itself be a good consequence, or produce good consequences, but he certainly offers a consequentialist defense of the Court’s validation of affirmative action.

78. Compare the public reaction to *Kelo v. City of New London*, 545 U.S. 469 (2005). President Bush, for example, reacted to the decision with an executive order instructing the federal government to use eminent domain “for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.” Exec. Order No. 13,406, 71 Fed. Reg. 36,973 (June 23, 2006), available at <http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html>. For a valuable treatment of the controversy, see Janice Nadler et al., *Government Takings of Private Property: Kelo and the Perfect Storm* (Northwestern Sch. of Law Pub. Law & Legal Theory Series, Working Paper No. 07-05, 2007), available at <http://ssrn.com/abstracts=962170>.

79. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

80. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 335-36 (6th ed. 2006).

81. See VALUING ENVIRONMENTAL PREFERENCES: THEORY AND PRACTICE OF THE CONTINGENT VALUATION METHOD IN THE US, EU, AND DEVELOPING COUNTRIES (Ian J. Bateman & Kenneth G. Willis eds., 1999).

existence value. Ought judges to pay attention to any relevant evidence? Such questions are admittedly fanciful, but it is important to figure out why.

For the committed consequentialist, it is tempting to answer that judges should consider all relevant consequences, not merely those associated with outrage. Negative feelings are themselves a social loss,<sup>82</sup> and positive feelings are a social gain. And if negative feelings would result in adverse effects, or if positive feelings would produce desirable effects, they should certainly count. A political leader, deciding whether to support a proposed bill, might well be influenced by negative reactions of this kind, not only because her reelection prospects might be affected, but also because she is a considered consequentialist. If judges have hedometers and crystal balls, and are therefore able to make perfect forecasts, the consequentialist judgment would seem to be that they should reach the same conclusion, considering not merely outrage, but the full array of effects of their decisions.

But for rule-consequentialist reasons, and from the standpoint of system design for real-world judges, that conclusion would be hard to defend. It is an understatement to say that judges lack reliable methods for measuring the hedonic effects of their rulings. Any attempt to try would undoubtedly be subject to distortions, including those distortions that come from the judges' own beliefs and commitments. There are also questions about whether all hedonic effects should count in the social welfare calculus, independently of whether they should count in the judicial calculus: if people would be pleased at the continuation of torture or discrimination, does their pleasure count?<sup>83</sup> If judges attempted the relevant measurement and made its outcome relevant in hard cases, the consequences would probably be worse, not better. If judges should care at all about public reactions, the argument for doing so is strongest in the case of outrage, because outrage is likely to produce the most damaging consequences. The effects associated with other hedonic states are exceedingly difficult to predict.

#### F. Bentham's Conclusion

With respect to public outrage and its effects, Bentham is left with two possible conclusions. Perhaps Kantian adjudication is ultimately right, because blindness to consequences is likely to produce the best consequences. This conclusion might be defended on several grounds. *First*, courts lack reliable tools for deciding whether outrage and adverse effects would be present; they might well produce false negatives and false positives. *Second*, consideration of

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82. See Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 987-89 (2004) (describing how a particular negative feeling—fear—is a welfare setback and should be counted as a cost in cost-benefit analyses).

83. For a discussion with relevant citations, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002).

outrage would undoubtedly lead to strategic behavior, making public outrage partly endogenous to the Court's willingness to take it into account. If people are aware that their outrage will affect the Court, then they will have every reason to produce outrage, creating a heckler's veto. *Third*, consideration of outrage might produce undue timidity, especially in areas in which the Court's role is most important. If widespread outrage is understood to be a legitimate reason for the Court to fail to act, then the Court will uphold government decisions that, by hypothesis, violate the Constitution, simply because people are outraged at what the Constitution commands. If the document is taken as a kind of precommitment strategy<sup>84</sup> designed to check certain actions—however intensely those actions are supported at any moment in time—then consideration of outrage will produce bad consequences, once those consequences are properly understood and weighted.

But another conclusion is possible, and to Justice Bentham it will seem more reasonable still: in unusual (but important) cases, judges are likely to have sufficient information to know whether outrage will exist and have significant effects, and in such cases they rightly hesitate before imposing their view on the nation. This was Bickel's position about certain controversial rulings in his era,<sup>85</sup> and it helps to explain the view that the Court was right not to invalidate the ban on racial intermarriage in the 1950s<sup>86</sup> and wrong to rule so broadly on the abortion question in the early 1970s.<sup>87</sup>

It is easy to imagine analogues today, including invalidation of bans on same-sex marriage, a large-scale expansion of the takings clause,<sup>88</sup> a constitutional attack on references to God in currency and in the Pledge of Allegiance, and sharp limitations on congressional authority under the Commerce Clause (as, for example, through invalidation of popular civil rights and environmental legislation). In at least some of these cases, consequentialist considerations do seem to justify a degree of judicial hesitation. To the extent that judges proceed cautiously in cases of this kind, we are now in a good position to see why.

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84. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

85. See BICKEL, *supra* note 2, at 174-75.

86. See *Naim v. Naim*, 350 U.S. 891 (1955).

87. See *Roe v. Wade*, 410 U.S. 113 (1973); see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985).

88. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (calling for such an expansion).

## II. HUMILITY, INVALIDATIONS, AND THE CONDORCET JURY THEOREM

Now let us relax a key assumption, involving not crystal balls but the judge's level of confidence. Let us imagine, in short, that we are dealing not with Justice Bentham but with Justice Condorcet.

Suppose that Condorcet accepts propositions 1A-1F, but he is not entirely certain that he is correct to do so. Suppose that Condorcet, like Bentham, is casting the tie vote on an evenly divided Supreme Court. Let us stipulate that in these cases, Condorcet is aware that most officials and most citizens disagree with him about the appropriate understanding of the Constitution. If so, Condorcet might find anticipated public outrage relevant not on the consequentialist grounds discussed thus far, but for an epistemic reason: *intense public opposition is a clue that his interpretation of the Constitution is incorrect*. To make the argument most plausible, let us suppose that Condorcet's acceptance of propositions 1A-1F is inconsistent with the shared judgment of the President, almost all members of Congress, and the overwhelming majority of state and local officials and ordinary citizens. Condorcet might hesitate on grounds of humility; his own view about the Constitution's meaning might be wrong.

Of course Bickel, and those who share his confidence in judicial capacities, would have little sympathy for this argument. Recall that Bickel believed that judges, by virtue of their insulation, are in a particularly good position to announce the enduring values that the Constitution should be taken to embody.<sup>89</sup> To the extent that this belief is correct, judges do not have an epistemic deficit that would justify humility. But Bickel's confidence on this count is certainly not universally held; indeed it seems strikingly unself-conscious. Sensible judges are aware of their own fallibility.

A. *The Basic Argument*

To understand Justice Condorcet's hesitation, consider the Condorcet Jury Theorem (CJT).<sup>90</sup> Suppose that members of some group are asked to resolve some question, and each member is at least more than 50% likely to be right. The CJT says that as the size of the group expands, the likelihood that a majority of the group will be right approaches 100%. The CJT helps to explain the "wisdom of crowds,"<sup>91</sup> that is, the frequent and apparently magical correctness of large collections of people in making judgments of fact.<sup>92</sup> If many people are asked some question of fact, with one right answer and one wrong answer, there is a strong likelihood that the majority will be right so long

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89. See *supra* text accompanying note 43.

90. For a sketch, see CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 25-28 (2006).

91. See SUROWIECKI, *supra* note 19.

92. An especially helpful discussion is found in PAGE, *supra* note 19.

as all or most people are more than 50% likely to be right. Technical work shows that a similar result holds for plurality judgments about questions with more than two possible responses.<sup>93</sup>

Here is a mundane example from the constitutional domain: Suppose that there is a dispute about the original understanding of some constitutional provision—say, about whether the Equal Protection Clause, as originally understood, forbids racial segregation. Suppose that Condorcet is interested in the original understanding and that he believes that the Equal Protection Clause was, in fact, originally understood to ban racial segregation. If it turns out that Condorcet's view is an outlier and is accepted by almost none of those who have studied the relevant period, the CJT suggests that Condorcet is probably wrong. And if most specialists are outraged by Condorcet's conclusion, Condorcet has particular reason to hesitate on epistemic grounds.

Alert to the CJT, Condorcet might think the following: *I accept propositions 1A-1F. But most of the public disagrees with me. If crowds are wise, I may well be wrong, at least if the public's disagreement bears on an issue that is relevant to the legal conclusion.* It might be useful to make a distinction here between judgments of fact and judgments of political morality. Suppose that Condorcet is not an originalist and that he believes that the constitutionality of capital punishment turns, in part, on whether that form of punishment has a deterrent effect. On the basis of his own view of the evidence, Condorcet may doubt that there is any such effect. But if most people believe that capital punishment does, in fact, have a deterrent effect, then Condorcet might want to pay careful attention to their beliefs. Perhaps Condorcet is more interested in the views of specialists than in the views of the public at large; but if members of the public have some access to relevant information, the view of a strong majority might bear on the factual question.

