

## Community in Conflict: Same-Sex Marriage and Backlash

Reva B. Siegel



### ABSTRACT

Did backlash to judicial decisions play a destructive role in debates over same-sex marriage, as was so often claimed? This Article questions assumptions about consensus and constitutionalism that undergird claims about judicial backlash, and explores some constructive functions of conflict in our constitutional order.

The debate over same-sex marriage illustrates that conflict, constrained by constitutional culture, can forge meanings and bonds that strengthen the constitutional order. Constitutional culture, on this account, includes the understandings about role that guide interactions among citizens and officials who disagree about the Constitution's meaning. Analyzing the long-running conflict over same-sex marriage with attention to these role-based understandings leads us differently to evaluate the power and limits of judicial review.

In this Article I argue that the backlash narrative and the consensus model of constitutionalism on which it rests simultaneously underestimate *and* overestimate the power of judicial review. The Court's decision in *Obergefell* was possible not simply because public opinion changed, but also because struggle over the courts helped change public opinion and forge new constitutional understandings. Even so, *Obergefell* has not ended debate over marriage, but instead has channeled it into new forms. Conflict of this kind is enabled, and constrained, by the role-based understandings of constitutional culture.

A conclusion invokes anxieties attending the election of Donald Trump to illustrate how critical the perpetually contested role constraints of constitutional culture are in sustaining our constitutional order.

### AUTHOR

Nicholas deB. Katzenbach Professor of Law, Yale University. I began this article at the Max Weber Lecture at the European University Institute, and developed it in lectures and workshops at Cardozo School of Law, Columbia Law School, Drake University School of Law, Loyola University Chicago School of Law, the Department of Law of LUISS Guido Carli University, UCLA School of Law, and Yale Law School. I owe thanks to faculty at these schools who engaged with the project, as well as to Amna Akbar, Jack Balkin, Neal Devins, Joseph Fishkin, Owen Fiss, Cary Franklin, Aziz Huq, Doug NeJaime, Ruth Rubio Marin, Robert Post, and Neil Siegel for comments on the manuscript. I have been fortunate to have the research assistance of Ashraf Ahmed, Hilary Ledwell, Zachary Manfredi, Aaron Nathan, Josh Revesz, and Sarah Weiner.

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## INTRODUCTION

The process of debating, litigating and legislating in response to a constitutional decision one thinks wrong has been an important part of our legal tradition. It has been used by political liberals and political conservatives alike . . . .

—Edwin Meese III<sup>1</sup>

We look to courts to protect minority rights yet often doubt the power of courts to defy majority views. For many, it is constitutional common sense that judges will provoke destructive forms of backlash if they do not interpret the U.S. Constitution in accord with popular consensus. Beliefs of this kind, which dominated the debate over same-sex marriage, call into question the countermajoritarian possibilities of judicial review.

In this Article, I question the consensus-based account of constitutional authority on which the backlash narrative rests, and explore the goods of constitutional conflict in the debate over same-sex marriage, and beyond. Conflict is not only or always destructive, as the backlash narrative suggests. As judges handed down decisions recognizing same-sex marriage, Americans mobilized to oppose and to defend the courts' judgments, and with the passage of time, this very conflict changed the ways Americans understood the equities of the marriage debate.

The debate over same-sex marriage illustrates that conflict, constrained by constitutional culture, can forge meanings and bonds that strengthen the constitutional order. Constitutional culture, on this account, includes the understandings about role that guide interactions among citizens and officials who disagree about the Constitution's meaning.<sup>2</sup> Analyzing the long-running conflict over same-sex

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1. Edwin Meese III, *The Tulane Speech: What I Meant*, 61 TUL. L. REV. 1003 1006 (1987) (defending a widely criticized speech in which Meese, Attorney General under President Ronald Reagan, asserted that the executive branch was the U.S. Supreme Court's equal in interpreting the Constitution).

2. See *infra* Part V. I first analyzed how the role-based understandings of constitutional culture constrain and channel conflict in Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). There I observe:

[C]onstitutional culture supplies understandings of role and practices of argument through which citizens and officials can propose new ways of enacting the society's defining commitments—as well as resources to resist those proposals. Constitutional culture preserves and perpetually destabilizes the distinction between politics and law . . . . When constitutional culture can harness the energies of social conflict,

marriage with attention to these role-based understandings leads us differently to evaluate the power and limits of judicial review. As fundamentally, the analysis focuses our attention on understandings of citizens and officials on which the functioning of a constitutional democracy depends.

The backlash narrative is a familiar one. In the four decades before the U.S. Supreme Court decided *Obergefell v. Hodges*,<sup>3</sup> the nation debated the constitutional right of same-sex couples to marry and the role of courts in deciding this question. When state courts recognized the right of same-sex couples to marry under their state constitutions, opponents amended the constitutions to define marriage as a union of man and a woman.<sup>4</sup> Critics argued that court decisions shutting down democratic debate were counterproductive and provoked backlash that exacerbated political polarization and inhibited the prospects of change. Conversation about backlash ranged widely from academics and advocates to judges.<sup>5</sup> These realist accounts of judicial review depicted courts as majoritarian institutions whose authority is tied to public consensus.<sup>6</sup> On this view, the Court's opinion in *Obergefell* was possible only because public opinion changed.<sup>7</sup>

In this Article I argue that the backlash narrative and the consensus-based model of constitutionalism on which it rests simultaneously underestimate *and* overestimate the power of judicial review. As I show, the Court's decision in *Obergefell* was possible not simply because public opinion changed but also because struggle over the courts helped change public opinion and forge new constitutional understandings.<sup>8</sup> Even so, *Obergefell* has not ended debate over marriage but instead has channeled it into new forms: Opponents of same-sex marriage now assert rights of conscience and religious liberty to resist recognition of same-sex relationships.<sup>9</sup> Dynamics that cleared the path to *Obergefell* are con-

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agents of deeply agonistic views remain engaged in constitutional dispute, speaking through the Constitution rather than against it.

*Id.* at 1327. In a jointly authored work, Robert Post and I have employed the model of democratic constitutionalism to examine "the potentially constructive effects of backlash." Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 375, 376 (2007) ("Democratic constitutionalism describes how our constitutional order actually negotiates the tension between the rule of law and self-governance. It shows how constitutional meaning bends to the insistence of popular beliefs and yet simultaneously retains integrity as law.").

3. 135 S. Ct. 2584 (2015).

4. *See infra* Part I.A.

5. *See infra* Part I.B.

6. *See infra* Part II.

7. *See infra* note 74 and accompanying text, which discusses op-eds by law professors advancing this view.

8. *See infra* Part IV.

9. *See, e.g.*, *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (reviewing a wedding cake shop owner's religiously-based refusal to provide services to same-sex couples), *cert. granted sub*

tinuing in its wake. Conflict of this kind is enabled, and constrained, by the role-based understandings of constitutional culture.

There are, of course, many conceptions and instantiations of constitutional culture. I use the term to draw attention to popular and professional understandings about law in the United States that structure the roles of citizens and officials in making claims in conflicts over the Constitution's meaning. These understandings about role, and the beliefs about institutional authority on which they rest help citizens and officials decide whether they must defer to one another and when and how they may contest each other's views. It is through these role-based understandings that the constitutional order coordinates its commitments to democracy and the rule of law.<sup>10</sup> Analyzing the work of courts through the lens of constitutional culture suggests that courts have more and less power than the consensus-based model of constitutionalism assumes. Furthermore, it suggests that conflict can play a more constructive role in the legal system than the consensus-based model of constitutionalism imagines.

The account of constitutional culture I offer sees a source of meaning and community in role-constrained conflict. It is not only consent, but conflict, constrained by the role understandings of constitutional culture, that sustains the Constitution's authority in history. These role-based interactions help "steer[]" constitutional development over time, and promote the "attachment" of those who may be deeply estranged from official pronouncements of the law.<sup>11</sup> The conflict over marriage illustrates how these popular and professional understandings about law can guide citizens and officials arguing over the Constitution in elections, legislatures, and courts as they debate what it means to live in a constitutional democracy committed to the rule of law. This account of constitutional culture contributes to descriptive, interpretive, and prescriptive judgments about the logic of our constitutional law.

In Part I, I begin with a brief sketch of the conflict over same-sex marriage and suggest how criticism of courts causing backlash emerged in that setting. In Part II, I examine a premise of many who criticized courts for provoking backlash: that courts' authority to interpret the Constitution is tied to popular consensus.

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*nom.* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, No. 16-111, 2017 WL 2722428 (U.S. June 26, 2017); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2542-65 (2015) (showing how, through constitutional conflict, objections to contraception, abortion, and same-sex marriage have evolved into claims about religious liberties); *infra* text accompanying notes 142-54.

10. See *infra* Part V. In modeling the relation of law and politics, I draw on my prior work on social movement conflict and constitutional culture as well as on my writing on democratic constitutionalism with Robert Post. See *supra* note 2.

11. See Siegel, *supra* note 2, at 1343, 1328.

Part III argues that this consensus-based account of judicial authority misapprehends the conflict adjudication provokes in ways that both underestimates and overestimates the power of courts. To illustrate, Part IV examines the goods produced by conflict over the courts in the decades before *Obergefell*, showing how the fight over the courts changed meanings and relationships within movements, between movements, and in the public at large. In Part V, I focus attention on the role-based understandings of constitutional culture that enable conflicts of this kind—and suggest how the understandings that enabled conflict on the path to *Obergefell* enable conflict to persist in *Obergefell*'s wake.

Once we recognize the role-based understandings that constrained and channeled conflict over marriage, we can appreciate how these role-based understandings sustain community through conflict in many arenas. A conclusion invokes anxieties attending the election of Donald Trump to illustrate how critical the perpetually contested role constraints of constitutional culture are in sustaining our constitutional order.

## I. SAME-SEX MARRIAGE AND BACKLASH

In 1972, the Supreme Court refused to recognize a same-sex marriage claim.<sup>12</sup> Four decades later, in 2015, the Court held that state laws defining marriage as the union of man and a woman denied same-sex couples a right to marry that was protected by the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>13</sup> In what follows, I sketch the broad outlines of that conflict as a field in which Americans debated the role of courts in enforcing minority rights.

### A. The Conflict Over Marriage, 1970–2015

In the four and a half decades between the Court's two marriage decisions, a great debate raged over the constitutional protections afforded to gays and lesbians. In 1986, the Supreme Court ruled in *Bowers v. Hardwick*<sup>14</sup> that the Constitution allowed states to criminalize same-sex sex.<sup>15</sup> A decade later, without mention of its decision in *Bowers*, the Court held that animus against homosexuals was not a constitutionally sufficient reason for a state to restrict its ability to enact antidis-

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12. *Baker v. Nelson*, 409 U.S. 810 (1972), (dismissing the appeal "for want of substantial federal question"), *dismissing appeal from* 191 N.W.2d 185 (Minn. 1971).

13. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

14. 478 U.S. 186 (1986).

15. *Id.* at 196.

crimination laws.<sup>16</sup> In 2003, the Court reversed *Bowers* and ruled in *Lawrence v. Texas*<sup>17</sup> that laws criminalizing same-sex sodomy denied gays dignity, liberty, and equality protected by the Due Process Clause.<sup>18</sup> Reversal of *Bowers* signaled an important shift. After *Lawrence*, courts began to rule that the exclusion of gays from the military violated liberty and equality,<sup>19</sup> ultimately prompting Congress to repeal the ban in 2010.<sup>20</sup>

The marriage debate unfolded in the midst of this tumult. In the 1990s, courts began to scrutinize restrictions on the rights of same-sex couples to marry under state constitutions, first in Hawaii and Alaska.<sup>21</sup> But citizens mobilized against these early state decisions. In 1996, Congress enacted the Defense of Marriage Act, which defined marriage for purposes of federal tax and benefits law as a union of a man and a woman and allowed states to refuse to recognize same-sex unions solemnized in other states.<sup>22</sup> Soon after, citizens overturned the Hawaii and Alaska decisions by amending their state constitutions to define marriage as a relationship between a man and a woman.<sup>23</sup>

This pattern recurred. In 2003, months after the Supreme Court struck down a law criminalizing same-sex sodomy in *Lawrence*, the Massachusetts's highest court ruled in *Goodridge v. Department of Public Health*<sup>24</sup> that denying marriage licenses to same-sex couples violated the state constitution.<sup>25</sup> Again, Americans mobilized to block the spread of same-sex marriage. As other state

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16. *Romer v. Evans*, 517 U.S. 620, 636 (1996).

17. 539 U.S. 558 (2003).

18. *Id.* at 579.

19. *See, e.g.*, *Witt v. Dep't of the Air Force*, 527 F.3d 806, 815–19 (9th Cir. 2008); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated*, 658 F.3d 1162 (9th Cir. 2011).

20. 10 U.S.C. § 654, *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

21. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 852 P.2d 44, 63–67 (Haw. 1993) (recognizing that a statute restricting marriage to heterosexual unions was a sex-based classification and subjecting the statute to strict scrutiny). In Hawaii, the statute that limited marriage to heterosexual unions was not struck down until 1996, *see Baehr v. Miike*, No. 91-1394, 1996 WL 649235 (Haw. Cir. Ct. Dec. 3, 1996), but the Hawaii Supreme Court's 1993 ruling that the statute was subject to strict scrutiny generated the first wave of backlash. *See, e.g.*, Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning From Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1524 (2006); William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality*, 93 B.U.L. REV. 275, 284 (2013).

22. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

23. *See* ALASKA CONST. art I § 25; HAW. CONST. art. I § 23; William N. Eskridge Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 874 (2001).

24. 798 N.E.2d 941 (Mass. 2003).

25. *Id.* at 970.

constitutional courts began to consider right to marry cases, citizens enacted a wave of state constitutional amendments and referenda that prohibited marriage between same-sex couples.<sup>26</sup> A movement to ban same-sex marriage by amending the United States Constitution drew conservatives to the polls in the 2004 presidential election, with many attributing President Bush's margin of victory to the marriage debate.<sup>27</sup> In 2010, opponents of marriage led a successful campaign to block the reelection of three Iowa Supreme Court justices who had joined that court's unanimous decision to recognize same-sex marriage under the state's constitution. "I think it will send a message across the country that the power resides with the people," the campaign's leader urged. "It's we the people, not we the courts."<sup>28</sup>

## B. Backlash and the Institutional Limitations of Courts

Amidst these developments, a growing number of commentators began to argue that popular reaction to decisions recognizing the right of same-sex couples to marry demonstrated the impotence of courts to vindicate minority rights. Court decisions recognizing the right to marry prompted backlash, critics argued, prompting attacks on the courts as had decisions striking down racial segregation, the death penalty, or laws criminalizing abortion.<sup>29</sup>

According to the judicial backlash thesis, courts striking down popular legislation to vindicate minority rights were not only ineffective, but counterpro-

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26. *E.g.*, MO. CONST. art. I, § 33; OR. CONST. art. xv § 51; *see* Reva B. Siegel, *The Supreme Court 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 80 n.406 (2013) ("[C]onstitutional amendments banning same-sex marriage passed in twenty-three states from 2004 to 2006 alone.").

27. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 481–82 & nn. 364–70 (2005). *But see* KENNETH SHERRILL, NAT'L GAY & LESBIAN TASK FORCE POL'Y INST., SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE 2004 PRESIDENTIAL ELECTION, [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/2004ElectionAndMarriage.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/2004ElectionAndMarriage.pdf) [<https://perma.cc/8GKD-M4MV>] ("In the 2004 presidential election, 60% of voters said that they supported same-sex marriage or civil unions . . . . [T]he notion that the issue of same-sex marriage cost the election to the Democratic Party has been uncritically accepted as common wisdom."); David Brooks, *Opinion, The Values-Vote Myth*, N.Y. TIMES (Nov. 6, 2004), <http://www.nytimes.com/2004/11/06/opinion/the-valuesvote-myth.html> [<https://perma.cc/Y6AD-CUMC>] (challenging the view that "throng[s] of homophobic, Red America values-voters surged to the polls to put George Bush over the top").

28. A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04judges.html> [<https://perma.cc/HC48-26Y6>] (quoting Bob Vander Plaats, an "unsuccessful Republican candidate for governor who led the campaign").

29. For a comparison of same-sex marriage "backlash" to *Brown* and racial desegregation backlash, *see* Klarman, *supra* note 27, at 473–82.

ductive; judicial decisions “shutting down” politics<sup>30</sup> could frustrate democratic majorities in ways that would produce more virulent politics than might have resulted had judges refused to intervene.

In a prominent article published in 2005, Professor Michael Klarman compared response to *Goodridge*, the Massachusetts marriage decision, to massive resistance to *Brown v. Board of Education*.<sup>31</sup> He asserted that “Court rulings such as *Brown* and *Goodridge* produce political backlashes for three principal reasons: They raise the salience of an issue, they incite anger over ‘outside interference’ or ‘judicial activism,’ and they alter the order in which social change would otherwise have occurred.”<sup>32</sup> Romance about *Brown* notwithstanding, courts are poor vehicles for social change, Klarman argued: “[J]udicially mandated social reform may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions.”<sup>33</sup> Loss through litigation specially enraged citizens accustomed to self-government: “[B]ecause [*Goodridge*] was a court decision, rather than a reform adopted by voters or popularly elected legislators, critics were able to deride it as the handiwork of arrogant ‘activist judges’ defying the will of the people.”<sup>34</sup> In the short run at least, Klarman emphasized, litigation can lead to perverse results: “By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.”<sup>35</sup>

30. For an example of the judicial backlash thesis in the context of same-sex marriage, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 416 (2d ed. 2008). For claims about the abortion decisions “shutting down politics” and causing backlash, see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028, 2028, 2074 (2011), and Post & Siegel, *supra* note 2, at 398–99.

Chief Justice Roberts used the “shutting down” metaphor in his *Obergefell* dissent. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (“There will be consequences to shutting down the political process on an issue of such profound public significance.”); see also Cary Franklin, *Roe as We Know It*, 114 *MICH. L. REV.* 867, 882–83 (2016) (discussing Chief Justice Roberts’s claim about “shutting down” politics and similar criticisms of the *Obergefell* decision (quoting *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting))).

31. Klarman, *supra* note 27, at 482 (discussing *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003)).

32. *Id.* at 473.

33. *Id.* at 475.

34. *Id.* (quoting Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, *N.Y. TIMES*, Feb. 25, 2004, at A1).

35. *Id.* at 482. Over time Klarman has qualified his views, suggesting that legislatures as well as courts may trigger backlash when they take action that deviates from public opinion. See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 1669 (2013) (“Political backlash results from government action that strongly contravenes public opinion. Whether that action derives from legislatures or courts seems relatively unimportant. Yet courts are more likely than legislatures to take action that is sufficiently

Klarman was joined by political scientist professor Gerald Rosenberg, best known for the argument that racial desegregation resulted from the enforcement of federal civil rights laws and not the Court's decision in *Brown v. Board*—one of several decisions exemplifying the theory he famously called *The Hollow Hope*.<sup>36</sup> Court decisions could consolidate social change, but courts could not prompt social change, Rosenberg argued. He pointed to the many laws and amendments enacted to ban same-sex marriage. They demonstrated not only the futility but also the perversity of seeking change through adjudication: “The battle for same-sex marriage would have been better served if they had never brought litigation, or had lost their cases.”<sup>37</sup>

Concern about backlash to court decisions recognizing the right to marry was not limited to academics. Faced with litigation losses and warnings of backlash, gay rights litigators assumed a self-consciously cautious litigation strategy,<sup>38</sup> seeking to avoid suits unless necessary.<sup>39</sup> In 2008, when lawyers unaffiliated with the gay rights movement prepared to challenge state marriage bans under the federal Constitution in *Hollingsworth v. Perry*,<sup>40</sup> movement lawyers worked to stop them from bringing the case.<sup>41</sup> How would the public respond to a court decision recognizing the constitutional right of same-sex couples to marry that changed the law in all states? When unable to dissuade the lawyers in the *Perry* case, the movement worked to shape litigation of the case.<sup>42</sup>

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deviant from public opinion to generate powerful backlash.”). The model still looks to public opinion to change before law can change in socially beneficial ways.

36. ROSENBERG, *supra* note 30; *see id.* at 431 (“Political organizing, political mobilization, and voter registration . . . are the best if not the only hope to produce change. . . . [I]f those seeking significant social reform build a mass political base, then the hope will not be hollow.”). This cautionary account of how American same-sex marriage cases caused backlash has traveled to Europe. *See* ANGIOLETTA SPERTI, CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY 80–109 (2017) (drawing on literature on backlash in the United States in the course of analyzing same-sex marriage legislation and litigation in Europe); Frances Hamilton, *Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change*, 25 J. TRANSNAT'L L. & POL'Y 121 (2015–16) (reviewing stories about backlash to same-sex marriage decisions in the United States and advocating incrementalist change through legislation rather than litigation).
37. Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 812–15 (2006).
38. Mary L. Bonauto, *Equality and the Impossible—State Constitutions and Marriage*, 68 RUTGERS U. L. REV. 1481, 1493–95, 1505–07 (2016); *see* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1278, 1284 (2010).
39. Cummings & NeJaime, *supra* note 38, at 1312–18.
40. 133 S. Ct. 2652 (2013).
41. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 698–99 (2012).
42. Cummings & NeJaime, *supra* note 38, at 1310–12; *see also* KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 32–33, 77–80 (2015).

Judges began openly to speak about backlash as litigation of *Perry* progressed. The district judge in *Perry* asked the plaintiffs' lawyers about the risk of backlash before conducting a lengthy trial and ruling in their favor.<sup>43</sup> As the *Perry* case made its way toward the Supreme Court—along with the *United States v. Windsor*<sup>44</sup> case challenging the constitutionality of the federal Defense of Marriage Act—a variety of academics and advocates urged judges to narrow or to avoid decision in the cases, warning the Supreme Court that a court decision striking down state same-sex marriage bans could trigger powerful backlash.<sup>45</sup>

Even Supreme Court justices joined the conversation. In several public interviews in 2012 and 2013, Justice Ginsburg offered not-so-veiled warnings about the dangers of a Supreme Court decision in *Perry* by reiterating her view that an early and overbroad ruling in *Roe v. Wade*<sup>46</sup> had caused backlash.<sup>47</sup> The Court should not move “too far too fast,” she cautioned.<sup>48</sup> When the Supreme Court struck down the Defense of Marriage Act in *Windsor* but ruled that the parties in *Perry* lacked standing to bring the case, Justice Kennedy objected that the Court should not have avoided the merits and adverted to judicial

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43. Transcript of Record at 3095, *Perry v. Schwarzenegger*, No. C 09-2292-VRW (N.D. Cal. June 16, 2010); see Greenhouse & Siegel, *supra* note 30, at 2030.

44. 133 S. Ct. 2675 (2013).

45. See, e.g., Brief of Amici Curiae William N. Eskridge Jr. et al. in Support of Respondents at 6, 7–9, 13, *Perry*, 133 S. Ct. 2652 (No. 12-144), 2012 WL 3838124, at \*6, \*7–9, \*13 (observing that the “prudential approach” that the Court employed in slowly adjudicating anti-miscegenation cases was animated by backlash concerns and urging a similar approach in the marriage cases); William N. Eskridge Jr. & Darren Spedale, *Sit Down, Ted Olson and David Boies: Let the States Experiment With Gay Marriage—It’s Not Time Yet for a Federal Lawsuit*, SLATE (May 29, 2009, 11:25 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/05/sit\\_down\\_ted\\_olson\\_and\\_david\\_boies.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/05/sit_down_ted_olson_and_david_boies.html) [https://perma.cc/SLR4-MV4W]; Michael McConnell, Opinion, *Michael McConnell: The Constitution and Same-Sex Marriage*, WALL STREET J. (Mar. 21, 2013, 7:37 PM), <http://www.wsj.com/articles/SB10001424127887324281004578354300151597848> [https://perma.cc/P822-KWJK]; Cass R. Sunstein, *For the Supreme Court, Silence Can Be Golden*, BLOOMBERG VIEW (Apr. 1, 2013, 3:30 PM), <http://www.bloombergview.com/articles/2013-04-01/for-the-supreme-court-silence-can-be-golden> [https://perma.cc/JUW5-Q9DQ].

46. 410 U.S. 113 (1973).

47. David Crary, *Ruth Bader Ginsburg Questions Timing of Roe v. Wade, Gives Hint on Same-Sex Marriage Issue*, HUFFINGTON POST (Apr. 11, 2012), [https://web.archive.org/web/20160124025651/http://www.huffingtonpost.com/2012/02/10/ruth-bader-ginsburg-roe-v-wade-gay-marriage\\_n\\_1269399.html](https://web.archive.org/web/20160124025651/http://www.huffingtonpost.com/2012/02/10/ruth-bader-ginsburg-roe-v-wade-gay-marriage_n_1269399.html) [https://perma.cc/GX6F-S8J7]; Colleen Walsh, *Ginsburg Holds Court*, HARV. GAZETTE (Feb. 6, 2013), <http://news.harvard.edu/gazette/story/2013/02/ginsburg-holds-court> [https://perma.cc/7GV8-R726]; see also Justice Ruth Bader Ginsburg and Geoffrey Stone, “Roe at 40”, U. CHI. L. SCH. (May 11, 2013), <http://www.law.uchicago.edu/video/ginsburg051113> [https://perma.cc/5VN8-C75T].

48. Crary, *supra* note 47 (quoting Ginsburg, J.).

concerns about backlash as he did so.<sup>49</sup> Instead *Perry* sent the decision back to the lower federal and state courts.<sup>50</sup>

Over the years, talk of backlash had changed shape and assumed variant forms. Did backlash concern the question of whether courts *could* intervene in democratic politics and vindicate minority rights or whether judges *should* intervene in democratic politics and vindicate minority rights? Or was concern about backlash not a *whether* question, but a *when* question: At what point in evolution of public opinion should a lower court—or the Supreme Court—intervene?<sup>51</sup>

When in 2015 the Court finally recognized the right of same-sex couples to marry, Chief Justice Roberts dissented, predicting backlash and quoting Justice Ginsburg on the backlash that *Roe v. Wade* provoked.<sup>52</sup> Michael Klarman disagreed. By the time of *Obergefell*, Klarman was arguing that the Court could decide the question of marriage without concern of backlash because there was already majority public support for same-sex marriage (and because *Obergefell*, unlike *Brown* or *Roe*, was likely to “have little direct impact on opponents’ lives”).<sup>53</sup>

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49. *Perry*, 133 S. Ct. at 2674 (Kennedy, J., dissenting) (“Of course, the Court must be cautious before entering a realm of controversy where the legal community and society at large are still formulating ideas and approaches to a most difficult subject. But it is shortsighted to misconstrue principles of justiciability to avoid that subject.”). For an argument that the Court resolved *Perry* on standing grounds to avoid the merits, see Michael J. Klarman, Windsor and Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 144–54 (2013).

50. *Perry*, 133 S. Ct. at 2668.

51. See *infra* note 155 and accompanying text (discussing the fusion of descriptive and prescriptive claims in backlash discourse).

52. Justice Roberts warned:

There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue, “The political process was moving . . . , not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (quoting Justice Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385–86 (1985)).

53. Michael Klarman, Opinion, *The Supreme Court Is Most Powerful When It Follows Public Opinion*, N.Y. TIMES: ROOM FOR DEBATE (July 6, 2015), <http://www.nytimes.com/roomfordebate/2015/07/06/is-the-supreme-court-too-powerful/the-supreme-court-is-most-powerful-when-it-follows-public-opinion> [https://perma.cc/U955-VANM].

## II. CONSENSUS-BASED CONSTITUTIONALISM

The judicial backlash thesis spread, not only because of the statutes, amendments, and initiatives enacted to block court decisions protecting the right of same-sex couples to marry but also because the judicial backlash thesis echoed widespread realist views about the institution of judicial review.

In *The Least Dangerous Branch*, law professor Alexander Bickel famously characterized the institution of judicial review as “counter-majoritarian.”<sup>54</sup> But scholars in political science have long reasoned differently, following the work of Robert Dahl who characterized courts as *majoritarian* institutions. Backlash theorists reason from Dahl’s majoritarian view of courts.<sup>55</sup> In an admiring account, backlash theorist Gerald Rosenberg observed of Dahl: “First, he found that the Court historically had seldom strayed from the policy wishes of the lawmaking majority, generally failing to protect minorities against majoritarian outcomes. . . . Second, he found that when the Court did stray from the policy wishes of the lawmaking majority, Congress overturned those decisions.”<sup>56</sup>

Views of judicial review as majoritarian have increasingly spread in the American legal academy—where academics have long argued in the shadow of the countermajoritarian difficulty. This a shift in outlook that may reflect the experience of living with a Supreme Court under fire, whose membership, and interpretation of the Constitution, has shifted dramatically over the decades, and is about to shift again.