By contrast, suppose that the constitutionality of the ban on same-sex marriage does not turn on disputed facts, but instead on a judgment of political morality. Suppose that the question is whether the grounds for discriminating against gays and lesbians, in the particular domain of marriage, are legitimate. Is the CJT irrelevant? It would be if we believe that moral judgments cannot be right or wrong. If we are moral relativists or skeptics, we will not have much interest in the idea of moral truth.<sup>94</sup> But suppose we believe that such judgments are in fact subject to evaluation; if Condorcet's moral views are relevant to his legal conclusions, he had better share that belief. Even if a moral judgment is crucial, the views of the public might provide some clues about what morality in fact requires. If most people reject Condorcet's moral

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93. See Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 283-88, 295-97 (2001). A good discussion can also be found in PAGE, *supra* note 19.

94. A useful, brisk discussion can be found in BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* (1972).

conclusions, he might worry that he is missing something or that his conclusions are wrong.

To come to terms with these possibilities, much will depend on the prevailing theory of constitutional interpretation. If Condorcet's theory is originalist, the views of the public might not much matter; as should be evident and as we shall see in more detail, those views are not likely to tell Condorcet much about the nature of the original understanding. (Nonetheless, the CJT suggests that he should be interested in the views of specialists.) But suppose, with Bickel and many others, that Condorcet's conclusions about the meaning of the Constitution do in fact depend on some judgment of political morality.<sup>95</sup> If so, then the views of others might well be relevant. And indeed, the Court's decision to strike down criminal bans on same-sex relationships had a great deal to do with its perceptions of contemporary social values, in a way that offered at least a hint of an implicit Condorcetian logic.<sup>96</sup>

Suppose that Justice Condorcet believes that in cases 1A-1F, he is obliged to try to bring forward the best justification, in principle, for the fabric of existing law.<sup>97</sup> The public's views might provide valuable information about which justification is best. Of course Condorcet will not be much interested in those views if they are irrelevant to what matters under his theory of interpretation (a point to which I will return). A strong division between the domain of law and the domain of politics and morality would weaken and possibly eliminate the epistemic argument for attending to public outrage.

### *B. Who's Outraged, and What Are They Outraged About?*

To sharpen the question, we need to know what proposition, exactly, the public's outrage can be taken to affirm. The initial objection to the epistemic argument is that public outrage may not be related to any proposition in which Justice Condorcet should be interested.

If the public is outraged by 1A-1F, it is most unlikely to be motivated by its independent interpretation of the Constitution. The outrage is more likely to reflect a judgment about the actual social risks, speaking empirically, that would be created by (for example) same-sex or polygamous marriages or abolition of the death penalty, or about the social values, speaking in purely moral terms, that the existing practices promote. If the outrage is to matter to the Condorcetian judge, it must be because the public's judgments on these points bear on, or overlap with, the judgments that give rise to constitutional interpretation.

This is hardly unimaginable, at least on certain assumptions about Condorcet's constitutional method. Condorcet might think that moral

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95. See, e.g., DWORKIN, *supra* note 13.

96. See *Lawrence v. Texas*, 539 U.S. 558, 572, 576 (2003).

97. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).



considerations are relevant to the proper interpretation; if so, the views of the public might turn out to be relevant. Perhaps the public believes that there is a legitimate and weighty reason to ban polygamy, and perhaps that belief bears on the constitutional issue. Perhaps the public believes that under contemporary conditions, the President needs the authority to commit troops without congressional authorization, and perhaps that judgment of necessity is relevant to the meaning of the Constitution.

Or consider another possibility, involving not the public as such but a relevant segment of it. Perhaps Condorcet should focus not on the public, but on the outrage of prominent officials who are themselves charged with the duty of complying with the Constitution. Perhaps the executive branch, and many legislators, have a considered view about what the Constitution requires with respect to 1A-1F. If the executive branch thinks that there is no constitutional problem with the death penalty, or that bans on polygamy are unobjectionable, then that view may be worth serious consideration.

As I have suggested, a great deal depends on the appropriate constitutional method. If the executive operates on originalist premises, and if Condorcet rejects those premises, then the view of the executive and its level of outrage would appear to be neither here nor there. But suppose that Condorcet is not sure, in the end, of the appropriate constitutional method. On grounds signaled by the CJT, Condorcet should hesitate before rejecting a view, even about method, that is widely held. Perhaps Condorcet's judgment about method will be influenced by the majority of large groups of people; the CJT suggests that it ought to be. And if the widely held view depends on a method that he accepts, he might well attend to it.

Thus far I have assumed that the views of the public are relatively uniform, on the ground that with that assumption, the epistemic argument for attention to outrage is most straightforward. But it is far more likely that the public will be divided. Suppose, for example, that 30% of the public agrees with 1A, that 50% disagrees, and that 20% is unsure; suppose that of those who disagree, only about two-thirds are genuinely outraged. Or suppose that for 1B, 80% disagree, 20% agree, and 70% of those who disagree are outraged. In the face of divisions of this kind, judges will have far more difficulty in deciding whether the epistemic reasons for attention to public outrage are present. The CJT is most helpful when there is a consensus, or something close to it, on a relevant proposition from a group most of whose members are more than 50% likely to be right. I will return to this point below.

### *C. Biases and Cascades*

Sometimes widely held views are uninformative about what is true. If Americans were asked about the distance between Paris and Nigeria, the number of federal statutes invalidated by the Supreme Court, or the weight of the moon, there would be no particular reason to trust the majority's answer. If

most people are likely to blunder, the average answer, or the majority answer, has no epistemic credentials. In the constitutional context, there is especially good reason to think that widespread public judgments deserve little weight.

### 1. *Bias*

Suppose, first, that judgments of the public are less than 50% likely to be right because of some kind of systematic bias. If so, the majority is not likely to be right. On the contrary, the simple arithmetic behind the CJT shows that the likelihood that the majority will be *wrong* approaches 100% as the size of the group expands!<sup>98</sup> To see the point, begin with an area outside of the domain of constitutional law: suppose that most people underestimate the number of people who die from asthma attacks, because the relevant deaths are not cognitively “available,” and the availability heuristic biases their judgments.<sup>99</sup> If so, it is senseless to ask what most people think. Because of a systematic bias, their judgments will be erroneous.

Now turn to the legal domain and consider the constitutional validity of statutory bans on racial intermarriage. It should hardly be controversial to suggest that public disapproval of racial intermarriage is a product of a systematic bias. Insofar as that disapproval bears on the constitutional issue, it is easily understood as biased in light of the relevant equal protection norms, in which Condorcet deserves to have confidence. Very plausibly, public disapproval of racial intermarriage stems from systematic biases with respect to facts as well as values. Why should Condorcet pay attention to people’s error-prone judgments?

The general problem is that if Condorcet has good reason to believe that most people suffer from a kind of prejudice that infects their judgments, he ought not to pay attention to what they think. And in fact, the real Condorcet emphasized that “prejudices” can introduce a distortion that makes his arithmetic unlikely to produce good results: “In effect, when the probability of the truth of a voter’s opinion falls below 1/2, there must be a reason why he decides less well than one would at random. The reason can only be found in the prejudices to which this voter is subject.”<sup>100</sup> Bickel’s emphasis on the consequentialist grounds for concern with public outrage, and his failure to see the epistemic grounds, is best understood as a product of a belief that when the Court and the public diverge, the Court will be right and the public will be wrong.<sup>101</sup> Perhaps Bickel was far too confident on this count, but we can easily imagine cases in which judges rightly distrust the public.

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98. See SUNSTEIN, *supra* note 90, at 29-30.

99. See, e.g., Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 103 (Thomas Gilovich et al. eds., 2002).

100. CONDORCET: SELECTED WRITINGS 62 (Keith Michael Baker ed., 1976).

101. See BICKEL, *supra* note 2, at 23-28.

The question, then, is whether a bias might distort people's judgments with respect to 1A-1F, in which case those judgments have no epistemic value. It would be entirely plausible for Justice Condorcet to worry about the risk of such a bias; 1A and 1E are especially good candidates.

## 2. Cascades

The second problem is that people's judgments may be a product of an informational, moral, or strictly legal cascade, in which case they lack the independence that the CJT requires.<sup>102</sup>

### a. Basic processes

In an informational cascade, most people form their judgments on the basis of the actual or apparent judgments of others.<sup>103</sup> Consider a stylized example. Adams says that in her view, the death penalty deters. Barnes does not have a great deal of private information, but having heard Adams' belief, she agrees that the death penalty deters. Carlton would have to have reliable information in order to reject the views of Adams and Barnes—and he lacks that information. If he follows Adams and Barnes on the ground that their shared belief is likely to be right, Carlton is in a cascade. Davison, Earnhardt, and Franklin may well follow the shared views of Adams, Barnes, and Carlton, at least if they lack private information.<sup>104</sup>

It is easy to imagine moral analogues,<sup>105</sup> in which Carlton follows Adams and Barnes, not because they independently agree, but because they do not have enough confidence in their antecedent moral views to reject the judgments of others. With respect to same-sex marriage, it is plausible to think that moral cascades are pervasive. Many people are outraged by same-sex marriage, not because of their own independent judgments, but because of the real or apparent moral convictions of trusted others. In the domain of terrorist behavior, the moral judgments that produce violence are typically a product of

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102. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006) (exploring the view that courts should take into account decisions of other courts on the Condorcetian ground that they provide valuable information).