Scholars highlight different processes that contribute to the majoritarian logic of judicial review. Jack Balkin and Sanford Levinson observe that the participation of the President and U.S. Senate in appointing judges produces “partisan entrenchment” on the courts.<sup>57</sup> Others emphasize judicial response to public opinion as a key mechanism for coordinating law and politics. In *The Will of the People*,<sup>58</sup> Barry Friedman describes lines of cases demonstrating how the Supreme Court has responded to “public opinion” over time: “The accountability

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54. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

55. Klarman, *supra* note 27, at 440 & n.68.

56. Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl’s Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 613, 622 (2001) (book review) (footnotes omitted).

57. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001).

58. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

of the justices (and thus the Constitution) to the popular will has been established time and time again. To the extent that the judges have had freedom to act, it has been because the American people have given it to them. Judicial power exists at popular dispensation.<sup>59</sup> Jeffrey Rosen also chronicles the Court's responsiveness to public opinion.<sup>60</sup> Other more informal accounts depict judicial review as following social norms or popular consensus.<sup>61</sup> Majoritarian accounts of judicial review echo beliefs about constitutional legitimacy: Just as the Constitution draws authority from majoritarian consent procedures and informal indicia of popular acceptance, so, too, does the institution of judicial review.<sup>62</sup> Justin Driver terms this trend in constitutional theory "consensus constitutionalism."<sup>63</sup>

In these realist accounts of judicial review, courts are tethered to representative government through judicial appointments or conform to the will of the majority in the quest to avoid political reprisals and secure popular compliance with their judgments. Courts can issue judgments that force regional majorities—so-called "outliers"<sup>64</sup>—to conform to majority views, but courts cannot issue judgments that step too far ahead of popular opinion.

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59. *Id.* at 370.

60. See JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA*, at xii (2006) ("In this book, I argue that the . . . view—that courts are broadly in step with public opinion—has tended, throughout American history, to be the most descriptively accurate. Far from protecting minorities against the tyranny of the majority or thwarting the will of the people, courts for most of American history have tended to reflect the constitutional views of majorities.").

61. See, e.g., CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 4* (2009) (arguing that when the Supreme Court announces a seemingly "new constitutional principle," it is usually merely "endorsing, fairly late, a judgment that has long attracted widespread social support from many minds").

62. See, e.g., Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2015–16 (2012) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011), and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)) ("The Constitution is not law today simply because its provisions were adopted by the People in 1789, 1791, 1868, and so forth. The Constitution is law today because it continues to be accepted today."); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792 (2005) ("[T]he legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification. Other fundamental elements of the constitutional order, including practices of constitutional interpretation, also owe their legal legitimacy to current sociological acceptance.").

63. Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 757, 767–76 (2011) (identifying a school of "consensus constitutionalism" including Friedman, Klarman, and Sunstein).

64. See, e.g., Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 565 (2009) ("[T]he federal judicial system as a whole acts as an enforcer of national values in a federal republic" by "bring[ing] stragglers and outliers—usually local and regional majorities—in line with the constitutional views of the newly dominant national political coalition"); Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 930–50 (2014) (summarizing, before critiquing, the concept of "constitutional outliers"); Klarman, *supra* note 27, at 483 (noting "the propensity of constitutional law to suppress outliers"); Richard H. Pildes, *Is the Supreme Court a "Majoritarian"*

### III. SOME REALISM ABOUT REALISM: RELATIONS OF CONFLICT THAT CONSENSUS-BASED CONSTITUTIONALISM OBSCURES

In recent years, majoritarian accounts of judicial review have drawn fire. In an article entitled *Is the Supreme Court a “Majoritarian” Institution?*<sup>65</sup> law professor Richard Pildes demonstrates many forms of imprecision and ambiguity in the claim that judicial review is “majoritarian,”<sup>66</sup> and worries that the characterization is likely to have pernicious effects. Views of the Court as majoritarian might lead people to acquiesce in countermajoritarian decisions like *Citizens United v. Federal Election Commission*,<sup>67</sup> which invalidated electoral campaign finance laws as a violation of free speech.<sup>68</sup> A different worry leads law professor Justin Driver to criticize talk of “[t]he Consensus Constitution.”<sup>69</sup> Without an historical appreciation of the ways that the Court defied popular opinion in prohibiting racial segregation, he emphasizes, judges might grow timid in the protection of minority rights.<sup>70</sup>

Informal pictures of how law works guide judgment about doing law. They play a role in orienting judgments of citizens, advocates, and officials, as talk of backlash illustrates. Repeated description comes to support and guide prescription.

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*Institution?*, 2010 SUP. CT. REV. 103, 150 & n.172 (offering a brief summary of the outlier concept and collecting sources); Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 309 (2010) (“Much of the Warren Court’s constitutional work, . . . policed local or regional outlier policies without contradicting anything approaching a national consensus.”).

65. Pildes, *supra* note 64.

66. Pildes observes:

Different theorists appeal to different baselines for defining what constitutes the “majoritarian views” that purportedly constrain the Court. Or the same theorists invoke different concepts of “the majority” in different works. Moreover, some of the baselines are so nebulous that it becomes almost impossible to confirm or falsify the theory.

*Id.* at 117. He points out that “majoritarian” theorists like Barry Friedman, Jack Balkin, Keith Whittington, Mark Graber, and Gerald Rosenberg disagree on the relevant baseline for what counts as “majoritarian.” *Id.* at 118–19. This leads to disagreement about whether landmark constitutional decisions—*Brown v. Board of Education*, for example—were actually majoritarian or were instead countermajoritarian. *Id.* at 120–22. The “majoritarian” theorists can wrongly infer from the Court’s long-term “majoritarian” tendencies that, in the short-term, the Court exhibits the same majoritarian behavior on a case-by-case basis. *Id.* at 122–26. Majoritarian theorists also disagree about how, in practice, democratic majorities constrain the Court’s behavior. *Id.* at 126–42. Finally, Pildes argues that Dahl’s empirical observations have not held up over time, while majoritarian theorists have collected little new data to replace it. *Id.* at 142.

67. 558 U.S. 310 (2010).

68. *Id.*

69. Driver, *supra* note 63.

70. *Id.* at 800.

So what then might be wrong with realist accounts that emphasize the importance of public opinion in judicial decisions? Public opinion is important: A Supreme Court decision recognizing same-sex marriage in 2015—when close to 60 percent of the American public supported marriage equality<sup>71</sup>—is by far less controversial than it would have been at the time of the Hawaii decision in the 1990s, when polls measured 60 percent of the American public opposing same-sex marriage.<sup>72</sup>

But one can acknowledge the importance of public opinion without treating majority support as: (1) indispensable; or (2) sufficient to sustain a constitutional ruling as realist accounts often do. For example, Michael Klarman voiced what I believe is a widely shared intuition when he asserted that the Court could decide *Obergefell v. Hodges*<sup>73</sup> because public support had tipped in favor of marriage. On this view, once a majority of the public supports a particular constitutional understanding, the Court can settle conflict by imposing public consensus on regional outliers.<sup>74</sup>

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71. *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Sept. 19, 2017) (showing 58 percent of people in poll conducted July 8–12, 2015 believed same-sex marriages should be legally valid). Other polls conducted around the same time, such as one AP Poll, reflected weaker public support at only 42 percent approval. ASSOCIATED PRESS & GFK PUB. AFF. & CORP. COMM., THE AP-GFK POLL 3 (2015), [http://ap-gfkpoll.com/main/wp-content/uploads/2015/07/AP-GfK\\_Poll\\_July\\_2015-Topline\\_gay-marriage.pdf](http://ap-gfkpoll.com/main/wp-content/uploads/2015/07/AP-GfK_Poll_July_2015-Topline_gay-marriage.pdf) [<https://perma.cc/P3SA-HSF4>]. However, this differs from the general trends visible in both the Gallup, *supra*, and Pew Research Center polls from the same time, which both reflected public support at more than 50 percent. PEW RESEARCH CTR., PEW RESEARCH CENTER MAY 2015 POLITICAL SURVEY FINAL TOPLINE 1 (2015), <http://www.people-press.org/files/2015/06/6-8-15-Same-sex-marriage-topline-for-release.pdf> [<https://perma.cc/K459-H9SR>] (showing results from a survey conducted May 12–18, 2015 and reflecting 57 percent support for marriage equality).
72. *Baehr v. Lewin*, 852 P.2d 44 (Haw.), *as clarified on reconsideration*, 875 P.2d 225 (Haw. 1993) (unpublished table decision). A national public opinion poll taken six months before *Baehr* showed opposition to same-sex marriage at 60 percent. ACLU, AMERICAN PUBLIC OPINION ABOUT PRIVACY AT HOME AND AT WORK (1992), *reprinted in iPoll Question Details*, ROPER CTR. PUB. OPINION RES., <https://ropercenter.comell.edu/CFIDE/cf/action/ipoll/questionDetail.cfm?> [<https://perma.cc/M656-KM3Q>].
73. 135 S. Ct. 2584 (2015).
74. See Michael Klarman, *Opinion, A Gay Marriage Backlash? Not Likely*, L.A. TIMES (Mar. 24, 2013), <http://articles.latimes.com/2013/mar/24/opinion/la-oe-klarman-scotus-and-gay-marriage-20130324> [<https://perma.cc/U2PC-V33Q>]; Michael Klarman, *Opinion, Marriage Equality and Political Backlash*, N.Y. TIMES: ROOM FOR DEBATE (July 1, 2015, 6:05 PM), <http://www.nytimes.com/roomfordebate/2013/03/26/civil-rights-decisions-in-courts-or-legislatures/marriage-equality-and-political-backlash> [<https://perma.cc/H364-S69B>]; see also David Fontana, *The Justices' Justice*, SLATE (June 29, 2015, 6:00 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/06/supreme\\_court\\_gay\\_marriage\\_ruling\\_we\\_can\\_now\\_stop\\_fearing\\_social\\_progress.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/supreme_court_gay_marriage_ruling_we_can_now_stop_fearing_social_progress.html) [<https://perma.cc/P7KU-EN3D>]. On outliers, see *supra* note 64.

There is common sense authority to this account. But I believe that the backlash narrative and the consensus model of constitutionalism on which it rests lead us to underestimate and to overestimate the power of judicial review.

When consensus-based models of constitutionalism assess the effects of a judicial opinion in a short time horizon, they may underestimate the capacity of judges to shape public opinion. If we consider the question in a longer time horizon, we can see dynamics around judicial review that consensus-based models of constitutionalism overlook. *Obergefell* grew out of innumerable court and legislative decisions, as appendices to the Court's own opinion emphasize<sup>75</sup>—with many of these decisions growing out of the Supreme Court's earlier decisions in *Lawrence v. Texas*<sup>76</sup> and *United States v. Windsor*.<sup>77</sup> The Court's decision in *Obergefell* was possible not simply because public opinion changed, but also because struggle over the courts helped change public opinion and forge new constitutional understandings. In short, as advocates and judges appreciate, adjudication creates as well as reflects public opinion.<sup>78</sup> While the judicial backlash thesis focuses on the opposition that countermajoritarian rulings can arouse, that is only part of the story. As I emphasize here and elsewhere, even when countermajoritarian judgments arouse opposition, the judgments can create meanings that fatefully alter the conditions of persuasion in political debate.<sup>79</sup>

At the same time, accounts of consensus constitutionalism may *overestimate* the power of judicial review. The story of courts enforcing social consensus and repressing regional "outliers" imputes to judicial review more power than courts have. Again, consider the question in a longer time horizon. Public support for gay marriage has risen dramatically over the last decade, but many Americans

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75. *Obergefell*, 135 S. Ct. app. A at 2608 (listing state and federal judicial opinions addressing same-sex marriage); *id.* app. B at 2611 (2015) (listing state legislation and judicial opinions that legalize same-sex marriage).

76. 539 U.S. 558 (2003).

77. 133 S. Ct. 2675 (2013). For accounts that emphasize the importance of judicial decisions after *Windsor*, see Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183 (2017). For accounts that emphasize the role of courts in shaping public opinion over a longer time frame, see *infra* Part V.

78. See *infra* Part IV. For recent empirical work analyzing the legitimating effects of court decisions on public opinion, see Benjamin G. Bishin et al., *Opinion Backlash and Public Attitudes: Are Political Advances in Gay Rights Counterproductive?*, 60 AM. J. POL. SCI. 625 (2016), and ANDREW R. FLORES & SCOTT BARCLAY, WILLIAMS INST., TRENDS IN PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATES (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Trends-in-Public-Support-for-Same-Sex-Marriage-2004-2014.pdf> [<https://perma.cc/UW2K-T4Z5>].

79. See Siegel, *supra* note 26, at 82 ("We can see that in the marriage debates, courts exercised authority indirectly, as they injected constitutional questions into democratic deliberation, making minority voices audible and informing political conflict with constitutional values.").

remain passionately opposed, especially when one attends to differences in age, region, religion, and political party.<sup>80</sup> And a plurality of citizens fiercely committed to particular views will make itself felt in ways a majority diffusely committed to particular views may not. For this reason, Americans opposed to same-sex marriage have mobilized to continue the fight over marriage, seeking control over the courts in campaigns for the presidency<sup>81</sup> and carrying their objections forward under the banner of conscience and religious liberty.<sup>82</sup> Just as *Brown v. Board of Education* did not end debate over racial segregation,<sup>83</sup> *Obergefell* has not ended debate over marriage but instead has channeled it into new forms.<sup>84</sup> Proponents of same-sex marriage persisted in the face of loss, and so too will its opponents.