103. See Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151, 154-56 (1998).

104. For fascinating experimental evidence, see Robert C. Jacobs & Donald T. Campbell, *The Perpetuation of an Arbitrary Tradition Through Several Generations of a Laboratory Microculture*, 62 J. ABNORMAL & SOC. PSYCHOL. 649 (1961), and Gregory J. Moschetti, *Individual Maintenance and Perpetuation of a Means/Ends Arbitrary Tradition*, 40 SOCIOMETRY 78 (1977).

105. See STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* (3d ed. 2002). Of course moral judgments might well be a product of relevant information, in which case moral cascades are informational cascades too.

social influences;<sup>106</sup> outrage is itself fueled and increased by such influences. There is no need to speculate about the effects of social influences on juries, for an experimental study found that jurors' level of outrage is greatly amplified as a result of deliberative processes.<sup>107</sup> Outrage is demonstrably heightened by the outrage of others, ensuring that groups are far more outraged after deliberation than were individual group members prior to deliberation.<sup>108</sup>

b. Outrage cascades, meaning entrepreneurs, and polarization

Informational and moral cascades might well be responsible for public outrage in response to a judicial ruling. Suppose, for example, that people believe that polygamy harms women, or that same-sex marriage is morally unacceptable, not because of any private information or even judgment, but because they are reacting to the informational signals given by others. We could readily imagine constitutional cascades as well, in which the public's constitutional judgments develop not on the basis of independent assessments of the merits, but in response to the actual or apparent constitutional judgments of others. Within the lower courts, legal cascades do seem to develop among judges.<sup>109</sup>

If precedential cascades can be found within the court system, there is every reason to believe that legal cascades occur within the legal culture, or the public culture in general, as the constitutional judgments of a few help to produce an apparently widespread view in favor of one or another position. If such cascades are widespread or enduring, they might even become self-confirming, as the widespread judgment becomes entrenched within the public and eventually within the law.

Cascades might be spontaneous or deliberately induced. Spontaneous cascades arise because a few early movers express their view in a prominent way; the early movers increase the salience of the Court's decisions and might eventually produce widespread outrage. Alternatively, political actors in the public or private sectors might work very hard to generate a cascade effect, using the popular media to generate a great deal of public opprobrium. It is easy to imagine "meaning entrepreneurs," who take it as their task to inculcate a certain view of constitutional meaning and to spread that view far and wide. In either case, there is no particular reason to trust the apparent judgments of

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106. See Alan B. Krueger & Jitka Malečková, *Education, Poverty, and Terrorism: Is There a Causal Connection?*, 17 J. ECON. PERSP. 119, 119 (2003) (suggesting that terrorism "is more accurately viewed as a response to political conditions and long-standing feelings of indignity and frustration that have little to do with economics").

107. See David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000).

108. *Id.*

109. See Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158 (1999).

large groups on Condorcetian grounds. By hypothesis, such groups are responding to the beliefs of only a few. A precondition for deference to the wisdom of the crowd—a large number of independent judgments—is absent.

There is a related point. Through the process of group polarization, it is well established that deliberation tends to move people to a more extreme position in line with their pre-deliberation tendencies.<sup>110</sup> Imagine, for example, that like-minded citizens are speaking together about a decision of the Supreme Court and begin with a level of disapproval; their discussions may well increase mere disapproval to outrage.<sup>111</sup> When deliberation leads juries to greater levels of outrage, group polarization is often responsible.<sup>112</sup> In general, outrage may well be a product of the kinds of social influences that produce polarization. It follows that if the public is outraged by a Supreme Court decision, group polarization may be responsible. To the extent that this is so, Justice Condorcet will likely conclude that outrage lacks epistemic credentials because it is not a product of the independent judgments that can make large groups wise.

### 3. *Hesitation and humility without the CJT*

Most generally, and even without speaking of a systematic bias or social influences, Condorcet might well want to ask himself this question: is it really the case that many or most members of the public are more likely than not to provide correct answers to legally relevant questions of fact and morality? If morality is pertinent to constitutional adjudication, Condorcet might be puzzled by the suggestion that most people will answer the key questions correctly. Suppose that Condorcet is exploring some constitutional question associated with racial segregation, free speech in a time of war, the Establishment Clause, or discrimination on grounds of sexual orientation. Why—Condorcet might wonder—should I believe that most people are more than 50% likely to provide the right answer to the underlying question?

If Condorcet cannot answer this question, and hence finds the CJT irrelevant, it remains possible that he will hesitate on epistemic grounds before rejecting the views of the majority. He might believe that the issue is comparative: is the public more likely, or less likely, to be right than are federal judges?<sup>113</sup> Does the answer to this question change if the public is genuinely outraged? If Condorcet is an originalist, he will be confident that the public's views do not much matter. If he follows Bickel and thinks that judges have a unique ability to discern evolving values, he will not be greatly interested in

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110. See David Schkade et al., *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915 (2007).

111. See Nadler et al., *supra* note 78 (discussing public outrage over the Court's decision in *Kelo*).

112. See Schkade et al., *supra* note 107, at 1164.

113. Cf. PAGE, *supra* note 19, at 209-11 (suggesting that on factual questions, diverse groups regularly outperform individuals).

what the public thinks. We can therefore find a temporary epistemic alliance (a truce?), in rejecting the views of the public, between originalists and many of those who believe that the Constitution's meaning evolves over time.

But Condorcet might observe that the Court consists of nine lawyers—mostly white, mostly male, mostly wealthy, and mostly old (or at least not young). In light of that fact, he might believe that judges are at an epistemic disadvantage in answering some important questions—perhaps because of their relative lack of diversity,<sup>114</sup> perhaps because they are the ones who are likely to suffer from a systematic bias. If Condorcet thinks in this way, and if he believes that judgments of fact or morality bear on constitutional meaning, he might well be interested in the widely held views of the public.

#### *D. A Practical Problem and Condorcet's Conclusion*

In theory, these points are straightforward. In practice, they create serious problems for those who invoke epistemic grounds for considering public outrage. Suppose that Condorcet is a humble judge, alert to his own fallibility, who wants to consider the views of others unless there is a systematic bias, a cascade effect, or group polarization. Condorcet must decide whether a bias, a cascade, or polarization is at work. Suppose, first, that he has unerring tools for making that decision. If so, there is no particular problem; he knows when the circumstances are right for consulting the public's view. But if Condorcet really does have such tools, he probably knows a great deal, and he might well be able to rely on his own judgment. If so, he need not worry about what other people think.

Suppose, as is far more realistic, that he lacks such tools. To know whether the public suffers from a relevant bias or thinks as it does because of a cascade or polarization, Condorcet has to answer some hard questions—conceptual, normative, and empirical. As a judge, he will likely lack the tools to answer them well. Realistically, his own views about the merits, in cases 1A-1F, will undoubtedly influence his answers. If most people disagree with him, he is likely to conclude that they do, in fact, suffer from some kind of bias. There is a pervasive risk that any judge, asking whether the preconditions for collective wisdom are met, will answer the question affirmatively only when he already agrees with what people think.

Let us imagine that Condorcet can overcome this problem and approach the underlying questions in an acceptably neutral way. Is it possible for him to know when a bias, a cascade, or polarization is at work? In the abstract, we can imagine how he might make progress on that question. Perhaps his theory of interpretation permits him to consider certain judgments to be “biases” in a constitutionally relevant sense. Perhaps he believes that if most people oppose racial intermarriage, or same-sex marriage, on moral grounds, those very

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114. *See id.* at 207-12 (emphasizing comparative accuracy of diverse groups).

grounds are illicit under the proper theory of (say) the Equal Protection Clause. Perhaps the public is split along lines that suggest, or do not suggest, some kind of bias. If a relatively weak group is not outraged, and if an identifiably powerful group is outraged, Condorcet might conclude that a bias is likely to be at work. Perhaps the existence of outrage among powerful groups, whose interests are conspicuously at stake, does not have much epistemic value because of the risk of bias.<sup>115</sup> With respect to cascade effects and polarization, Condorcet must inquire into the social and political dynamics by which the public thinks as it does.

Perhaps Condorcet would like to consult the wisdom of the crowd to obtain an answer to the meta-question whether there is a bias, a cascade, or polarization, but on the meta-question, a bias, a cascade, or polarization may also be at work (and so too on the meta-meta-question). Perhaps Condorcet can work with presumptions of one or another kind. If he is particularly humble, he will find a bias or suspect a cascade or polarization only if he is very firmly convinced that one or the other is present.

All in all, the epistemic argument for considering public outrage emerges as intelligible but quite fragile—more so than the consequentialist argument. For the epistemic argument to have any force at all, public outrage must reflect a consensus on some proposition of fact or value that bears on the legal conclusion. Even if it does so, such outrage may be a product of a systematic bias or the kinds of social influence involved in cascades and polarization. Judges lack good tools for investigating these questions. If there is a consensus within the relevant community on a question of law, or on a question that bears on the right answer to a question of law, then judges might pay attention to that consensus. But in hard constitutional cases, a consensus will be rare, and in any case the judges will be unlikely to want to rule in a way that rejects it.<sup>116</sup>

### E. *Beyond Outrage (Again)*

To the extent that the epistemic point is taken seriously, we might well wonder about the focus on outrage.<sup>117</sup> Perhaps outrage is simply an extreme point along a continuum of disapproval, starting with mild disagreement and

115. Condorcet has to be careful here. What groups count as powerful, and what groups count as powerless, may not be a mere question of fact; it might well have a normative component as well. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (discussing how to distinguish groups that deserve special protection under *Carolene Products*). And if a powerful group is large, Condorcet might hesitate before rejecting its view, notwithstanding its power.