In what follows, I look back at backlash to same-sex marriage with attention to the ways in which the fight over the courts—and other sites of government

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80. Less than two months before the *Obergefell* decision, a national opinion poll by the Pew Research Center found that 70 percent of white evangelical Protestants opposed allowing gays and lesbians to marry legally, with 43 percent describing their opposition as strong. PEW RESEARCH CTR., SUPPORT FOR SAME-SEX MARRIAGE AT RECORD HIGH, BUT KEY SEGMENTS REMAIN OPPOSED 3, 24 (2015), <http://www.people-press.org/files/2015/06/6-8-15-Same-sex-marriage-release1.pdf> [https://perma.cc/X7VY-C3Z5] (displaying results from a poll conducted May 12–18, 2015). In the same opinion poll, 63 percent of Republicans and 54 percent of persons residing in the South Central United States (Alabama, Arkansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Texas) expressed opposition to marriage rights for gays and lesbians. *Same-Sex Marriage Detailed Tables*, PEW RES. CTR. (June 8, 2015), <http://www.people-press.org/2015/06/08/same-sex-marriage-detailed-tables> [https://perma.cc/BQW8-9JGQ]; see also Bishin et al., *supra* note 78, at 628 (noting white evangelicals as “the staunchest political opponents of gay rights”).
81. Numerous Republican candidates for the presidency opposed same-sex marriage and sought control of the courts to change the law. See, e.g., Ryan J. Reilly, *Marco Rubio Suggests His Supreme Court Would Roll Back Marriage Equality*, HUFFINGTON POST (Dec. 13, 2015, 11:59 AM), [http://www.huffingtonpost.com/entry/marco-rubio-meet-the-press-marriage\\_us\\_566d9098e4b0fccee16ee695](http://www.huffingtonpost.com/entry/marco-rubio-meet-the-press-marriage_us_566d9098e4b0fccee16ee695) [https://perma.cc/3NVP-SZLY] (noting that Rubio said he disagreed with the Court’s marriage decision and urged, “I don’t believe any case law is settled law. Any future Supreme Court can change it. And ultimately, I will appoint Supreme Court justices that will interpret the Constitution as originally constructed”); Brian Tashman, *Donald Trump: ‘Trust Me’ to Overturn the ‘Shocking’ Gay Marriage Decision*, RIGHT WING WATCH (Feb. 18, 2016, 11:25 AM), <http://www.rightwingwatch.org/content/donald-trump-trust-me-overturn-shocking-gay-marriage-decision> [https://perma.cc/5LE5-E7LT]. For other Republican candidates who criticized the marriage decision and promised to appoint jurists who would interpret the Constitution in accord with conservative precepts, see Scott Bomboy, *The Supreme Court as a 2016 Campaign Issue*, PHILLY.COM (Dec. 16, 2015, 5:02 PM), [http://www.philly.com/philly/news/politics/The\\_Supreme\\_Court\\_as\\_a\\_2016\\_election\\_issue.html](http://www.philly.com/philly/news/politics/The_Supreme_Court_as_a_2016_election_issue.html) [https://perma.cc/R4K6-ZHJS].
82. See NeJaime & Siegel, *supra* note 9, at 2558–65 (tracing the transformation of the marriage debate into the religious liberties debate). For further discussion, see *infra* notes 142–154.
83. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004) (surveying a half-century of debate over *Brown*’s meaning).
84. See *infra* notes 107, 142–54 (discussing the emergence of religious liberty-based objections to same-sex marriage).

decisionmaking—was constructive, and not merely destructive, as backlash theory suggests. As conflict over same-sex marriage raged, citizens engaged in the struggle to influence government decisionmakers helped to create new constitutional meanings, and in the process, forged new relationships.

#### IV. BACKLASH REDUX: THE MARRIAGE CONFLICT'S CONSTRUCTIVE EFFECTS

Conflict can have constructive effects. We know that the first decisions recognizing same-sex marriage sparked conflict that, in the short run, produced immense setbacks. Judges who sought to impose new understandings of constitutional law saw their judgments quickly reversed. Yet, it was precisely by amplifying the claims of despised minorities in the legislative process that courts changed the shape of the conflict over marriage and infused it with new meanings. Opponents in other jurisdictions mobilized to enact bans on same-sex marriage because they understood that court decisions recognizing the claim had imbued it with increasing legitimacy. The countermobilization we call “backlash” was a response to the claim’s growing authority.<sup>85</sup> The first marriage decisions thus had mixed effects. As a growing number of commentators have observed, *Goodridge v. Department of Public Health*<sup>86</sup> and other early decisions not only set back the cause of same-sex marriage, but they also strengthened the claim’s authority in a variety of significant ways.<sup>87</sup> The early court decisions were, as Robert Cover might put it, “jurisgenerative.”<sup>88</sup>

85. See Siegel, *supra* note 2, at 1362 (“Once a movement contests the jurisdiction of a constitutional principle in a bid to renegotiate social structure, those who benefit from the contested understandings and arrangements have reason to mobilize in their defense. Countermobilization is likely to occur only as movement claims begin to elicit public response.” (footnote omitted)).

86. 798 N.E.2d 941 (Mass. 2003).

87. See, e.g., Eskridge, *supra* note 21, at 309–23; Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA J. CONST. L. (forthcoming 2018); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 986–1011 (2011); Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185, 1195–99 (2013) (reviewing KLARMAN, *supra* note 35); Siegel, *supra* note 26, at 77–85.

For early suggestions that the conflict could have constructive effects, see, for example, Ball, *supra* note 21, and Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC’Y REV. 151, 155–60 (2009).

88. Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983). Through these decisions, state courts began a conversation with the American people. Similarly, Alexander Bickel stated:

Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives. . . . [T]o say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases, and in others it is a

The fight over marriage forged new meanings and altered relationships, within movements, between movements, and in the public at large. Of course, the conflicts we call backlash are by no means caused by courts alone.<sup>89</sup> Courts were not the only institutional site of conflict over marriage—yet the fight over and through the courts shaped the debate over marriage in distinctive ways:<sup>90</sup>

- *The early court decisions amplified minority claims:* Court decisions made claims for same-sex marriage visible and audible; for better or for

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form of speech only. The effectiveness of the judgment universalized depends on consent and administration.

ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1978).

89. See Siegel, *supra* note 26, at 74–76. As I have observed:

Backlash arcs across the decades because there are natural incentives in democratic politics to appeal to those aggrieved by change, whether change transpires by judicial decision, the great civil rights statutes of the 1960s, or the efforts of local government to ensure a modicum of integration in basic social institutions. Backlash is best understood, not as the repression of democratic politics, but its expression: backlash escalates as movements, parties, and officials embrace the cause of those who resent change, in the hopes of winning their support.

*Id.* at 75 (footnote omitted).

Backlash may involve courts, but it can also spread without courts. In writing with Linda Greenhouse, I have shown that conflict over abortion began before the Supreme Court ruled in *Roe*. It escalated as Republicans used the abortion issue to recruit conservative Democrats to join the Republican Party, a project that began before *Roe* and played out over the 1980s and 1990s. See generally Greenhouse & Siegel, *supra* note 30. The story of *Roe* as anti-democratic was constructed as part of this political realignment process. See Franklin, *supra* note 30 (reviewing work on abortion backlash by Greenhouse, Siegel, and Ziegler). Courts played little part in polarization around the Equal Rights Amendment. See Siegel, *supra* note 2; see also Post & Siegel, *supra* note 2, at 406–24 (examining the role the ERA debates played in expanding the conflict over abortion). Polarization around gun rights began decades before courts entered the debate over the Second Amendment. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

90. It is a complex matter to ascertain whether and to what degree judicial decisions are responsible for shaping conflict. Cf. Cummings & NeJaime, *supra* note 38, at 1318–25 (analyzing whether the enactment of two propositions banning same-sex marriage in California was due to the fact that a court, rather than a legislature, had recognized same-sex marriages in the state); Kreis, *supra* note 87 (offering a state-by-state analysis and closing “with a synthesis of all the evidence laid out to conclude that courts were indeed largely responsible for the equal marriage revolution” (manuscript at 5)). In what follows, I draw attention to distinctive ways that judicial decisions and conflict in the courts shaped the marriage debate, but I do so without trying to sort out what portion of evolving social norms can be attributed to judicial and extrajudicial sources. My central point is more modest.

Much of the literature on backlash assumes that adjudication was specially responsible for stoking conflict in directions that harmed the case for marriage equality. Along with a number of others cited in the following discussion, I show how judicial review contributed to building the case for marriage equality, even as the decisions stimulated backlash. Nothing in what I argue assumes courts were solely responsible for evolving public opinion—in the case of same-sex marriage any more than in the case of abortion, see *supra* note 89. Rather, my point is the simpler one—that judicial decisions advanced as well as retarded recognition of marriage equality. I identify pathways through which adjudication shaped politics in support of marriage recognition, and not only in opposition to it.

worse, court decisions put same-sex marriage on the public agenda at a time when legislators would not do so.<sup>91</sup>

- *The early court decisions helped legitimate unconventional views about marriage:* Court decisions changed meanings, and thus they changed the conditions of political debate about same-sex marriage in a variety of ways.
  - *Role modeling:* *Goodridge* and other early state court decisions created actual married same-sex couples and, through these actual role models, allowed the nation to learn about the consequences of same-sex marriage for same-sex relationships, for children, and for the larger community.<sup>92</sup>
  - *Challenging Stereotypes:* The Supreme Court's decisions in *Romer v. Evans*<sup>93</sup> and *Lawrence v. Texas*<sup>94</sup> limited the kinds of derogatory claims that opponents could make about same-sex marriage,<sup>95</sup> while proponents of same-sex marriage made liberty and equality arguments that challenged stereotypes of gay sex and the family life of same-sex couples.<sup>96</sup>
  - *Symbolic Associations:* Claims on the Constitution transformed arguments about marriage into a referendum on the citizenship status of gays and lesbians. The right to marry posed the question of equal citizenship for gays and lesbians, much as the right to vote once raised questions of sex equality for women and the right to attend integrated schools raised questions of race equality for African Americans.<sup>97</sup>
- *The fight over the courts had a variety of social mobilization effects:*
  - *The early court decisions influenced intra-movement debate about movement goals:* The more the argument over marriage turned into a referendum on the equal status of gays in the

91. Eskridge, *supra* note 21, at 310–12.

92. See Ball, *supra* note 21, at 1527 (“It is reasonable to believe that many of the neighbors and co-workers of married same-sex couples in Massachusetts are realizing that what they share with lesbian and gay couples (in terms, for example, of commitment and love for their partners and families) is greater and more important than the differences as represented by the gender of the parties.”).

93. 517 U.S. 620 (1996).

94. 539 U.S. 558 (2003).

95. *Romer* and *Lawrence* limited the openly denigrating kinds of arguments advocates could employ against same-sex marriage in public fora. See *supra* notes 16–20 and accompanying text. These decisions helped change arguments against same-sex marriage from gay-denigrating to gay-respecting in form. See *infra* notes 103–09 and accompanying text.

96. See, e.g., WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 146–47, 183–84 (2002); YOSHINO, *supra* note 42, at 155–63.

97. For reflection on these themes, see Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 68–69 (2005), in which Bonauto, the lead attorney for Gay & Lesbian Advocates & Defenders in *Goodridge*, reflects on the significance of marriage equality.

community, the more the LGBT movement invested in the question. A movement that once understood itself as seeking sexual freedom came to understand itself through the institution of the family.<sup>98</sup>

- *The decisions fostered inter-movement dialogue:* As advocates attempted to persuade decision-makers accountable to wider publics, each side was obliged to answer arguments of the other. Vying to persuade judges and the larger public, each side incorporated elements of the other's views.<sup>99</sup> LGBT advocates responded to conservative arguments by espousing fidelity to family values, and defenders of traditional marriage responded to liberal arguments by espousing commitments to equality values.<sup>100</sup>

These observations suggest some of the pathways through which even bitterly contested judicial decisions can shape conflict, even as the decisions provoke backlash and countermobilization. Judges could not resolve the debate over marriage, but the prospect of judicial intervention disciplined argument. Objections to same-sex marriage evolved in form, from gay-denigrating to gay-respecting modes of constitutional argument.

In the 1980s and 1990s, it was commonplace to oppose same-sex marriage by depicting it as deviant and immoral. The legislative history of the Defense of Marriage Act vividly captures this phase of public debate.<sup>101</sup> (Courts in this era regularly denied gays protection against discrimination; why accord discrimination against gays heightened equal protection scrutiny when the conduct that defined the class was “criminalizable”?)<sup>102</sup>

But in the aftermath of the Supreme Court decisions in *Romer* and *Lawrence* according gays rudimentary protections against discrimination,<sup>103</sup> objections to

98. The movement remains divided on the importance of marriage, with proponents now ascendant. See Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 CHI.-KENT L. REV. 379, 390–93 (2009).

99. See generally Siegel, *supra* note 2, at 1403–14 (analyzing forms of dialogue that occur in constitutional conflict).

100. See *id.* at 1415–18; *infra* notes 103–10 and accompanying text.

101. See, e.g., 142 CONG. REC. 17,082 (1996) (statement of Rep. Smith) (“Rather than focus on the legal need for this legislation, I would like to discuss some of the reasons why I feel it is morally necessary.”); 142 CONG. REC. 16,972 (1996) (statement of Rep. Coburn) (claiming homosexuality is “based on perversion” and “lust”).

102. See, e.g., *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (rejecting a claim that discrimination against gay job applicants by the FBI violated the Equal Protection Clause, the Court reasoned that “[i]f the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious”).