116. See Dahl, *supra* note 3, at 283-91 (showing that courts rarely reject a public consensus); PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., forthcoming 2008).

117. Cf. Posner & Sunstein, *supra* note 102 (arguing that general practice of states and nations has epistemic value, and not concentrating on outrage or any particular affective state).

culminating in outrage. Under the CJT, what matters is numerosity, not intensity. Suppose that 90% of the public believes that the Court would be wrong to strike down bans on polygamous marriages, or to rule that the President lacks the authority to commit troops to combat an apparent threat. At first glance, outrage is not important. What matters is whether the underlying judgment is widely held.

As I have noted, the Court's decision to invalidate a ban on same-sex sodomy seemed to have a great deal to do with a belief that invalidation fit with emerging social values.<sup>118</sup> Thus the Court said that "[i]n the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects,"<sup>119</sup> and the Court emphasized "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives . . . ."<sup>120</sup> And if nonjudicial actors would disagree with a decision, that point might seem relevant too, even if their disagreement is much milder than outrage. Armed with an understanding of some of the arguments thus far, we can better appreciate two time-honored views about the appropriate role of the judiciary in American government.

1. *Thayerism*. Consider in this light the view associated with James Bradley Thayer, which asks judges to defer to any plausible understanding of the Constitution, at least if the understanding came from Congress.<sup>121</sup> Thayer argued that because the American Constitution is often ambiguous, those who decide on its meaning must inevitably exercise discretion.<sup>122</sup> Thayer's argument, in brief, was that courts should strike down national legislation only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question."<sup>123</sup> The question for courts "is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt."<sup>124</sup>

Thayer was concerned about public judgments in general, not about outrage in particular. There is an unmistakable Condorcetian dimension to Thayer's own argument for the view that courts should uphold congressional decisions unless they are unconstitutional "beyond a reasonable doubt."<sup>125</sup> If the public and its representatives, who have their own duty of fidelity to the

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118. See *Lawrence v. Texas*, 539 U.S. 558, 572, 576 (2003).

119. *Id.* at 576.

120. *Id.* at 572.

121. See VERMEULE, *supra* note 17, at 254; Thayer, *supra* note 15.

122. See Thayer, *supra* note 15, at 144 (noting that laws "which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; . . . the constitution often admits of different interpretations; . . . there is often a range of choice and judgment").

123. *Id.*

124. *Id.* at 151.

125. *Id.*



document, have understood a constitutional provision in a certain way, then the Court should pay respectful attention to their views. At the very least, a point of this kind provides a plausible reason for the Court to take account of the constitutional conclusions of other branches of the national government,<sup>126</sup> and perhaps of the constitutional judgments of the high courts of other nations.<sup>127</sup> If other branches have focused squarely on the constitutional question and reached a consensus in favor of one or another view, the Court might well pay attention for epistemic reasons.

2. *Social commitments and the place of consensus.* On an alternative view, the Court should pay close attention to existing social commitments in deciding when and whether to strike down legislation. Indeed, some of the most aggressive invalidations by the Court have been defended on the ground that they reflect widespread social judgments.<sup>128</sup> In some cases, the Court has explicitly referred to such judgments as a basis for invalidating legislation.<sup>129</sup> At first glance, it is puzzling to suggest that the Supreme Court should strike statutes down on this ground; if a statute is inconsistent with public commitments, it is likely to be changed or repealed in any event.<sup>130</sup> But some statutes, especially at the state level, may reflect judgments of fact or morality that are not in line with the views of the public at large. If this is so, and if the Court can reliably measure public convictions, there is a plausible Condorcetian justification for taking them into account, at least on a certain view of constitutional interpretation.

Interesting debates might be imagined between modern Thayerians, who are reluctant to invalidate legislation on epistemic grounds, and those who are willing to do so on those same grounds. Thayerians would be tempted to emphasize the lack of good tools by which judges might measure public convictions; their adversaries would respond that it is extravagant to identify any particular statute, especially at the state level, with the will of the public. What is of interest here is that both sides are likely to raise a simple question: what makes outrage distinctive, if the epistemic argument is the governing one?

If an answer exists, it is that outrage suggests a degree of both confidence and intensity, in a way that strengthens the epistemic credentials of the public judgment. Recall that under the CJT, a successful answer from a large group can be expected if most people are at least more than 50% likely to be right. The

126. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (holding that when Congress has specifically considered the question of an act's constitutionality the "customary deference accorded the judgments of Congress is certainly appropriate").

127. See Posner & Sunstein, *supra* note 102.

128. See, e.g., KLARMAN, *supra* note 3 (defending *Brown* on such grounds); RICHARD A. POSNER, *SEX AND REASON* 324 (reprint ed. 1994) (defending *Griswold* on such grounds); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221, 297-311 (1973) (defending *Roe* on such grounds).

129. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

130. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 181-83 (1980).

key point is that if most people are confident that they are right, we might be able to find that the conditions for a correct group answer are more likely to be present. When people are less confident of a position, their views tend to moderate;<sup>131</sup> it is hard to be outraged without a degree of confidence. Moreover, confidence is correlated with accuracy.<sup>132</sup> Of course confident people are often wrong. But confidence has been found to be “associated with correctness for both individual and group performance.”<sup>133</sup> We might therefore think that when the public is outraged, it is more likely to be confident, and hence its members are more likely to be right.

It is true that these points must be taken with many grains of salt. People might be confident about some highly technical issue of law, but they might not be outraged if judges give the wrong answer, simply because the issue is highly technical and little might turn on its resolution. Alternatively, people might be outraged even though they are not entirely confident, simply because the stakes are so high. Perhaps outrage, when it exists, is associated with a systematic bias or a cascade effect or polarization. Certainly it is plausible to say that those who have been subject to the processes that tend to produce polarization are more likely to be outraged. Hence outrage is an imperfect proxy for confidence, just as confidence is an imperfect proxy for accuracy.<sup>134</sup>

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131. See Robert S. Baron et al., *Social Corroboration and Opinion Extremity*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 537, 538 (1996) (suggesting that confidence produces more extremity, with the implication that a lack of confidence produces moderation).

132. See Reid Hastie, *Review Essay: Experimental Evidence of Group Accuracy*, in INFORMATION POOLING AND GROUP DECISION MAKING 129, 133-46 (Bernard Grofman & Guillermo Owen eds., 1983).

133. See *id.* at 148.

134. The analysis thus far has broader implications. The tension between judicial review and democracy qualifies as such only on the basis of certain understandings of both judicial capacities and democracy itself. The tension is serious if we believe that democratic self-government requires the public, and not the judges, to decide relevant moral questions. But why, exactly, might we think that? The consequentialist and epistemic arguments help to provide answers.

If Thayerism is understood through a Condorcetian lens, a deferential judicial role is best defended on the ground that the public is far more likely to be right than the federal judiciary. An evident problem with this position is that a systematic bias, a cascade, or polarization might have led the public in the wrong direction; an additional problem is that the views of the public may not involve any proposition that bears on constitutional meaning. If Thayerism is understood in consequentialist terms, the argument would be that even if judges have special access to the document's meaning, the results will be better, at least on occasion, if they attend to the public's view. It is certainly open for a consequentialist to believe that self-government is an intrinsic as well as an instrumental good, and that any decision to thwart the democratic will creates a bad consequence by definition. My goal with these brief remarks is not to take sides in this large debate, but to specify some of the grounds on which democratic objections to judicial review might be both defended and challenged.

### III. OUTRAGE AND VALIDATIONS (WITH NOTES ON STATUTORY INTERPRETATION)

#### A. *The Problem*

The public might be outraged by validations as well as by invalidations. Indeed, the public reaction to Supreme Court decisions seems to depend on the merits, not on whether the Supreme Court has upheld or struck down the decisions of the elected branches. If the Court ruled tomorrow that racial segregation by state governments is constitutionally unobjectionable, an intense reaction would be entirely predictable. If the Court said next week that the Bill of Rights does not apply to the states, the public would indeed be outraged. Let us imagine, then, a Justice Thayer, who accepts the following propositions:

2A. *The President's national wiretapping program*<sup>135</sup> *does not violate the Constitution.*

2B. *The Establishment Clause does not apply to the states; it follows that mandatory school prayer, at the state level, does not violate the Clause.*

2C. *The Takings Clause allows the government to characterize any minimally plausible justification as a "public use," so as to allow it to take private property so long as compensation is paid.*<sup>136</sup>

Justice Thayer accepts these propositions because he is a good Thayerian; he does not believe that the Court should invalidate acts of government unless the constitutional violation is plain.<sup>137</sup> That belief might itself stem from a number of possible foundations. Perhaps Thayer is a democrat, one who believes that the people have a right to govern themselves, and who thinks that judicial use of ambiguous constitutional provisions to invalidate legislation is in tension with the very idea of democratic self-government. Perhaps more promisingly, we might suppose that Thayer is a consequentialist who believes that things will simply be better if judges adopt a general posture or rule of restraint.<sup>138</sup> Let us simply stipulate that Thayer has been led to his Thayerism, and hence to propositions 2A-2C, on rule-consequentialist grounds.

Assume that the public would be outraged by any of these decisions. It should be immediately clear that cases 2A-2C are importantly different from cases 1A-1F, because the former involve validation of government decisions. How, if at all, should Justice Thayer take account of the prospect of public

135. For a discussion, see Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, SUP. CT. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=922406>. Thayer himself emphasized the need to defer to Congress, not state governments or the President; I understand Justice Thayer, and Thayerism more generally, to suggest a broader posture of restraint.

136. *Cf. Kelo v. City of New London*, 545 U.S. 469 (2005) (offering a broad interpretation of the "public use" requirement).

137. *See* Thayer, *supra* note 15.

138. *See* VERMEULE, *supra* note 17 (defending a form of Thayerism on consequentialist grounds).

outrage? How, if at all, should his analysis differ from that of Justices Bentham and Condorcet in cases 1A-1F?

If these questions seem puzzling and exotic, we might note that outrage does play an explicit role in several areas of constitutional law, and here the Court has used outrage as a reason for invalidating rather than upholding legislation. In an early substantive due process case, the Court asked whether a disputed practice would “shock[] the conscience” in a way that would “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . .”<sup>139</sup> In deciding whether a punishment is cruel and unusual, the Court refers to “evolving standards of decency,”<sup>140</sup> an inquiry that is meant to attend to public judgments about what kinds of punishments are morally acceptable or instead beyond the bounds of “decency” (and in that sense outrageous).

There seems to be an implicit Condorcetian dimension to these rulings, with the suggestion that widespread moral disapproval—and it is agreed that the disapproval needs to be widespread<sup>141</sup>—is a measure of the moral acceptability of the practice. Insofar as the Court refers to evolving social values in due process cases,<sup>142</sup> its decisions can also be taken in Condorcetian terms.

### B. *Thayerians and Outrage*

Let us stipulate that Thayer is a consequentialist and that he is not committed to Kantian adjudication as a matter of abstract principle. Indeed, let us stipulate that Thayer is a Thayerian for consequentialist reasons; he believes that if judges uphold legislation whenever there is reasonable doubt, the consequences will be good.<sup>143</sup> As a consequentialist, Thayer is certainly willing to pay attention to outrage, at least if it will have harmful effects. But at first glance, cases 2A-2C are importantly different from cases 1A-1F because even if outrage is present, it has a simple outlet: the public can turn its outrage into legislation. If the public opposes the President’s national wiretapping program, it can ban it. If the public wants to forbid school prayer, it can do so, certainly at the state level and potentially through national legislation as well; Thayer himself would be reluctant to invalidate national legislation to this effect. If state or national governments seek to impose fresh restrictions on public takings of private property, they can do exactly that. I will qualify this argument shortly. But because public corrections are possible, the

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139. *Rochin v. California*, 342 U.S. 165, 169 (1952).

140. The test originated in *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

141. See *Roper v. Simmons*, 543 U.S. 551, 564-68 (2005) (evaluating whether there was truly a “national consensus” against imposition of a juvenile death penalty and finding it persuasive that a majority of states had rejected such a penalty).

142. See *Lawrence v. Texas*, 539 U.S. 558, 572, 576 (2003).

143. See VERMEULE, *supra* note 17, at 239.

consequentialist arguments for taking account of outrage are, at the very least, much weakened in the case of validations.

Now turn to the question of humility. Even if Thayer thinks that he might be wrong, the stakes are significantly lower than in cases 1A-1F, again because there is a democratic corrective for Thayer's error. Indeed, Thayer's willingness to validate legislation, in cases 2A-2C and more generally, might itself be influenced by a kind of rough-and-ready Condorcetianism. If legislation has been enacted, the public probably favors it, or at least does not greatly disapprove of it; and if the public approves, Thayer has some reason to believe that the legislation is justified in terms of facts and values (supposing again a theory of interpretation for which public approval has epistemic value). Of course well-organized private groups might be responsible for legislation, and the public might not care or might even disagree with it; but as a humble judge, Thayer is probably unwilling to ask hard questions about that possibility. The major point is that even if the CJT does not strongly support Thayerism, a Thayerian judge can rest content with the knowledge that if the public is truly outraged by validation of legislation, it can respond with an amendment or repeal.

If Thayer puts the consequentialist and epistemic points together, he is not likely to be affected by the prospect of public outrage at validations. The consequences of validations that produce outrage are not likely to be especially damaging, and because he is dealing with measures that have passed through democratic channels, the existence of outrage will usually lack much epistemic weight.

The question of statutory interpretation can be understood in similar terms. Perhaps people would be very upset if the Court ruled that the Endangered Species Act forbids some important project, or that the Civil Rights Act of 1964 bans affirmative action. But even if such rulings produce outrage, the public can respond with legislative change. For this reason, the consequentialist objection is greatly weakened. The epistemic argument is more difficult. Suppose that a statute is genuinely ambiguous and that all or almost all members of the (pertinent) community believe that it should be construed in a certain way.<sup>144</sup> For Condorcetian reasons, it may make sense to pay attention to the views of relevant others.<sup>145</sup> But on standard views about statutory interpretation, public outrage is likely to offer no relevant information at all.

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144. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), famously holds that courts must respect agency interpretations of ambiguous terms, so long as those interpretations are reasonable. *Chevron* can therefore be understood as a testimonial to judicial humility in the face of statutory ambiguity, not for Condorcetian reasons, but because of a belief in the superior accountability and technical specialization of the relevant agency.

145. Cf. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) (arguing that statutes might be interpreted by reference to the preferences of the current legislature).

Suppose that the public wants to permit affirmative action, or to limit the reach of the Endangered Species Act. Its desires may well tell us exactly nothing about the proper interpretation of the relevant statutes.<sup>146</sup>

Of course the prevailing theory of statutory interpretation is critical here. If questions of political morality matter to that theory, public outrage might be pertinent.<sup>147</sup> If the views of the current legislature are relevant, an outraged legislature, and hence an outraged public, might be worthy of attention.<sup>148</sup> But if the judge's view is a product of the statutory text, structure, and history, the views of the public, and its likely outrage, would seem uninformative. And to the extent that public outrage does offer some kind of signal that the Court may be wrong, there is far less reason for concern, because the Court's error can be corrected. In any case, it is not clear that in the domain of statutory interpretation, public judgments provide any relevant information about whether the Court is correct.

### C. Complications

These points are not necessarily decisive. It is often difficult to enact new legislation or to amend statutes, even when there is general agreement that such legislation or such an amendment is a good idea. In the constitutional domain, a consequentialist judge might be somewhat more inclined to strike down an enactment if validation would produce widespread outrage; and if the views of the public do have epistemic value, perhaps outrage at the prospect of validation could operate as a tie-breaker or somewhat more. The democratic objections to judicial invalidation seem weakened if the public would be greatly disturbed by validation.<sup>149</sup> As we have seen, the Court does, in some areas of the law, consider widespread public outrage as a reason to invalidate legislation.<sup>150</sup>

In the abstract, the idea of outrage at validations might seem puzzling, but it is certainly imaginable that officials in one state, or a few states, might take action of which the general public greatly disapproves.<sup>151</sup> Such officials might, for example, take private property,<sup>152</sup> or impose restrictions on the right to choose abortion (say, in cases of rape or incest), in a way that triggers genuine

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146. *But see id.*

147. *See* DWORKIN, *supra* note 97.

148. *See* Elhauge, *supra* note 145.

149. Consider *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court struck down a ban on the use of contraceptives by married people, a ban that was limited to two states and that was widely regarded as indefensible or even outrageous within the nation. *See* POSNER, *supra* note 128, at 326. In a federal system, it is entirely predictable that one state will sometimes engage in actions that other states will find outrageous.

150. *See supra* notes 139-41 and accompanying text.

151. *See* Nadler et al., *supra* note 78 (considering such widespread disapproval with respect to *Kelo v. City of New London*, 545 U.S. 469 (2005)).

152. *See id.*

outrage. Perhaps legislation in one or another state is itself a product of a cascade effect or of group polarization, depriving such legislation of epistemic credentials. In invalidating the decisions of one or a few states, the Court might be vindicating widespread judgments against a small minority. Validation of legislation generally perceived to be outrageous might also trigger fears of other abridgements of important rights and interests; imagine a decision to validate a restriction on the right to use contraceptives. In most real-world cases, of course, the public is likely to be divided, and a national consensus in opposition to the law that is being validated should be rare.<sup>153</sup> But even if most of the public would be outraged by validation, it might not be so easy to produce a legislative corrective, at least not if a particular state is a genuine outlier or if a well-organized set of interests opposes that corrective.

In a very hard case of statutory interpretation, perhaps a consequentialist judge, or a humble one, should construe a statute so as to avoid public outrage; perhaps that is the right course when the judge is otherwise in or close to equipoise.<sup>154</sup> But if judges cannot reliably decide whether outrage would be present, it is far more plausible to say that they should simply refuse to consider the prospect of outrage at all.

It follows that in the context of validations and statutory interpretation, there is a strong rule-consequentialist argument for refusing to consider public outrage in deciding what to do. If courts refuse to take account of outrage, they need not undertake an inquiry that might be difficult. As we have seen, judges may not have excellent or even decent tools for knowing whether outrage would be present, or what consequences would result from outrage, or what epistemic credentials outrage might have. It follows that Justice Thayer will be inclined not to take account of outrage and will vote his convictions, as expressed in 2A-2C.