103. See *supra* notes 16–17 and accompanying text (discussing *Romer* and *Lawrence*).

same-sex marriage voiced in public settings began to shift into a gay-respecting mode. In the 2000s, litigants and judges began to justify restricting marriage to different sex couples in terms focused on the needs and vulnerabilities of heterosexuals. Heterosexual couples needed incentives to marry (the so-called “accidental procreation” argument<sup>104</sup>), and children needed different sex parents to model gender roles for them (the “dual gender” marriage argument<sup>105</sup>). Conservative opponents of same-sex marriage objected to being outcast as “bigots”<sup>106</sup> and asserted the importance of preserving traditional marriage to protect “religious liberty.”<sup>107</sup> Publicly expressed opposition to same-sex marriage increasingly came to focus on a (gay-respecting) claim about the proper role of courts: There might in fact be a case for recognizing same-sex marriage, opponents argued, but in a constitutional democracy, that question is for determination by legislatures, not

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104. See, e.g., Brief Amicus Curiae of the American Center for Law & Justice in Support of Respondent Proposition 22 Legal Defense and Education Fund at 2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 3167052, at \*2 (“The state’s purpose in civil marriage is to channel ‘the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly (and even at times unexpectedly) produce.’” (quoting DAN CERE, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 13 (2005))); Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 *YALE J.L. & HUMAN.* 1 (2009).
105. See, e.g., Memorandum in Opposition to Plaintiffs’ Motion for Summary Judgment and in Support of Defendants’ Motion for Summary Judgment at 63, *Goodridge v. Dep’t of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (No. 20011674A), 2001 WL 35920960, at \*63 (“In addition to their primary purpose of fostering procreation per se, the marriage statutes were intended to ensure that children would not only be born in wedlock but also reared by their mothers and fathers in one self-sufficient family unit with specialized roles for wives and husbands.”); see also Deborah A. Widiss, Elizabeth L. Rosenblatt, & Douglas NeJaime., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 *HARV. J.L. & GENDER* 461, 489–92 (2007) (discussing the appearance of arguments for different-gender role models in state court opinions and amicus briefs).
106. For an overview of these arguments, see Siegel, *supra* note 26, at 78–80.
107. See, e.g., Brief of Douglas Laycock et al., as Amici Curiae in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 1048450. Religious liberty and the demand for the accommodation of conscience are now the rallying cries of those mobilizing against the Court’s decision in *Obergefell*. See, for example, the litigation arising out of Rowan County Clerk Kim Davis’s refusal to issue marriage licenses to same-sex couples after *Obergefell*. Lyle Denniston, *Clerk Freed, Her Appeals on Same-Sex Marriage Go on*, SCOTUSBLOG (Sept. 8, 2015, 6:55 PM), <http://www.scotusblog.com/2015/09/clerk-freed-her-appeals-on-same-sex-marriage-go-on> [<https://perma.cc/6Q8W-68VC>]. Others object to being made complicit in the recognition of same-sex marriage. See, e.g., 161 CONG. REC. H5024 (daily ed. July 9, 2015) (statement of Rep. Babin (“We should also pass the First Amendment Defense Act to protect churches, Christian schools and colleges and business owners from being coerced by the government to act against their religious convictions in regards to acceptance of same-sex marriage.”)). See generally NeJaime & Siegel, *supra* note 9 (drawing on social movement sources to show how objections to same-sex marriage were reworked into religious liberty and conscience objections).

courts. For example, in his *Obergefell v. Hodges*<sup>108</sup> dissent, Chief Justice Roberts conceded that the claim to marital recognition “has undeniable appeal; over the past six years, voters and legislators in eleven States and the District of Columbia have revised their laws to allow marriage between two people of the same sex.” “But,” he insisted, “this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.”<sup>109</sup>

Evolving objections to marriage signaled rising respect for gays among citizens, judges, and possibly, among opponents of same-sex marriage themselves.<sup>110</sup> These changes in the grounds of constitutional argument illustrate how constitutional conflict can foster relationships, even among adversaries who fiercely disagree about the meaning of constitutional norms to which they share fealty.

The judicial backlash thesis does not treat as significant these changes in the shape of the conflict over same-sex marriage. The backlash framework evaluates judicial review within a short time horizon<sup>111</sup> and tends to rely on opinion polls (and other practices of counting<sup>112</sup>) to identify circumstances in which courts can successfully intervene and resolve conflict in such a way as to enforce social consensus.

But when we look at conflict over a longer time horizon, and with attention to the understandings that guide participants in constitutional conflicts, we can appreciate ways in which struggle over the law is the locus of significant social bonds that can engender evolving constitutional understandings.

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108. 135 S. Ct. 2584.

109. *Id.* at 2611 (Roberts, C.J., dissenting).

110. For example, during oral argument in *Perry*, Justice Sotomayor asked petitioners’ counsel Charles Cooper, “[O]utside of the marriage context, can you think of any other rational basis . . . for a State using sexual orientation as a factor in denying homosexuals benefits or imposing burdens on them?” Cooper replied, “Your Honor, I cannot. I do not have . . . anything to offer you in that regard.” Transcript of Oral Argument at 14, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

111. Five years after the *Goodridge* decision, Gerald Rosenberg argued that the litigation strategy was counterproductive. See *supra* notes 36–37 and accompanying text. By contrast, Bonauto, who led litigation in the case, invoked the race cases as precedent, and emphasized that the constructive effects of the decision would emerge in a longer time horizon. Bonauto, *supra* note 97, at 68–69. On the relevance of time horizons in assessing backlash, see DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 50 (2016).

112. There is a widely held view that judicial review can impose national uniformity on regional outliers. See Driver, *supra* note 64; cf. Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL’Y 17, 17 (2009) (describing the Supreme Court’s practice of “counting states’ laws in a variety of doctrinal contexts to determine the legislative consensus among the States” and arguing that this serves as a useful check on judicial power to announce new national norms). The outlier framework plays an important role in consensus constitutionalism. For its use in the marriage context, see *supra* note 74 and accompanying text.

## V. UNDERSTANDING BACKLASH THROUGH THE LENS OF CONSTITUTIONAL CULTURE

We talk about backlash and the countermajoritarian difficulty as if judicial review “shuts down” politics,<sup>113</sup> but of course it does not. In fiercely contested constitutional cases, citizens often mobilize in opposition to judicial decisions. This conflict may be distressing to those who participate in or witness it, but it can forge relationships that strengthen the constitutional order as a whole. In my work, I have employed concepts of constitutional culture to explore the role-based understandings that mediate conflicts over the meaning of constitutional commitments while sustaining community in disagreement.<sup>114</sup>

On the most familiar account, constitutional culture refers to the social norms, values, and beliefs that give shape to a society’s constitutional law.<sup>115</sup> Without disputing the power of social norms to shape law, I have focused on aspects of constitutional culture that enable law to shape social norms. Constitutional culture includes both popular and professional beliefs about law, in particular, the beliefs about institutions and authority that structure the roles of citizens and officials in disagreements about the Constitution’s meaning.<sup>116</sup> Understandings about role and authority guide citizens and officials making

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113. See *supra* note 30 and accompanying text.

114. See Siegel, *supra* note 2.

115. See Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (defining constitutional culture as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution”).

116. Siegel, *supra* note 2, at 1325–26.

A number of scholars interested in popular constitutionalism now use the concept of constitutional culture to draw attention to communicative pathways between citizens and officials. In these accounts, the concept of constitutional culture typically refers to substantive beliefs about the Constitution’s meaning—and not the beliefs about authority and role that guide citizens and officials in conflicts over the Constitution’s meaning. See, e.g., Balkin, *supra* note 64, at 605 (“Indeed, we can define a constitutional culture to a significant extent by what claims both ordinary citizens and professionals regard as reasonable and unreasonable, ‘off-the-wall’ and ‘on-the-wall.’ Citizens and professionals may differ in these judgments from time to time, but this is also an important aspect of constitutional culture, because it means that popular opinion and popular mobilizations may, over time, alter professional judgments.”); Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 547–48 (2009) (“Constitutional culture is the fish tank in which the beliefs and actions of judicial as well as nonjudicial participants swim. It is the ‘dynamic sociopolitical environment’ in which ideas about legal meanings circulate, ferment, compete and ultimately surface in formal venues such as legal advocacy or legislative actions.” (quoting Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 59 (2008))); Gerald Torres & Lani Guinier, *The Constitutional Imaginary: Just Stories About We the People*, 71 MD. L. REV. 1052, 1067 (2012) (“While the lawyers and judges formally construct the law, lay actors can also influence how the law is interpreted, enforced, or in fact popularly understood through their participation in the creation of our constitutional culture.”).

judgments about when they need to defer to one another, and when they can challenge each other's views and pronouncements, and how. These role-based understandings allow citizens and officials arguing about the Constitution's meaning to assert independence from one another, while laboring under the constraint to defer to one another, producing the evolving interpretations of the Constitution that sustain its democratic legitimacy over time.<sup>117</sup>

Because of these understandings about role, great constitutional controversies typically unfold along two axes, as debates about the Constitution's meaning *and* as debates about the respective prerogatives of officials and citizens to act when their understandings about the Constitution's meaning diverge. Southern officials famously greeted the Supreme Court's decision in *Brown v. Board of Education*<sup>118</sup> with determination to resist "by all lawful means"<sup>119</sup>—encouraging practices of resistance that would prompt the Court's assertion of judicial supremacy in *Cooper v. Aaron*.<sup>120</sup>

In the heat of constitutional controversies, these competing assertions of role authority are fiercely debated but rarely resolved.<sup>121</sup> As we know, the Court's assertion of judicial supremacy in *Cooper v. Aaron* did not go unquestioned but led instead to democratic objections of diverse forms.<sup>122</sup> Decades later, when President Reagan's Attorney General Edwin Meese countered claims of judicial supremacy by asserting the equal authority of coordinate branches of the federal government

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117. See Siegel, *supra* note 2, at 1349.

118. 347 U.S. 483 (1954).

119. 102 CONG. REC. 4460 (1956) (statement of Sen. George). See generally Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1054 (2014) (discussing reception of the statements by Senator George—popularly termed the "Southern Manifesto"—as a respectable statement of law that required response by those who supported the Court's decision in *Brown*).

120. 358 U.S. 1, 1, 18 (1958) (holding, in response to claims by "the Governor and Legislature [of Arkansas] that they are not bound by [the Court's] holding in *Brown*," that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system").

121. See *supra* Siegel, *supra* note 2, at 1327; cf. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1041 (2004) ("The deference due to judicial opinions and judgments is worked out, issue by issue, over time, with distinct points of equilibria achieved and unsettled in substantive disputes over controverted questions of constitutional governance. The practice of disturbing these uncertain and unstable boundaries is in fact the practice of constitutional dialogue, fraught precisely because of the multiple and inconsistent values that are in play.").

122. Ernest A. Young, *Constitutionalism Outside the Courts*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 843, 843–44 (Mark Tushnet et al. eds., 2015); cf. Post & Siegel, *supra* note 121, at 1040 ("The broader the reach of constitutional law, the more nonjudicial actors are bound by the legal vision of courts, and the more diminished is the space for the political creation of the Constitution.").

to interpret the Constitution,<sup>123</sup> outcry led him to retreat but only in part.<sup>124</sup> When Iowans opposed the reelection of judges who recognized same-sex marriage under the state constitution, their effort to demonstrate “[i]t’s we the people, not we the courts”<sup>125</sup> prompted impassioned defenses of judicial independence.<sup>126</sup> Yet these assertions of judicial independence did not diminish objections to judicial resolution of the marriage question, which dominated the opinions of the Justices who dissented in *Obergefell v. Hodges*.<sup>127</sup>

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123. President Reagan’s Attorney General Edwin Meese argued:

If a constitutional decision is not the same as the Constitution itself, if it is not binding in the same way that the Constitution is, we as citizens may respond to a decision with which we disagree. . . . Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction . . . , we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.

Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987).

124. Meese responded to the criticisms:

Putting the worst construction on what I did *not* say, *The Post* wondered whether the speech might be “an invitation to constitutional chaos and an expression of contempt for the federal judiciary and the rule of law.” I believe it is important not only to put these concerns to rest but also to emphasize again the point of the speech—that our Constitution is the supreme or paramount law of the land.

Meese, *supra* note 1, at 1003 (quoting *Why Give That Speech?*, WASH. POST (Oct. 29, 1986)).

Meese’s re-statement of his views is the source of the epigraph that opens this article. See *supra* note 1 and accompanying text. Departmentalism, the equal authority of coordinate branches of the federal government to interpret the Constitution, remains a site of continuing debate. Publication of Larry Kramer’s book, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004), which asserted departmentalist views from a different political perspective, occasioned renewed debate. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (book review); Laurence H. Tribe, *The People Themselves: Judicial Populism*, N.Y. TIMES (Oct. 24, 2004), <http://www.nytimes.com/2004/10/24/books/review/the-people-themselves-judicial-populism.html>. Robert Post and I responded to Kramer’s book in Post & Siegel, *supra* note 121. E.g., *id.* at 1029 (“In contrast to Kramer, we do not understand judicial supremacy and popular constitutionalism to be mutually exclusive systems of constitutional ordering.”). For an earlier defense of “*Cooper* and its assertion of judicial primacy without qualification,” see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 (1997).

125. Sulzberger, *supra* note 28 (quoting Bob Vander Plaats, the leader of the campaign to recall “three Iowa Supreme Court justices who were part of the unanimous decision that legalized same-sex marriage in the state”).
126. See, e.g., Dahlia Lithwick, *Cheap Seats: How Sandra Day O’Connor Got Drawn Into the Gay-Marriage Debate in Iowa*, SLATE (Sept. 13, 2010, 6:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/09/cheap\\_seats.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/09/cheap_seats.html) [<https://perma.cc/RG6C-JYKK>] (discussing a speech Justice O’Connor delivered in Iowa criticizing judicial elections); see also Grant Schulte, *O’Connor: Iowa Selection Process Is Fair*, DES MOINES REG., Sept. 9, 2010, at B1.
127. 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) (“But this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.”); *id.* at 2631 (Scalia, J., dissenting) (“With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the ‘reasoned judgment’ of

When conflict is mediated through the role-based understandings of constitutional culture in this way, conflict takes the shape of a debate about what it means to live in a constitutional democracy committed to the rule of law. Through conflicts of this kind, law and politics constrain each other.

As struggles over same-sex marriage illustrate, constitutional conflict produces important social goods. Conflict constrained by the role-based interactions of constitutional culture helps “steer” constitutional development over time; it also promotes the “attachment” to the Constitution of those who may be deeply estranged from official pronouncements of the law.<sup>128</sup>

In certain respects the story is a familiar one. Theorists of free speech, procedural justice, federalism, and the rule of law emphasize that outlets for voicing and acting on dissent play a crucial role in maintaining the authority of law.<sup>129</sup>

a bare majority of this Court—we move one step closer to being reminded of our impotence.”); *id.* at 2643 (Alito, J., dissenting) (“Today’s decision shows that decades of attempts to restrain this Court’s abuse of its authority have failed.”).

128. I have examined these dynamics in my work exploring how social movement conflict shapes the Constitution’s meaning and authority. See Siegel, *supra* note 2, at 1328 (observing that “popular deliberation about constitutional questions guides officials in enforcing the Constitution and promotes citizen attachment to the Constitution” and “suggesting that the constitutional order’s openness to change may invite the engagement and inhibit the estrangement of a normatively divided polity, and so enable forms of solidarity that dispute resolution cannot.”).

129. Drawing on a body of First Amendment scholarship premised on the view that “a government’s legitimacy in the eyes of the minority depends in part on its creation of channels for dissent,” Heather Gerken emphasizes dissent’s importance in “[f]orging civic ties” and “bind[ing] dissenters to the community,” and in affirming the dignity of the dissenter. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1775–76 (2005).