#### IV. ORIGINALISM, MORAL READINGS, AND OUTRAGED MINORITIES

I have emphasized that the argument for considering outrage is sensitive to the prevailing theory of interpretation. If a judge accepts originalism or is committed to moral readings of the Constitution, the analysis must be somewhat different. It must be similarly altered if outrage is felt by a minority rather than a majority.

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153. *But see Griswold*, 381 U.S. 479. Validation of the statute in *Griswold*, even in 1965, would have met widespread public disapproval. *See* POSNER, *supra* note 128, at 324-31.

154. *Cf.* DWORKIN, *supra* note 97, at 148.

### A. Originalism

Assume that Justice Berger is an originalist; she believes that the meaning of the Constitution is settled by the original understanding of the ratifiers. She accepts the following propositions:<sup>155</sup>

3A. *The Second Amendment forbids (some or all) existing gun control legislation.*

3B. *Article II, section 1 prohibits the creation of independent regulatory agencies, such as the National Labor Relations Board, the Federal Communications Commission, and the Federal Reserve Board.*

3C. *The Equal Protection Clause does not ban discrimination on the basis of sex.*

Let us suppose too that Berger is deciding how to cast the deciding vote on an evenly divided Supreme Court. Suppose finally that under Berger's approach to constitutional interpretation, *stare decisis* is not controlling; when the Court's precedents are egregiously wrong, as she believes that they are in these domains, the Constitution should prevail, not the precedents.<sup>156</sup> At the same time, Berger believes, in cases 3A-3C, that a ruling would produce a great deal of public outrage.

#### 1. Originalism and consequences

Berger's reaction to the prospect of outrage might well depend on why, exactly, she is an originalist. Suppose that she is an originalist because of her judgment about what is entailed by the very idea of interpretation.<sup>157</sup> She believes that attention to the original understanding is required if judges are to "interpret" the founding document rather than to make it up. If so, she is unlikely to care about intense public opposition. Judges are obliged to interpret the document, and the results do not matter.

But by virtue of her theory of interpretation, Justice Berger is not *compelled* to reason in this way. She might believe that originalism is entailed by the very idea of interpretation, but her theory of adjudication might be consequentialist, in the sense that she believes that actions, including judicial actions, must be judged by reference to their consequences. Justice Berger might therefore be interested in the possibility of exercising the "passive virtues." On this view, the appropriate steps, by judges who are originalists, are

155. I do not mean to suggest that these positions are, in fact, compelled by the original understanding.

156. This is apparently Justice Thomas's view; Justice Scalia has said that Justice Thomas "doesn't believe in *stare decisis*, period. . . . [I]f a constitutional line of authority is wrong, [Thomas] would say 'Let's get it right.' I wouldn't do that." Stephen B. Presser, *Touting Thomas*, LEGAL AFF., Jan.-Feb. 2005, at 68, 68-69, available at [http://www.legalaffairs.org/issues/January-February-2005/review\\_presser\\_janfeb05.msp](http://www.legalaffairs.org/issues/January-February-2005/review_presser_janfeb05.msp).

157. See Prakash, *supra* note 36, at 2210-11.



legitimately influenced by the consequences of those steps. Such an originalist would not be inclined to *defy* the original understanding in order to avoid bad consequences. But she might seek to avoid the key questions on grounds of justiciability—certainly if the invocation of those grounds is defensible, or (preferably) right, on originalist grounds. In short, Justice Berger might have a nonconsequentialist theory of interpretation but also a consequentialist theory of adjudication, at least for purposes of deciding whether to exercise the passive virtues.

Consider a different type of originalist, one who considers originalism to be “the lesser evil,”<sup>158</sup> in the sense that it will produce better results than any other approach to interpretation. For such an originalist, the justification of originalism is itself consequentialist. On this view, originalism is likely to produce the best outcomes, all things considered. Consider the illuminating suggestion by Randy Barnett, a committed originalist: “Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer.”<sup>159</sup>

Originalists who defend their approach on this consequentialist ground might consider public opposition to be highly relevant. If Justice Berger is an originalist for consequentialist reasons, she is unlikely to favor originalism though the heavens may fall. The consequentialist considerations that justify originalism might lead this kind of originalist to try to avoid rulings of the sort indicated by 3A-3C, certainly if the consequences of such rulings would be very bad. Such an originalist would not interpret the Constitution in a way that violates the originalist understanding, but here too justiciability doctrines might be invoked to prevent the most radical rulings. Of course this result is not compelled. An originalist might believe that an insistence on originalism, producing 3A-3C, would yield good results, not bad ones, even if the public is outraged. The only point is that certain kinds of originalists would be entirely willing to take account of consequences and hence of outrage.

## 2. *Originalism and epistemology*

For originalists of any kind, humility and the CJT are much less likely to be important considerations. Why should an originalist care if most Americans believe that the Constitution allows gun control legislation or independent regulatory commissions, or forbids sex discrimination? The public consensus tells us little and probably nothing about the original understanding. Surely judges should pay attention if other originalists read the history in a way that is

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

159. Posting of Randy Barnett to Debate Club, *Constitution in Exile?*, [http://legalaffairs.org/webexclusive/debateclub\\_cie0505.msp](http://legalaffairs.org/webexclusive/debateclub_cie0505.msp) (May 3, 2005, 1:43 P.M.).

consistent with propositions 3A-3C. But public outrage, as such, is neither here nor there.

The only qualification arises if other branches of government have decided, on originalist assumptions, to reject propositions 3A-3C. Perhaps originalists should also be Condorcetians, not in the sense that they should care about the views of the general public, but in the sense that they ought to attend to the consensus of those who use their preferred method. Here too, of course, a systemic bias, a cascade effect, or group polarization might be at work. If members of other branches reject 3A because of such a bias, or if their judgment on 3C is a result of a legal cascade, there is no reason to pay careful attention to their opinions.

### *B. Moral Readings*

Suppose that propositions 1A-1F are supported by a “moral reading” of the Constitution, which asks judges to treat the founding document as establishing moral aspirations, which they should attempt to place in the best possible light, consistent with respect for the past.<sup>160</sup> Much of constitutional law does seem to reflect some kind of moral reading, for judicial judgments about the best moral understanding of constitutional principles play an occasionally large role in the Court’s conclusions.<sup>161</sup> For judges who are committed to moral readings, should public outrage receive consideration? Let us consider how Justice Hercules,<sup>162</sup> a moral reader of the Constitution in the (fortunate?) position of being able to resolve cases on which his colleagues are split 4-4, would approach the consequentialist and epistemic arguments.

At first glance, Justice Hercules is most unlikely to be impressed by those arguments. The point of the moral reading is to say (for example) how liberty and equality are best conceived in light of our practices; often the moral reading will run in the face of the public will, and sometimes the moral reading will produce outrage (if only because the existing practice is outrageous). For moral readers, the problems of school segregation, censorship, and sex discrimination are likely to loom large; and in all of those domains, the Court was willing to risk public outrage.<sup>163</sup> If Justice Hercules attends to public outrage, he might not give proper moral readings at all; consider 1A-1F in this light. There is a further difficulty. Those drawn to moral readings tend to be

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160. See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

161. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

162. See DWORKIN, *supra* note 97, at 239.

163. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (sex discrimination); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (censorship); *Brown*, 347 U.S. 483 (school desegregation).

deontologists, not consequentialists.<sup>164</sup> Insofar as attention to outrage is justified on consequentialist grounds, the justification would seem uninteresting to those who endorse moral readings.

But this conclusion may be premature; both consequential and epistemic reasons may be available. Justice Hercules should not welcome futile or self-defeating judicial rulings. As we have seen, deontologists do, and should, recognize the possibility of consequentialist overrides. It follows that if the consequences of outrage are bad enough, Justice Hercules should pay attention to them. It is certainly possible for judges to favor moral readings of the Constitution, and to see such readings in deontological terms, while also holding a consequentialist account of adjudication. The “all deliberate speed” formulation need not be rejected by those who believe that racial segregation is intrinsically wrong.

Moral readers might also be persuaded that insofar as public outrage is a signal of widely held moral convictions, it may well be worth attention for epistemic reasons, subject to the qualifications noted above. Suppose that the relevant moral readers are humble; they believe that the Constitution’s broad phrases should be read in the best constructive light, but they also agree that the Court’s own answers are fallible. Humble readers, moral or otherwise, might pay attention to the public’s judgments, perhaps especially if those judgments are intensely held. If the public’s conception of liberty and equality is consistent with some practice, and if judicial validation of that practice would produce outrage, judges might pay attention to those facts.

Of course moral readers will be alert to the risks catalogued above. The public’s judgment might not show support for any relevant proposition; the public might be subject to a systematic bias; members of the public might be in a cascade, or might be affected by group polarization. But if moral readers lack confidence in their own moral judgments, they might be willing to attend to public judgments on epistemic grounds.

### C. *Outraged Minorities and Actual Practices*

The discussion thus far has assumed that the public as a whole would be outraged. This is a useful simplifying assumption, because it makes the consequentialist and epistemic issues more tractable. But most of the time, it is far more likely that public outrage will be limited to a minority and that most people will either approve of the Court’s decision or at least not be outraged by it. When a minority is outraged, its reaction is not likely to be translated into law. How does all this bear on the normative question?