Like the scholarship on dissent, scholarship on procedural justice also emphasizes that opportunities for voice and participation engender civic attachment and enhance the government’s authority. Tom Tyler has shown us that an individual’s experience with legal procedures affects her willingness to accept decisions with which she disagrees: It matters to the litigant to have a neutral arbiter whom she trusts, to have an opportunity to voice her perspective, and to be addressed with respect by legal authorities. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 27 (2007) (“Because it provides all parties with desirable experiences with the courts, procedural justice is a key to the development of stable and lasting solutions to conflicts.”). See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (arguing that people obey the law because of its perceived legitimacy).

In his work on the rule of law, Jeremy Waldron has emphasized that the procedural aspects of law enable practices of argument that in turn vindicate individual dignity. See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in NOMOS L: GETTING TO THE RULE OF LAW 3, 23 (James E. Fleming ed., 2011). Waldron observes:

[L]aw is an argumentative discipline, and no analytic theory of what law is and what distinguishes legal systems from other systems of governance can afford to ignore this aspect of our legal practice and the distinctive role it plays in a legal system’s treating ordinary citizens with respect as active centers of intelligence. A fallacy of modern positivism, it seems to me, is its exclusive emphasis on the command-and-control aspect of law, or the norm-and-guidance aspect of law, without any reference to the culture of argument that a legal system frames, sponsors, and institutionalizes.

Yet constitutional theory remains oriented around consent as the key source of the Constitution's legitimacy.<sup>130</sup> It is less common for scholars in the field to explore the role of conflict in preserving the Constitution's authority and in sustaining attachment of those who are estranged from the Court's rulings.<sup>131</sup>

Entertaining these possibilities makes sense of many features of the constitutional order that we ignore when we reason as if consent is the sole source of constitutional meaning and community. Ongoing conflict about many crucial questions of constitutional law is commonplace, constrained by the role-based understandings of constitutional culture. When conflict is channeled in this way, it enacts a form of community in disagreement that can forge new constitutional meanings.<sup>132</sup>

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*Id.* at 21–22 (footnote omitted). For scholarship on dissent in the literature on federalism, see *infra* note 136.

These bodies of scholarship suggest that the role understandings of constitutional culture which enable Americans to fight over constitutional meaning provide forms of participation and voice that may be crucial in securing the Constitution's authority.

130. Constitutional theorists of many kinds ground the Constitution's authority in agreement. See, e.g., BRUCE ACKERMAN, *2 WE THE PEOPLE: TRANSFORMATIONS* 269–71 (1998) (offering a theory of constitutional moments that identifies forms of interbranch dialogue that function as “amendment analogues” and can give formal expression to the considered agreements of Americans about the foundational commitments that ought to guide national life); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 74 (2016) (“What makes the Constitution law is the consent of the ratifying public—We the People—who give assent to the text presented to them.”). This focus on consent as a crucial source of the Constitution's authority also funds the social-realist accounts of consensus-based constitutionalism discussed in Part II. See also Fallon, *supra* note 62, at 1792 (“[T]he legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification. Other fundamental elements of the constitutional order, including practices of constitutional interpretation, also owe their legal legitimacy to current sociological acceptance.”).
131. *But see, e.g.*, ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001). Robert Post and I approach conflict from this vantage point in our work on democratic constitutionalism. See, e.g., Post & Siegel, *supra* note 2. For a discussion of theories of judicial dialogue that value conflict, and their implications for *Obergefell's* reception, see Glen Staszewski, *Obergefell and Democracy*, 97 B.U. L. REV. 31, 98–101 (2017).
132. I have argued:
- [C]onstitutional culture supplies understandings of role and practices of argument through which citizens and officials can propose new ways of enacting the society's defining commitments—as well as resources to resist those proposals. Constitutional culture preserves and perpetually destabilizes the distinction between politics and law . . . . When constitutional culture can harness the energies of social conflict, agents of deeply agonistic views remain engaged in constitutional dispute, speaking through the Constitution rather than against it.

Siegel, *supra* note 2, at 1327.

Sociologists who examine the integrative role of conflict include LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956), and Georg Simmel, *The Sociology of Conflict*, 9 AM. J. SOC. 490 (1904). Work on the relational character of political conflict spans political theory and

Looking back at the debates preceding *Obergefell*, we can see how the understandings of role supplied by constitutional culture help create meaning and maintain community in the midst of passionate disagreement. Because advocates appreciate that officials accountable to the public have power to make binding decisions about constitutional questions, adversaries argue their case by appeal to constitutional values and memories that can persuade others who do not share their views.<sup>133</sup> Because advocates appreciate that there are multiple fora in which they can press their case, adversaries can persist in constitutional argument, even when they lose.<sup>134</sup>

In the United States, role-literate participants understand that the American constitutional order is a hierarchy headed by the U.S. Supreme Court and beneath it, fifty state supreme courts, all acting with authority to say what the law is. Yet participants also understand that in this system there are plural decisionmakers—forms of “jurisdictional redundancy,”<sup>135</sup> heterarchy as well as hierarchy.<sup>136</sup> It does not take a scholar of popular constitutionalism to explain

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law. See Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1336–40 (2010) (discussing this theme in the work of Chantal Mouffe, Jacques Rancière, Bernard Crick, Hannah Arendt, and Jeremy Waldron). For accounts that emphasize the integrative role of conflict in a federated system, see *infra* note 136.

133. See *supra* notes 103–10 and accompanying text. Elsewhere I have termed this the “public value” condition. See Siegel, *supra* note 2, at 1356–57 (“[T]he public value condition requires advocates to justify new constitutional understandings by appeal to older constitutional understandings that the community recognizes and shares. . . . The public value condition requires advocates to translate partial and partisan judgments about constitutional meaning into the language of a common tradition.”).

134. For examples, see *supra* Part I.A.

135. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 649 (1981). For one recent expression of Cover’s insights, see Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2372 (2008) (“In formulating measures for reform of our judicial systems we should consider the ability of multiple centers of adjudication to encourage socially beneficial institutional conflict and plural conceptions of the good.”).

136. In a heterarchical system such as the European Union, important questions of final legal authority remain unsettled. Daniel Halberstam argues that in certain respects the United States is a heterarchical or pluralist legal order like the European Union. Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 326 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009). For an American “analogue to Europe’s essential characteristic of unsettled legality and finality,” Halberstam looks not to federalism but to the separation of powers: “Here, a similar terrain of contestation and lack of finality operates in the United States among the various branches of the federal government, that is, among the President, the Congress, and the Supreme Court of the United States. According to some, it even extends to ‘the people themselves.’ Each of these actors has a plausible claim to being the final arbiter of legality within the American constitutional system.” *Id.* at 331–32 (footnote omitted) (quoting Mark Tushnet, *Popular Constitutionalism as Popular Law*, 81 CHI.-KENT L. REV. 991, 991 (2006)).

that even when the Supreme Court renders final judgment, there are many ways in which critics can work to restrict the reach of the Court's decisions and to change the Court's members. Those who believe the Court's judgments wrong or even illegitimate need not be wholly estranged but instead can contest those Court's judgments as an act of fidelity to the Constitution.

There is both closure and openness in this system, settlement and unsettlement. Citizens understand they are subject to the authority of decisionmakers whom they must persuade yet whose authority they also know how to contest. The need to persuade and the ability to contest each play a part in sustaining engagement. These understandings about role—about when to defer to government decisions and how to challenge them—allow for dialogue in constitutional systems where courts are thought to have the final word.<sup>137</sup>

When citizens are engaged in conflict that is mediated in these ways, conflict may hone arguments into new sources of constitutional meaning. Adversaries understand that they have an opportunity to shape law if they can translate their convictions into arguments with sufficiently broad-based appeal to refute their opponents' claims and persuade (or discredit) officials who are accountable to the larger public. Conflict structured in this triadic form can exert a moderating influence on adversaries' arguments, and transform them into claims about the

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There are several accounts that emphasize the pluralist dimensions of federalism and the integrative role of conflict in a federated system. See, e.g., Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1567 (2012) (“[W]e continue to emphasize federalism’s hierarchical dimensions rather than imagining federal-state relations as we do the relations between the three branches—as a system that mixes conflict and cooperation to produce governance.”); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010) (“[O]rienting constitutional theory around federalism-all-the-way-down would help us build a more satisfying nationalist account of federalism, one that emphasizes the integrative role that discord and division can play in a well-functioning democracy.”); Judith Resnik, *Accommodations, Discounts, and Displacement: The Variability of Rights as a Norm of Federalism(s)*, 17 JUS POLITICUM 209, 213 (2017) (“[F]ederalism enables participatory opportunities that create plural sources of law . . . . The plural legal sources within a federation generate conflict. . . . Instead of aspiring to ‘the tranquility of the state’ (to borrow from Thomas Aquinas), federalism entails discord, as an ongoing feature and as a *positive* attribute of governance” (footnote omitted)); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014) (“[F]ederalism constitutes a framework for national integration. . . . It creates a multiplicity of institutions with lawmaking power through which to develop national consensus, while establishing a system of government that allows for meaningful expressions of disagreement when consensus fractures or proves elusive . . .”).

137. It is constitutional culture that allows one to challenge the judgments of the courts in systems that have what Mark Tushnet terms “strong-form” judicial review, and that invite deference to judicial decisions in systems that have what he terms “weak-form” review. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2782–86 (2003). Christine Bateup explores the paradox that there may be more system-wide dialogue in systems with stronger judicial review. See Christine Bateup, Comment, *Reassessing the Dialogic Possibilities of Weak-Form Bills of Rights*, 32 HASTINGS INT’L & COMP. L. REV. 529, 593–95 (2009).

Constitution that command widespread support and recognition. In this way, “constitutional culture channels social movement conflict to produce enforceable constitutional understandings.”<sup>138</sup>

Looking at how the role-based understandings of constitutional culture constrained and channeled the conflict over same-sex marriage, we can see how Americans—acting in courts, legislatures, and civil society—argued in ways that created conditions of plausibility for the Court’s decision in *Obergefell*,<sup>139</sup> a dynamic Justice Kennedy expressly and repeatedly acknowledges in his opinions on same-sex marriage.<sup>140</sup> New constitutional meanings were forged through backlash. However bitterly contested, the Court’s decision in *Obergefell* is more plausible today than it would have been twenty years earlier.

Yet, *Obergefell* is still bitterly contested. Even if popular majorities now support the Court’s judgment, a mobilized and large plurality does not.<sup>141</sup> New constitutional meanings are still being forged through backlash, as these Americans arguing in *Obergefell*’s wake try to shape the decision’s meaning for the next phase of conflict.

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138. Siegel, *supra* note 2, at 1323. For a reflection on the ways that the triadic form of the conflict may exert “a moderating influence on the claims movements advance,” see *id.* at 1363–65. For an illustration of how this dynamic played out in the same-sex marriage conflict, see *supra* notes 99–100 and accompanying text.

139. See Siegel, *supra* note 2, at 1418 (observing the debate over marriage in 2006 and that “[o]ver time, the dispute is assuming a structure in which the Court can pronounce constitutional law, and have its pronouncement appear as an intelligible, if contestable, account of the Constitution’s meaning”).

140. Justice Kennedy counters the objection that courts should defer to democratic deliberation about same-sex marriage with the observation that judicial decisions have grown out of popular deliberation:

Yet there has been far more deliberation than this argument acknowledges.

There have been referenda, legislative debates, and grassroots campaigns, as well as countless studies, papers, books, and other popular and scholarly writings. There has been extensive litigation in state and federal courts. See Appendix A, *infra*.

Judicial opinions addressing the issue have been informed by the contentions of parties and counsel, which, in turn, reflect the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades. As more than 100 *amici* make clear in their filings, many of the central institutions in American life—state and local governments, the military, large and small businesses, labor unions, religious organizations, law enforcement, civic groups, professional organizations, and universities—have devoted substantial attention to the question.

This has led to an enhanced understanding of the issue—an understanding reflected in the arguments now presented for resolution as a matter of constitutional law.

*Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015); see also *id.* at 2597 (observing that the debate over same sex marriage was shaped by “years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage”); *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (“After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.”).

141. See *supra* note 80.

Exercising role-litracies of constitutional culture, critics of same-sex marriage have appealed to the nation's shared commitment to religious liberty as a ground on which to impose limits on *Obergefell*.<sup>142</sup> By seeking religious liberty exemptions—from laws concerning marriage and interactions with those who marry—opponents can express their continuing objections to same-sex marriage without directly defying the Court's judgment. Mobilizing as Christians seeking exemptions from the heavy hand of the law, opponents now speak as religious minorities asserting full-throated objections to same-sex marriage that before *Obergefell* they asserted as legislative majorities.<sup>143</sup> (Elsewhere I have termed this kind of shift in the form and justification of legal claims “preservation through transformation.”<sup>144</sup>)

142. Opponents of *Obergefell* planned to shift their arguments into appeal to religious liberty even before the Court's decision. See NeJaime & Siegel, *supra* note 9. As soon as the Court decided *Obergefell*, opponents invoked religious liberty as a principle to limit the Court's decision. See Jordain Carney, *McConnell: Congress Can't Roll Back Gay Marriage Decision*, HILL (July 1, 2015, 10:56 AM), <http://thehill.com/blogs/floor-action/246637-mcconnell-congress-cant-roll-back-gay-marriage-decision> [<https://perma.cc/UPU8-78QC>] (reporting that the U.S. Senate Majority Leader greeted the decision with the observation that “I think the courts have pretty well spoken. We'll be taking a look at whether or not religious liberty needs to be enhanced by statue [sic]”).

Opponents are now seeking to enact laws at the federal and state level protecting persons who object on religious grounds to interacting with persons in same-sex unions. See *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016) (preliminarily enjoining enforcement of Mississippi's religious exemptions law which grants special rights to citizens who hold particular religious or moral beliefs, specifically that “[m]arriage is or should be recognized as the union of one man and one woman; [s]exual relations are properly reserved to such a marriage; and [m]ale (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth”), *rev'd*, 860 F.3d 245 (5th Cir. 2017)); First Amendment Defense Act, H.R. 2802, 114th Cong., 1st Sess. § 3 (2015) (“[T]he Federal Government shall not take any discriminatory action against a person, wholly or partially, on the basis that such person believes or acts in accordance with a religious belief or moral conviction that marriage is or should be recognized as the union of one man and one woman, or sexual relations are properly reserved to such a marriage.”). For an account of the groups networked in opposition to *Obergefell*, see Jonathan Caphart, Opinion, *Here They Are, the 'Enemies of Equality' for LGBT Americans*, WASH. POST: POSTPARTISAN (July 7, 2016), <https://www.washingtonpost.com/blogs/post-partisan/wp/2016/07/07/here-they-are-the-enemies-of-equality-for-lgbt-americans> [<https://perma.cc/UL73-38BB>].

143. See NeJaime & Siegel, *supra* note 9 (tracing the emergence of religious liberties objections to same-sex marriage). Sherif Girgis argues that critics of same-sex marriage are entitled to exemptions from laws of general application to continue political conflict over same-sex marriage. See Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 YALE L.J. FORUM 399 (2016). In the ordinary case, those who lose in litigation or legislation have the usual forms of First Amendment rights to speak out and organize for change. As I understand his argument, Girgis believes that religious objectors are, in addition, entitled to exemptions from the application of laws with which they disagree—and may employ such exemptions to advocate for the reversal of laws they oppose. That is, Girgis believes that religious objectors are entitled to tools for expressing their opposition to laws that we do not grant to those who oppose laws on nonreligious grounds. See *id.*

144. See NeJaime & Siegel, *supra* note 9, at 2553 (observing that “when an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders

Kim Davis, the Kentucky clerk who invoked religious liberty as she refused to officiate at same-sex marriages,<sup>145</sup> richly illustrates how Americans drawing on the role understandings of constitutional culture can protest judicial judgments. The public debate provoked by Kim Davis's claims shows that Americans have understandings about the ways citizens and officials *must respect yet may properly resist* judicial authority—and are prepared to argue with one another about it. For example, after presidential candidate Mike Huckabee applauded Kim Davis by asserting that she should only “obey [the law] if it’s right,”<sup>146</sup> conservative Michael Gerson attacked Huckabee for advocating that a public official defy the judgments of the Supreme Court:

[T]here is no serious case to be made for the right of public officials to break laws they don’t agree with, even for religious reasons. This is, in essence, seizing power from our system of laws and courts. The proper manner to change the law, in this instance, is to work for the election of a president who will appoint Supreme Court justices with a different view and for the election of senators who will confirm such justices. Or to propose and pass a constitutional amendment. Davis may be impatient with this system, but it is the one we have. Personally assuming the role in Rowan County, Ky., of a Supreme Court majority is not an option. The available alternatives are to implement the law (as public servants across red America have overwhelmingly done) or to resign in protest (as some have done as well).<sup>147</sup>

In the wake of *Obergefell*, critics of the decision employed exactly the forms of electoral recourse to which Gerson points. Even as many celebrated *Obergefell* as the kind of judgment supported by popular opinion that courts have capacity to render,<sup>148</sup> critics of the decision mobilized to reassert control over the Court, in

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may adopt new rules and reasons that preserve elements of the challenged regime” and analyzing how this dynamic of “preservation through transformation” works in religious liberty-based objections to same-sex marriage); *id.* at 2552–54 (analyzing religious liberties claims in this framework). See generally Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2119 (1996) (analyzing the dynamic of preservation through transformation in the modernization of marital status law).

145. Denniston, *supra* note 107.

146. Zach Carter, *Mike Huckabee on Kim Davis: Obey the Law Only If It’s Right*, HUFFINGTON POST (Sept. 6, 2015, 12:28 PM), [http://www.huffingtonpost.com/entry/mike-huckabee-kim-davis-slavery\\_us\\_55ec61c4e4b03784e2761cb6](http://www.huffingtonpost.com/entry/mike-huckabee-kim-davis-slavery_us_55ec61c4e4b03784e2761cb6) [<https://perma.cc/LMP4-42QR>].

147. Michael Gerson, Opinion, *Kim Davis Is No Rosa Parks*, WASH. POST (Sept. 7, 2015), [https://www.washingtonpost.com/opinions/kim-davis-is-no-rosa-parks/2015/09/07/e821d528-533b-11e5-9812-92d5948a40f8\\_story.html?utm\\_term=.0e58d93df766&wpisrc=nl\\_opinions&wpm=1](https://www.washingtonpost.com/opinions/kim-davis-is-no-rosa-parks/2015/09/07/e821d528-533b-11e5-9812-92d5948a40f8_story.html?utm_term=.0e58d93df766&wpisrc=nl_opinions&wpm=1) [<https://perma.cc/D6GD-T6E4>]. Gerson served in the administration of George W. Bush and now writes for the *Washington Post*.

148. See *supra* note 74.

some regions as majorities and in other regions as intensely committed pluralities of voters.<sup>149</sup> Then-presidential candidate Donald Trump saw an opportunity to court their votes and appealed to voters who were disaffected from the Court's decision by selecting a prominent critic of same-sex marriage as his running mate.<sup>150</sup> Trump appealed to those same voters when he announced a list of conservative judges that he promised would guide his Supreme Court nominations.<sup>151</sup> After the election, President Trump asserted that voter concern about the Court had been a significant factor in his election<sup>152</sup>—a judgment that exit polls seemed to substantiate<sup>153</sup>—and moved to issue an executive order that

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149. See *supra* note 81 (observing that Republican candidates for president appealed to voters who wanted future nominees to the Court to oppose same-sex marriage).

150. See Paul Mirengoff, *Conservatives Rally Around Mike Pence for Vice President*, POWERLINE (July 6, 2016), <http://www.powerlineblog.com/archives/2016/07/conservatives-rally-around-mike-pence-for-vice-president.php> [<https://perma.cc/N5V6-DWAZ>] (“Pence is also popular with evangelicals. He’s strongly pro-life. With the support of evangelicals, the Koch brothers, and mainstream conservatives like Joni Ernst, Pence seems like a logical selection, assuming Trump wants to shore up conservative support.”).

151. As journalist Adam Liptak noted:

Mr. Trump credited two leading conservative policy groups—the Heritage Foundation and the Federalist Society—with helping to draw up his list. “You had an awful lot of conservatives during the campaign who were incredibly skeptical, to put it mildly, about Donald Trump,” said John G. Malcolm, a Heritage Foundation official who suggested a number of names that appeared on the list. “But they certainly cared a lot about the Scalia vacancy and the direction of the court. And that list was a very, very sober list, and it was greatly reassuring.”

Adam Liptak, *Trump’s Supreme Court List: Ivy League? Out. The Heartland? In.*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/us/politics/trump-supreme-court-justices.html> [<https://perma.cc/RVA3-LJ2H>]; see also Brooke Seipel, *McConnell: Supreme Court Vacancy Helped Trump Win*, HILL (April 8, 2017) <http://thehill.com/blogs/blog-briefing-room/news/327964-mcconnell-takes-partial-credit-for-trumps-win-report> [<https://perma.cc/9T86-TU24>] (“Nobody was predicting Trump would get 90 percent of the Republican vote just like Mitt Romney did, but he did. And the single biggest reason was, they wanted him to make the Supreme Court appointment, not Hillary Clinton.” (quoting Senator Mitch McConnell)).

152. Adam Liptak, *Trump Promises Fast Action on Supreme Court Nomination*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/supreme-court-nomination-trump.html> [<https://perma.cc/J5VU-Y6PA>] (“[Donald Trump] stressed the central role the court had played in his campaign. ‘I think it’s one of the reasons I got elected,’ Mr. Trump said. ‘I think the people of this country did not want to see what was happening with the Supreme Court, so I think it was a very, very big decision as to why I was elected.’”).

153. See ABC News Analysis Desk & Paul Blake, *Election 2016 National Exit Poll Results and Analysis*, ABC NEWS (Nov. 9, 2016, 2:10 AM), <http://abcnews.go.com/Politics/election-2016-national-exit-poll-results-analysis/story?id=43368675> [<https://perma.cc/5DBW-DWAM>] (“Nationally, 21 percent of voters call appointments to the U.S. Supreme Court ‘the most important factor’ in their decision, preliminary exit polls indicate. (Though President Obama did put forth a nominee, the Supreme Court seat vacated when Justice Antonin Scalia passed away in February [sic] remains open.) These voters overwhelmingly favor Trump, 57 to 40 percent.”); *Exit Polls*, CNN (Nov. 23, 2016, 11:58 AM), <http://edition.cnn.com/election/results/exit-polls> [<https://perma.cc/9Z7M->

licenses religious exemptions from laws concerning same-sex marriage, contraception, abortion, and more.<sup>154</sup>

### CONCLUSION

We have traveled a long distance from the stories about law and conflict on which accounts of judicial backlash rest. In familiar accounts of backlash, law has authority insofar as it reflects social consensus; conflict begins when law diverges from community and is a threat to each. In these accounts, there is little attention to the changing understandings that conflict enables, or the social relationships that constitutional conflict forges. In short, even as consensus-based models of constitutionalism reason from legal realist premises, this mode of describing our constitutional order fails to notice important features of our constitutional order.

In fact, Americans intuitively understand the centrality of conflict in constitutional law, even if they do not reason from this practical knowledge when discussing backlash. Talk of backlash is widespread at least in part because, as I will suggest in closing, claims about backlash are not only “sociological” or descriptive; they are also legal and prescriptive, funding normative argument about the roles of judges. Talk about backlash employs the language of legal realism to

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LH4T] (reporting that Supreme Court appointments were “important” for 70 percent of voters, and that among those for whom it was the “most important” factor, a majority voted for Trump).

154. See Exec. Order No. 13798, 82 Fed. Reg. 21676 (May 4, 2017). The Trump-Pence administration is interested in accommodating religious objections to laws protecting same-sex marriage, premarital sex, contraception, and abortion, as a leaked draft of an executive order illustrated. Sarah Posner, *Leaked Draft of Trump’s Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, NATION (Feb. 1, 2017), <https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination> [https://perma.cc/4ZZU-Z6AZ]. This regulation would allow any employer with moral or religious objections to his employees using contraception to refuse to provide his employees health insurance benefits covering contraception. Douglas NeJaime & Reva Siegel, *Trump and Pence Invoke Conscience to Block Contraception, Contrary to Our Religious Liberty Tradition*, TAKE CARE (June 4, 2017), <https://takecareblog.com/blog/trump-and-pence-invoke-conscience-to-block-contraception-contrary-to-our-religious-liberty-tradition> [https://perma.cc/35LY-M9WM]; Dylan Scott & Sarah Kliff, *Leaked Regulation: Trump Plans to Roll Back Obamacare Birth Control Mandate*, VOX (May 31, 2017, 8:00 AM), <https://www.vox.com/policy-and-politics/2017/5/31/15716778/trump-birth-control-regulation> [https://perma.cc/HTJ3-YYUX].

On the rise of religious liberty arguments as a ground on which to limit *Obergefell*, see *supra* note 142. On the influence of the religious right in the Trump administration, see Michelle Goldberg, Opinion, *Donald Trump, the Religious Right’s Trojan Horse*, N.Y. TIMES (Jan. 27, 2017), [https://www.nytimes.com/2017/01/27/opinion/sunday/donald-trump-the-religious-rights-trojan-horse.html?\\_r=0](https://www.nytimes.com/2017/01/27/opinion/sunday/donald-trump-the-religious-rights-trojan-horse.html?_r=0) (“It was the religious right’s weakness, which meant it couldn’t play kingmaker in the primary, that made Mr. Trump’s nomination possible, but his victory has given the movement tremendous new power.”).

debate judicial roles in the era of the living Constitution. The entanglement of description and prescription in backlash talk often goes unnoticed, compounding the confusion.<sup>155</sup>

As this reading of the backlash debate suggests, we rarely notice the role understandings of constitutional culture or appreciate their importance in sustaining our constitutional order. It is in the midst of fierce constitutional conflict, when citizens or officials press at the outer limits of role authority, that we focus on these often uncodified understandings about role whose centrality in channeling conflict we most appreciate when they can no longer be taken for granted. At these moments we often disagree about what counts as a breach of role authority, and debates over this question figure prominently in constitutional memory. Examples include the Court's decision in *Lochner v. New York*,<sup>156</sup> President Roosevelt's proposal for Court-packing,<sup>157</sup> the Court's decision in *Brown v. Board of Education*<sup>158</sup> and resistance to its enforcement,<sup>159</sup> the Court's decisions in *Roe v. Wade*<sup>160</sup> or *Bush v. Gore*,<sup>161</sup> and the Senate's refusal

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155. Consider how the backlash claims of progressives and conservatives diverged as the debate over marriage evolved. Over time, progressives have shifted from an argument about whether courts could intervene on behalf of minority rights to claims about when and how courts should intervene on behalf of minority rights. In invoking *Roe*, Justice Ginsburg was not warning judges to stay out of the business of vindicating rights, but instead she was cautioning judges how best to intervene, saying don't move too far, too fast. *See supra* notes 47–48 and accompanying text. Conservatives, by contrast, have invoked backlash as a reason for courts to stay out of the marriage debate and leave resolution of the question to the political process. These various strands of backlash discourse are often tangled together. In his *Obergefell* dissent, Chief Justice Roberts cited Justice Ginsburg and the abortion debate as a reason that the majority was wrong to recognize the constitutional rights of same-sex couples to marry. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting).

Progressive and conservative claims on backlash illustrate a rich paradox: In the American constitutional order, a claim about the institutional weakness of courts has developed into a form of argument directing the exercise of judicial power. Once we appreciate that talk of backlash is itself a mode of legal argument, we can better understand persistent recourse to talk of backlash through the lens of constitutional culture, and we can do so in ways that help clarify our understanding of judicial review.

156. 198 U.S. 45 (1905).

157. *See* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017). Bradley and Siegel examine separation of powers constraints on government actors. I include these among the role constraints of constitutional culture, which as I describe also operate among citizens and officials.

158. 347 U.S. 483 (1954).

159. For example, the Southern Manifesto challenged *Brown* as contrary to the Framers' intentions. *See* 102 CONG. REC. 4460 (1956) (statement of Sen. George).

160. 410 U.S. 113 (1973).

161. 531 U.S. 98 (2000).

to confirm Judge Robert Bork<sup>162</sup> or to hold hearings for Judge Merrick Garland.<sup>163</sup>

In some of these episodes, debate over whether the participants had authority to act as they did has taken the form of a debate about constitutional law. But in other of these episodes—particularly those that unfolded outside the courts—we are not clear whether the role constraints in question are constraints of law. Perhaps the asserted role constraints are merely political norms or conventions,<sup>164</sup> sub-constitutional understandings that have channeled conflict for generations but may or may not have the status of law.<sup>165</sup> This uncertainty is especially acute in contexts where courts do not commonly intervene. What exactly are the role constraints, if any? Are they constraints of law? If they do not have the force of constitutional law, are they constraints at all?<sup>166</sup>

162. See ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (2d ed. 2007).

163. See BREST, LEVINSON, BALKIN, AMAR & SIEGEL, 2016 SUPPLEMENT: PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIAL 44–52 (2016).