Begin with the Court’s actual practices. There are few cases in which the Court’s decision produced outrage within a strong majority of the public; the

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164. See DWORKIN, *supra* note 160; FLEMING, *supra* note 41.

most obvious examples are the Court's flag-burning<sup>165</sup> and school prayer decisions<sup>166</sup> and, even there, no constitutional amendment has come close to ratification. The Court's *Kelo* decision<sup>167</sup> attracted widespread disapproval,<sup>168</sup> but most of the Court's highly controversial decisions—involving school segregation<sup>169</sup> and abortion<sup>170</sup>—have spurred real outrage in segments of the public, not the nation as a whole. This fact suggests either that the Court is highly sensitive to the risks associated with widespread outrage, or more plausibly that political controls on the Court ensure that the Justices rarely (seek to) produce outrageous results. Because of the appointments process,<sup>171</sup> the justices are controlled, to some extent, by popular will; it is therefore most unlikely that they would favor an interpretation of the Constitution that all or most of the public would regard as not only wrong but outrageously so.

How do the consequentialist and epistemic arguments fare in the context of views intensely held by a minority? The epistemic point is easier to handle. Justice Condorcet is not likely to be much moved by learning that a minority of the public strongly rejects his reading of the Constitution. If the majority agrees with him, or is indifferent, the diversity of views within the community deprives the judgments of the minority of much in the way of epistemic credentials. Of course matters would be different if the minority consisted solely of neutral people, or of specialists whose views were entitled to particular respect. But minority opposition, even if intensely felt, will not greatly influence Condorcet.

The consequentialist arguments are less significantly affected. For Justice Bentham, the question is whether outrage, localized as it may be, is likely to ensure futile or perverse outcomes, or overall bad consequences. If a minority is willing and able to resist a proposed remedy, the Court would do well to consider a remedy that will be more effective. If a minority is able to ensure that a result will be counterproductive, the analysis is not radically different from what it is if a majority is involved. The major difference is that if a majority approves of the Court's decision, or does not disapprove, the likelihood of bad consequences is reduced—not eliminated, but reduced.

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165. See *Texas v. Johnson*, 491 U.S. 397 (1989). As many as 79% of Americans disapproved of this decision. Nadler et al., *supra* note 78, at 16.

166. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). The rate of disapproval of the Court's school prayer decisions was as high as 67% in the period 1974-2005. Nadler et al., *supra* note 78, at 16.

167. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

168. See Nadler et al., *supra* note 78, at 16 (reporting 80-90% disapproval rate).

169. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Here the disapproval rate ranged from 40-45%. Nadler et al., *supra* note 78, at 16.

170. See *Roe v. Wade*, 410 U.S. 113 (1973).

171. See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005).

## V. NONJUDICIAL ACTORS: BENTHAM AND CONDORCET IN THE DEMOCRATIC BRANCHES

My emphasis throughout has been on the question whether judges should attend to public outrage. In this final Part, I explore two related questions. The first is the relationship between popular constitutionalism and the arguments thus far; the second involves the implications of the argument for elected officials.

### A. *We the People*

In recent years, many people have expressed interest in “popular constitutionalism”—in the view, with some roots in the founding period, that the meaning of the Constitution might be ultimately settled by *We the People*, not by the federal judiciary.<sup>172</sup> On this view, the interpretations of the Supreme Court lack finality; the public is entitled to have the ultimate say, not because it has ratified any constitutional amendment, but because it has settled on its own view about how the document is best understood. A related but more modest position emphasizes that other branches of government have an independent duty to be faithful to the Constitution, and that this independent duty calls for a degree of interpretive independence.<sup>173</sup>

On a prominent version of this view, courts systematically “underenforce” the Constitution, because of their awareness of their own institutional limitations.<sup>174</sup> It follows that the President and Congress might disapprove of (say) affirmative action or bans on same-sex marriage on constitutional grounds, and take their own steps to prevent, and in a sense to invalidate, those same practices. When elected officials read the Constitution more expansively than does the Court, they might be acting perfectly legitimately; they do not face the same limitations that the Court does, and hence they are entitled to be more aggressive with it. It is not difficult to find examples of situations in which public officials, animated by their own views of constitutional commands, extended constitutional barriers in ways that the Supreme Court refused to do.<sup>175</sup>

172. See KRAMER, *supra* note 4.

173. See FLEMING, *supra* note 41.

174. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

175. Note, for example, President Reagan’s executive orders on federalism and takings. Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987) (requiring that executive agencies follow certain enumerated principles of federalism and consult states to the extent practicable before pursuing policies that would limit state “policymaking discretion”); Exec. Order No. 12,630, 53 Fed. Reg. 8859 (Mar. 15, 1988), *reprinted in* 5 U.S.C. § 601 (2000) (requiring executive agencies to conduct takings impact assessments when making regulatory decisions that may impact private property rights).

Perhaps public outrage can be seen as an especially dramatic exercise in popular constitutionalism, not least when it is likely to have concrete consequences. And when outrage is expressed by the political branches, they may well be exercising their own independent interpretive authority, especially when they ask for more severe constitutional barriers than the Court has proved willing to erect.<sup>176</sup> If we emphasize the epistemic argument for judicial attention to outrage, we might see that argument as embodying, even calling for, a kind of popular constitutionalism, or at least attention to the independent interpretive judgments of other branches.

I do not mean to speak directly here to the controversies over popular constitutionalism and the distribution of interpretive authority among the branches of government. Let us simply notice that when there is popular “backlash,” a great deal depends on its grounds, at least if the goal is to assess the question whether it can be seen as an exercise in popular constitutionalism. Perhaps the public’s judgment is not in any sense rooted in a judgment about constitutional meaning. Perhaps its outrage is a reflection of some kind of policy-driven, constitution-blind opprobrium. If a cascade or group polarization is at work, the epistemic argument loses much of its force; so too if there is a systemic bias. On the other hand, “backlash” might legitimately be seen as constitutionally relevant insofar as it reflects a widespread and considered judgment about the merits of the constitutional issue. Here, as elsewhere, that question cannot be resolved without an account of constitutional interpretation and some information about what, exactly, lies beneath public outrage.

### B. Elected Officials

My emphasis throughout has been on the resolution of legal issues, not issues of policy. Might the consequential and epistemic concerns play a role in the decisions of elected officials who are resolving policy issues? Suppose that under the law, such officials have considerable room to maneuver. They are certainly entitled to take a position on same-sex marriage, abortion, affirmative action, and gun control; and within a certain range, they are permitted to act as they see fit. How, if at all, do the consequentialist and epistemic concerns matter to them? It is important to explore this question, because as we shall see, the answer helps to illuminate some long-standing disputes about the appropriate understanding of political representation.

As a matter of actual practice, public outrage is certainly relevant to the decisions of many public officials, including presidents, legislators, governors, and mayors. If they anticipate outrage in reaction to their decisions, they will often be deterred, even if they think that the outrage is unjustified or worse. Of course there is a large debate about whether representatives should make

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176. For a recent example, see *Kelo* and the public reaction thereto, as explored in Nadler et al., *supra* note 78.

independent judgments or instead follow the views of those whom they represent.<sup>177</sup> Return in this light to cases 1A-1D; suppose now that the President of the United States holds the relevant views as a matter either of constitutional interpretation or of fundamental principle. He might hesitate to press those views for either of the two now-familiar reasons. He might believe that if he acts in accordance with his convictions, he will produce bad consequences. Alternatively, he might believe that his own judgments are unreliable, simply because so many people disagree with him.

Suppose, for example, that an American president concludes that same-sex marriages should be permitted; he believes that there is no good reason to ban such marriages, and indeed he thinks that existing bans are a reflection of unjustified prejudice and hostility. He might nonetheless hesitate before pressing his view in public or through legislation. He might fear that such an insistence would compromise the ultimate goal of producing same-sex marriage. Perhaps an evolutionary process, involving a high degree of social learning, is the best way of achieving his preferred end. Perhaps his own approval would have a helpful influence on that process, but perhaps it would compromise his other important goals, including those relating to national security, energy independence, and income tax reform.

Whether or not a court should be concerned about its limited political "capital," a national leader certainly has to decide whether and when to spend that capital. If a president has an assortment of projects, he might well hesitate before pressing a commitment that will generate public outrage. President Clinton's early effort to allow gays and lesbians to serve in the military produced a firestorm of protest, in a way that had serious adverse effects on his first year in office.<sup>178</sup> Perhaps it would have been better, in light of President Clinton's own goals, for him to have proceeded more slowly or not at all.

Consider here Abraham Lincoln's practices with respect to slavery. Lincoln always insisted that slavery was wrong.<sup>179</sup> On the basic principle, Lincoln allowed no compromises. No justification was available for chattel slavery. But the fact that slavery was wrong did not mean that it had to be eliminated immediately, or that African-Americans and whites had to be placed immediately on a plane of legal equality. In Lincoln's view, the feeling of "the great mass of white people" would not permit this result.<sup>180</sup> In his most striking formulation, Lincoln declared: "Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A

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177. See HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

178. See JANET E. HALLEY, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999).

179. See BICKEL, *supra* note 2, at 64-68; HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* (1959).

180. BICKEL, *supra* note 2, at 66 (quoting II *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 256 (Roy P. Basler ed., 1953) (speech at Peoria, Illinois, Oct. 16, 1854)).

universal feeling, whether well or ill-founded, can not be safely disregarded.”<sup>181</sup>

Evidently Lincoln believed that efforts to create immediate social change in this especially sensitive area could have unintended consequences or backfire, even if those efforts were founded on entirely sound principle. It was necessary first to educate people about the reasons for the change. Passions had to be cooled. Important interests had to be accommodated or persuaded to join the cause. Issues of timing were crucial. For Lincoln, rigidity about the principle was combined with caution about introducing the means by which the just outcome would be achieved. As Bickel emphasized, the point is highly relevant to constitutional law, especially in areas in which the Court is ruling in a way that large numbers of people will reject.<sup>182</sup> It is easy to imagine why many elected officials might think in the same general terms suggested by Lincoln.

Alternatively, the President might think that if most people do see a good reason for some social practice, their views are entitled to respect. Indeed, an elected official may well have stronger epistemic reasons to consider the views of the public and the prospect of outrage than do judges, simply because the views of the public are far more likely to bear on the particular questions that concern the official. Suppose that an official believes that affirmative action should be abolished tomorrow, or that abortion should be banned, but that a strong majority of the public disagrees. The official might conclude that the public has relevant information on questions of both fact and value, and that she should hesitate before acting in a way that violates public convictions.

Here as well, however, the risks of systemic bias, cascade effects, and polarization introduce important cautionary notes for politicians as well as for judges. A conscientious leader will inquire into the relevant risks in deciding whether to consider the possibility of outrage. The most general point is that an understanding of the consequentialist and epistemic arguments helps to explain debates over the concept of representation.<sup>183</sup> Should politicians attempt to implement the public will, or should they understand themselves as having considerable discretion to depart from it?<sup>184</sup> Those who are skeptical about official discretion, and want to cabin it, might have an epistemic point in mind. Perhaps the public is likely, on some or many questions, to know a great deal more than the relevant officials. Alternatively, they might believe, with Lincoln, that in certain domains, the consequences would be very bad if officials diverged too sharply from the public will. An appreciation of the

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181. *Id.*

182. See BICKEL, *supra* note 2, at 68-69.

183. See PITKIN, *supra* note 177.

184. The latter view is implicit in *The Federalist* No. 10, with its reference to “refin[ing] and enlarg[ing]” the public view. *THE FEDERALIST* NO. 10, at 47 (James Madison) (George W. Carey & James McClellan eds., 1989).



epistemic and consequentialist arguments should help to show when, and why, the diverging models of representation have particular force.

### C. *Juries*

Should juries attend to the risk of public outrage? We can imagine a variety of possible cases: (a) A conviction of a defendant would produce significant outrage. (b) An acquittal of a defendant would produce significant outrage. (c) A civil verdict, imposing damages on a police department, would produce significant outrage. (d) A civil verdict, refusing to impose damages on a police department or a corporate polluter, would produce significant outrage. Does the analysis of juries differ from the analysis of courts?

In one respect, the analysis is indeed different: The epistemic argument for considering outrage seems weaker still. By its very nature, the jury will have heard the relevant facts, and it will therefore have a significant comparative advantage over the less informed public. It is hard to argue that on epistemic grounds, the jury should attend to a widespread public judgment in favor of either conviction or liability. In addition, the jury is supposed to be representative of the public; and if it is indeed representative, it should be taken as a more knowledgeable microcosm.

To be sure, the jury is not always a mere factfinder. It might bring its own moral convictions to bear on the resolution of some factual questions, and perhaps a widely held moral conviction on the part of the public as a whole, signaled by the presence of outrage, has some epistemic value. But again, the jury is supposed to be representative of the public,<sup>185</sup> and in general, its own moral judgments should be a more informed version of those of the public as a whole. It is hard to see circumstances in which jurors would do well, on epistemic grounds, to consult the views of a public that has (by hypothesis) failed to reflect on the details of the case.<sup>186</sup>

In principle, the consequentialist argument is not so easily dismissed. Suppose, for example, that a criminal conviction would produce very bad consequences, such as riots that would ensure multiple deaths; or suppose that a failure to convict would produce the same result. Suppose too that the jurors have an accurate crystal ball, so that they know, for certain, about those very bad consequences. At first glance, such consequences, if sufficiently bad, might

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185. For evidence that the moral views of the jury are indeed likely to be representative of the moral views of the public, see Daniel Kahneman et al., *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998).

186. Consider the discussion of the deliberative opinion poll in JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE* (1995). Fishkin convincingly contends that the results of a deliberative poll, conducted among informed citizens, are far more worthwhile than the results of a mere opinion poll, conducted by asking people simply to state their views on questions on which they have not reflected. A jury has an analogous advantage over the public generally.

well justify a refusal to convict. The issue is hardest for criminal convictions; the deontological objection to conviction of the innocent, in order to protect other interests, is not easily rejected.<sup>187</sup> Perhaps that objection can be overridden if the heavens would fall, or even if the consequences would be genuinely grave. And perhaps juries should consider consequences in civil cases, or in cases in which consideration of outrage would result in a decision not to convict someone who, in the jury's view, is genuinely guilty.

The simplest response to the consequentialist arguments would be based on several points, all of them encountered in the judicial context as well. Jurors lack crystal balls; juries might wrongly anticipate outrage and bad consequences. Consequence-blind jury determinations are rarely likely to produce especially bad consequences. Jury judgments might well be distorted by considering consequences, in a way that would produce both unjust verdicts and strategic behavior on the part of the public or segments of it (not good consequences). It is reasonable to think that for rule-consequentialist and systemic reasons, consequences are properly placed off-limits to the decisions of juries. We can imagine a possible world, and a possible case, in which this argument might be wrong. But in our world, and in our cases, it is almost certainly correct.

#### CONCLUSION

If judges are consequentialists, and have perfect confidence in their forecasts of consequences, they should be willing to consider the likely effects of public outrage as part of their assessment of the consequences of one or another course of action. On epistemic grounds, judges might conclude that a widely and deeply held set of public convictions deserves respectful attention, at least if judgments of fact or political morality are pertinent to the constitutional question. The epistemic justification does not apply if a systematic bias is likely to affect public judgments, if group polarization is at work, or if most people are participating in some kind of informational, moral, or legal cascade. I have suggested that on inspection, the epistemic justification turns out to be quite fragile, but that in unusual cases, the consequentialist arguments have considerable force—arguing, at the very least, in favor of exercising the passive virtues or ruling in minimalist fashion.

The strongest arguments against judicial attention to the effects of outrage are rule-consequentialist or based on considerations of system design. It is not possible to rule out the possibility that the consequences will be best if judges put the effects of outrage entirely to one side. The broadest point is that any judgment in favor of Kantian adjudication, or for restricting the set of considerations that judges may consider, must usually be defended in consequentialist terms. If people in certain social roles, such as federal judges,

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187. See, e.g., Steiker, *supra* note 74.

blind themselves to certain considerations, the reasons for doing so might themselves be consequentialist.

The arguments for considering the effects of outrage are most forceful when judges are deciding whether to invalidate legislation. In the case of validations, there is far less reason to attend to outrage. It is true that if courts had perfect tools by which to answer the underlying questions, some theories of interpretation would suggest that the risk of outrage strengthens the argument for invalidating statutes, at least if judges are otherwise in equipoise. But if the public greatly objects to a law, it can respond by changing that law through democratic means. To be sure, democratic change may be difficult to obtain; and we have seen that widespread public outrage plays an occasional role in assessing whether punishment is cruel and unusual and whether certain statutes offend the Due Process Clause. But in the domain of validations, at least, there are usually good rule-consequentialist reasons to disregard outrage altogether. Those reasons are plausible but weaker in the case of invalidations.

I have emphasized that the strength of the argument for attending to outrage might well depend on the governing theory of constitutional interpretation. Originalists are not likely to accept the epistemic argument for considering outrage. For those who adopt a moral reading of the Constitution and who reject consequentialism, attending to outrage might seem jarring. Principle is what matters, and the fact that the public would be outraged does not seem to bear on what matters. But this conclusion is too quick, at least in some imaginable cases. Most deontologists believe in consequentialist overrides, and there is no reason to think that judicial judgments about the requirements of morality are unerring. For broadly similar reasons, originalists might pay attention to public outrage on consequentialist grounds, even though the epistemic rationale seems weak. It follows that originalists, and those who read the Constitution in moral terms, might be able to agree that when public outrage is anticipated, it can be appropriate to exercise the passive virtues or to proceed in minimalist fashion.

These points bear on the much-discussed question whether public representatives should follow their own independent judgments or instead pay close attention to what the public believes and wants. Even if a representative's judgments diverge from those of the public, she might hesitate to insist on those judgments if her insistence would disserve her most important projects, or if she believes that the views of the public provide a signal that her own views are wrong.

But my focus has been on the behavior of courts. In the general run of cases, public outrage is indeed irrelevant; the rule-consequentialist objection is convincing. In some circumstances, however, judges legitimately consider public outrage because and to the extent that consequences matter, and because and to the extent that outrage provides information about the proper interpretation of the Constitution.