164. Cf. Bradley & Siegel, *supra* note 157 (exploring separation of powers constraints on governmental actors, such as norms constraining court packing that we might understand either as “historical gloss” on constitutional text or as “constitutional conventions”).

165. The boundary is endlessly negotiated. For one closely argued account, see *id.* at 316–19. For another example, consider Robert George’s admiring review of Akhil Amar’s *America’s Unwritten Constitution*. See Robert P. George, *Interpretive Freedom*, N.Y. TIMES (Dec. 21, 2012), <http://www.nytimes.com/2012/12/23/books/review/americas-unwritten-constitution-by-akhil-reed-amar.html> [<https://perma.cc/U3BW-FT9H>] (reviewing AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012)) (“The tough question is how to determine systematically and rigorously what falls within the ‘unwritten constitution.’ What is the text, understood in context, pointing to? Amar proposes several criteria for deciding, which become more controversial as the book goes on.”).

166. This uncertainty is richly illustrated in debates over the Senate’s refusal to hold hearings on Judge Garland’s confirmation. See BREST, LEVINSON, BALKIN, AMAR & SIEGEL, *supra* note 163, at 48–49. Critics of the Senate’s action do not share a framework in which to condemn its decision. For example:

I agree with the argument that there was nothing “unconstitutional,” in the standard lawyer’s sense of that term, in the GOP refusing to give Garland a hearing, given the necessary agreement that they could have voted against him after hearings on whatever grounds they wanted. Nor am I willing to argue that giving nominees hearings is part of Akhil Amar’s “unwritten Constitution” that is sufficiently discernable to allow us confidently to proclaim what is or is not “constitutional.” What I am willing to say is that the GOP breached the long-standing rule of comity, similar, say, to not blocking the ordinary operations of the Senate by refusing to give unanimous consent or waiving the reading of the Congressional Record, etc. . . . In any event, this is what Mark Tushnet means, I believe—he can correct me if I’m wrong—by talking about “constitutional hardball.” No functioning constitutional order can survive if everyone is playing such hardball.

Posting of Sanford Levinson, to [conlawprof@lists.ucla.edu](mailto:conlawprof@lists.ucla.edu) (Feb. 1, 2017) (on file with author).

What is crucial to appreciate is the centrality of these debates about role to the functioning of the constitutional order. It is not conflict as such that poses a threat to the constitutional order. As I show, conflict as well as consent sustain the Constitution's meaning and authority. Conflict over the Constitution has engendered and transformed our understanding of constitutional decisions we deem canonical. Conflict over the Constitution sustains the allegiance of those most estranged from the Court's judgments. On the other hand, conflict unconstrained by the role understandings of constitutional culture does pose a grave threat to the constitutional order. Institutions cannot function if individuals inside and outside of them do not have shared understandings about role, however contested the particulars may be.

Constitutional conflict is quite commonly marked by claims that some official is exercising authority illegitimately.<sup>167</sup> As I have observed, negotiations over role authority is an integral feature of constitutional conflict.<sup>168</sup> Yet, at times, anxiety that government officials have wholly abandoned constraints on role is especially acute.

Anxiety that the role constraints that channel constitutional conflict are breaking down has suffused the recent election and the new administration of Donald Trump. Numerous commentators worry about a breakdown in norms.<sup>169</sup>

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167. See *supra* notes 156–163 and accompanying text.

168. See *supra* notes 117–119 and accompanying text.

169. Many commentators have focused on the norm-transgressing features of the 2016 election. See, e.g., Alexander Burns, *Donald Trump's Defiance Is Seen as 'Colossal Mistake' That Threatens U.S. Image*, N.Y. TIMES (Oct. 20, 2016), [https://www.nytimes.com/2016/10/21/us/politics/donald-trump-election-rigging.html?\\_r=0](https://www.nytimes.com/2016/10/21/us/politics/donald-trump-election-rigging.html?_r=0) [<https://perma.cc/8TGU-A63U>] (“It is unclear whether Mr. Trump has a concrete plan to contest the results of the election if he loses. There is no law that forces a losing candidate to concede defeat—only a bipartisan tradition of comity.”). As one reporter has noted:

Trump's startling refusal to promise he'd accept the election results was just the latest in a series of seemingly casual dismissals of long-held American political norms. Trump has suggested widening libel laws in a way that would blatantly infringe the freedom of the press; he's also flouted the First Amendment in his vow to ban Muslim immigrants and to close down mosques. Meanwhile, his threat to jail his opponent if elected has raised the specter that he might use his office to quell legitimate dissent.

Yascha Mounk, *Yes, American Democracy Could Break Down*, POLITICO (Oct. 22, 2016), <http://www.politico.com/magazine/story/2016/10/trump-american-democracy-could-break-down-214383> [<https://perma.cc/6D3F-C6S2>]; see also Clare Foran, *An Erosion of Democratic Norms in America: The President-Elect Is Testing the Limits of Political Convention*, ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/11/donald-trump-democratic-norms/508469> [<https://perma.cc/G2E2-7RSH>] (featuring an interview with Dartmouth College political scientist Brendan Nyhan on how Trump's actions frequently breach norms); Greg Sargent, *Opinion, A Group of Political Scientists Says Trump's Attacks on Our Democracy Are Unprecedented and Dangerous*, WASH. POST: PLUM LINE (Nov. 7, 2016), <https://www.washingtonpost.com/blogs/plum-line/wp/2016/11/07/a-group-of-political-scientists-says-trumps-attacks-on-our-democracy-are-unprecedented-and-dangerous> [<https://perma.cc/R9M6-GW3S>] (discussing

Responding to a president who has challenged the legitimacy of elections<sup>170</sup> and the authority of (“so-called”) judges,<sup>171</sup> one observer announced that “norms and practices that underpin our constitutional order are under threat.” He continued:

I’m not talking about whether abortion will be legal or about what immigration policy will be (as important as these issues are to a great many people, of all political stripes). I’m talking about whether the outcomes of elections will be respected, about whether judicial orders will be obeyed. You know—fundamentals.<sup>172</sup>

The President’s desire for a “Muslim Ban,”<sup>173</sup> attacks on the “FAKE NEWS media” as “the enemy of the American People!”<sup>174</sup> and abrupt firing of the Director of the Federal Bureau of Investigation who was investigating his administration<sup>175</sup> prompt similar anxieties. Considering developments such as

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political scientists’ documentation of Trump’s unprecedented challenges to election norms); *infra* note 175 (quoting sources discussing President Trump’s firing of the Director of the Federal Bureau of Investigation).

170. In the closing weeks of his campaign, Donald Trump regularly asserted that the election is “rigged” and that his opponent Hillary Clinton should be in jail. David Jackson, *Trump: Clinton Should Be in Jail, the Election Is Rigged*, USA TODAY (Oct. 15, 2016, 3:58 PM), <http://www.usatoday.com/story/news/politics/elections/2016/10/15/donald-trump-maine-new-hampshire/92143964> [<https://perma.cc/MG3B-S7NQ>]; see also Philip Bump, *Americans Now Live in Two Worlds, Each With Its Own Reality*, WASH. POST: THE FIX (Oct. 15, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/15/americans-now-live-in-two-worlds-each-with-its-own-reality> [<https://perma.cc/6J8C-3G59>] (discussing claims of election rigging and the trust issues they tap and fuel). His supporters chanted “lock her up!” Jackson, *supra*. Since taking office, President Trump has continued to argue that the popular vote count for Hillary Clinton was contaminated by millions of fraudulent votes. See, e.g., Paulina Firozi, *Trump Continues to Insist Voter Fraud Robbed Him of Popular Vote*, HILL (Jan. 23, 2017, 8:12 PM), <http://thehill.com/blogs/blog-briefing-room/news/315786-trump-continues-to-insist-mass-voter-fraud-robbed-him-of> [<https://perma.cc/W7XD-5HR4>].
171. President Trump greeted the decision of a federal judge temporarily staying enforcement of his executive order with the tweet, “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!” Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976> [<https://perma.cc/D7SW-WW35>].
172. Posting of Mitch Berman, to [conlawprof@lists.ucla.edu](mailto:conlawprof@lists.ucla.edu) (Feb. 9, 2017) (on file with author). For similar observations, see *supra* note 169.
173. Amy B. Wang, *Trump Asked for a ‘Muslim Ban,’ Giuliani Says—and Ordered a Commission to Do It Legally*, WASH. POST: THE FIX (Jan. 29, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm\\_term=.bcb2f04a18e4](https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.bcb2f04a18e4) [<https://perma.cc/CJF3-L885>].
174. See Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), [https://twitter.com/realdonaldtrump/status/832708293516632065?ref\\_src=twsrc%5Etfw](https://twitter.com/realdonaldtrump/status/832708293516632065?ref_src=twsrc%5Etfw) [<https://perma.cc/V889-X76S>].
175. See Michael Gerson, *The Real Test of Our Tolerance of Trump Comes Now*, WASH. POST (May 11, 2017, 7:57 PM), [https://www.washingtonpost.com/opinions/the-real-test-of-our-tolerance-for-trump-comes-now/2017/05/11/d9558c6a-3679-11e7-b4ee-434b6d506b37\\_story.html?tid=ss\\_mail&utm\\_term=.a1e01d7a6b12](https://www.washingtonpost.com/opinions/the-real-test-of-our-tolerance-for-trump-comes-now/2017/05/11/d9558c6a-3679-11e7-b4ee-434b6d506b37_story.html?tid=ss_mail&utm_term=.a1e01d7a6b12) [<https://perma.cc/347Q-MK9W>] (“It is dangerous to have a

these, one account concludes: Whether American liberal democracy “survives depends less on the robustness of our formal, institutional defenses—which, we conclude, are not particularly strong—but on the decisions of discrete political elites, and the contingent and elusive dynamics of popular and elite mobilization for and against the conventions and norms that render democratic life feasible.”<sup>176</sup>

These accounts point to the domain of constitutional culture that this Article describes: to popular and professional understandings about law in the United States that structure the roles of citizens and officials in making claims in conflicts over the Constitution’s meaning. These understandings about role, and the beliefs about institutional authority on which they rest, help citizens and officials decide whether they must defer to one another, and when and how they may contest each other’s views. It is through these role-based understandings that the constitutional order coordinates its potentially conflicting commitments to democratic responsiveness and to the rule of law.

The role constraints of constitutional culture seek to channel disagreement into nonviolent forms.<sup>177</sup> Threats of violence of the sort that have surfaced in the

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leader with disdain for the law. It is also dangerous to have a leader who believes that anything legal is permissible. Trump’s firing of Comey was legal. It also violated a democratic norm—a proper presidential deference for an ongoing investigation and the independence of law enforcement.”); Amanda Taub, *Comey’s Firing Tests Strength of the ‘Guardrails of Democracy’*, N.Y. TIMES: THE UPSHOT (May 12, 2017), <https://www.nytimes.com/2017/05/12/upshot/comeys-firing-tests-strength-of-the-guardrails-of-democracy.html> (interviewing political scientists about the firing of James Comey and observing that “[i]n unhealthy systems, norm violations can spiral into tit-for-tat retaliation, ultimately tearing democracies apart. But in strong democracies, institutions will step in to enforce vital norms, preventing escalation and protecting the democratic system”).

176. Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. (forthcoming 2018) (updated manuscript at 100).

177. Role understandings of the constitutional order restrict the exercise of violence to state actors who act under Due Process constraints, and require citizens to achieve change through persuasion rather than coercion (allowing for liminal cases where violence serves a communicative rather than a coercive role). See Siegel, *supra* note 2, at 1352 (“The consent condition requires those who disagree about questions of constitutional meaning to advance their views through persuasion, by appeal to the Constitution. It is a constraint on argument that shapes the roles of citizens and officials in a constitutional democracy, and enacts community bound by conviction rather than coercion.”). These constitutional constraints exist in principle but not always in practice: they offer a framework for arguing about the legitimate bounds of public and private power. See, e.g., Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 127 (2017) (analyzing “an important dimension of the police violence problem: Fourth Amendment law. It permits police officers to force interactions with African Americans with little or no basis” and showing how “[t]his ‘front-end’ police contact—which Fourth Amendment law enables—is often the predicate to ‘back-end’ police violence—which Fourth Amendment law should help to prevent”); cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.”).

American electorate<sup>178</sup> are a vivid reminder that democracies depend on understandings of role to channel conflict and transform potentially antagonistic relations into agonistic relations.<sup>179</sup> When these understandings about role break down, agonistic relations deteriorate into utter mistrust and enmity. Citizens assert authority through violence<sup>180</sup> and officials subvert democratic norms and processes for entrenching power.<sup>181</sup>

We commonly talk as if consent and consensus define the terms and bonds of community, but the Constitution's authority does not depend on consent alone. Conflict channeled through the role understandings of constitutional culture is crucial in directing the growth and sustaining the authority of our constitutional law. Conflict helped forge *Obergefell v. Hodges* and establish its authority, just as conflict will play a crucial role in defining its reach. For conflict to serve these ends, however, it must be constrained. Whether we ground these constraints in text, structure, or the unwritten Constitution, or call these constraints law, gloss, norms, or conventions, the vitality of these role constraints is key to the strength and to the character of a constitutional democracy.

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178. See, e.g., Lois Beckett, *Milwaukee Sheriff Says It's 'Pitchforks and Torches Time' and Stands by Trump*, GUARDIAN (Oct. 15, 2016, 4:34 PM), <https://www.theguardian.com/us-news/2016/oct/15/milwaukee-sheriff-david-clarke-pitchforks-torches-time-twitter> [https://perma.cc/4Y3P-NE4T] (quoting Sheriff David A. Clarke, Jr., of Milwaukee County, who previously called Black Lives Matter the “enemy,” asserting that “[i]t’s incredible that our institutions of gov, WH, Congress, DOJ, and big media are corrupt & all we do is bitch. Pitchforks and torches time”).

179. See *supra* notes 128–31 and accompanying text.

180. See, e.g., *supra* note 178.

181. Cf. Huq & Ginsburg, *supra* note 176 (updated manuscript at 97) (discussing role understandings of officials who are “committed to democratic politics, rather than to the securing of permanent, entrenched governmental power”).