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## Our Court Masters

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Chad J. Pomeroy\*

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### I. INTRODUCTION

Imagine a hypothetical state. We will call it Calore, newly admitted splitting off from California and Oregon.

Calore is a politically moderate state, given its derivation from the northern, and relatively conservative, part of California and the coastal, and relatively progressive, part of Oregon. In fact, given its roots, Calore is a good example of the fiscally moderate and socially liberal viewpoint so many politicians claim to possess.<sup>1</sup>

Given this political landscape, the people of Calore (colloquially referred to as “Calormen”) decide to legalize (and tax receipts on the sale of) a wide variety of drugs that are illegal to possess, consume, or sell in neighboring states. They do so by amending the Calore Constitution by voter initiative (with the proposed amendment referred to as “Amendment 3”).

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1. But that none, in truth, seem to actually possess.

Prior to the vote, there was a robust public debate. Conservative members of Calore decried both the moral failings often associated with drug use and the negative economic externalities accompanying widespread drug usage. A coalition of libertarians and progressives lauded the freedom of choice inherent in drug liberalization and the increased tax receipts the state might reap. After the debate played out (including significant contributions and participation by interested parties from outside Calore), the people voted on the issue at a duly held general election. The debate sparked a large turnout of over 60%, and voters overwhelmingly approved Amendment 3 by a vote of 65% to 35%.

Shortly thereafter, a new (and relatively newly appointed) bureaucrat in Calore's State Comptroller's Office<sup>2</sup> issued Letter Ruling 5.23.1(a)(ii), which concluded that Amendment 3 was contrary to a superseding provision of the Calore Constitution (as interpreted by said bureaucrat) and that, as such, it was null and void. This Letter Ruling, bearing the imprimatur of an official Finding of the Comptroller's Office, became administrative law, and all state employees (including police officers) immediately began enforcing it.

The voters for Amendment 3 cried foul, but the State of Calore was unmoved. Majority rule be damned, Amendment 3 was overturned because of the interpretation of an arcane set of rules issued by an appointed, low-level official.

What do you think of this narrative? Should a large majority of citizens have their voice silenced by a single, unelected government official? Do you think that superseding rules and laws should be respected and honored, no matter the circumstances? Or are you perhaps agnostic about the particulars of this case but troubled by the process by which Amendment 3 was disposed?

Whatever your view, this hypothetical is not far-fetched. This happens throughout the country, and it happens regularly.

Take a recent example from Utah. In 1995, Utah became the first state to pass a bill prohibiting the recognition of same-sex marriages performed in other states and nations.<sup>3</sup> Thereafter, in 2004, Utah vot-

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2. This bureaucrat has the title of Third Designee in Charge of the Fifteenth Division of Accounting Regulatory Issues of the Comptroller. These sorts of titles make social standing and importance difficult to determine, but it is apparent to everyone that this fellow is not important because he only has one security detail and one car in his retinue, very low numbers for the Comptroller's Office.

3. See Husband and Wife—Recognition of Marriages Act, 1995 Utah Laws ch. 146 (H.B. 366) (codified as amended at UTAH CODE ANN. § 30-1-4 (West 2014)). The law arose from the "Recognition of Marriages" bill, passed in response to the *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996) decision on same-sex marriage from Hawaii, primarily as an attempt to address "a deficiency in Utah's laws [that] might require the state to recognize" unions performed outside the state. Karen Snow, *Law Professor Defends Marriage in Same-Sex Marriage Battle*, BYU MAG.,

ers approved a ballot referendum on Utah Constitutional Amendment 3, which defined marriage as the legal union between a man and a woman and which restricted unmarried civil unions.<sup>4</sup> This referendum was approved by 65.9% of those who voted on it.<sup>5</sup> This means that 593,297 Utah citizens (of the approximately 900,000 who voted) voted to approve the amendment.<sup>6</sup>

That majority held until 2013. In March, three couples, including one previously married in Iowa, filed suit in the United States District Court for the District of Utah, arguing that Amendment 3 violated the Due Process and Equal Protection Clauses of the United States Constitution.<sup>7</sup> On December 20, 2013, the court ruled the amendment was unconstitutional, with District Judge Robert Shelby expressing his opinion that Amendment 3 “does not . . . elevate the status of opposite-sex marriage; it merely demeans the dignity of same-sex couples.”<sup>8</sup> Thus, one man overturned the vote of nearly 600,000 people.<sup>9</sup>

Obviously, gay marriage is a topical, and controversial, issue.<sup>10</sup> Ultimately, this Article has nothing to say about that issue.

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Spring 1997, *archived at* <http://perma.unl.edu/89D8-JLMD>. “The bill was brought to the floor just minutes before midnight, after . . . [being] lifted . . . from the bottom of the Senate calendar. It passed 24 to 1.” *Utah Won’t Accept Same-Sex Marriages*, N.Y. TIMES, Mar. 3, 1995.

4. H.R.J. Res. 25, 55th Leg., Gen. Sess. (Utah 2004) (proposing amendment: UTAH CONST. art. 1, § 29, approved in the general election on November 2, 2004, and effective on January 1, 2005).
5. 2004 UTAH GENERAL ELECTION RESULTS 1, 30 (2004), [http://elections.utah.gov/Media/Default/Documents/Election\\_Results/General/2004Gen.pdf](http://elections.utah.gov/Media/Default/Documents/Election_Results/General/2004Gen.pdf), *archived at* <http://perma.unl.edu/7LA8-AEET>.
6. *Id.*
7. *See generally* Complaint, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (No. 2:13-cv-00217-RJS), 2013 WL 1287377.
8. *Kitchen*, 961 F. Supp. 2d at 1215.
9. I practiced law in Utah for nearly ten years prior to teaching and had some glancing familiarity with Judge Shelby prior to his elevation to the federal bench. It is that familiarity that sparked my interest in this topic and that ultimately led to the writing of this Article.
10. It is probably unnecessary to cite to anything for the proposition that gay marriage is topical. It is, however, necessary to cite to authority for the proposition that gay marriage is controversial. Media coverage is nearly universally positive, so it may come as a surprise that this is an issue that still divides public opinion. Since 1996, public view has gradually shifted from opposing same-sex marriage to supporting it, albeit by a small margin. *See* Michael Muskal, *Gallup Poll: Same-Sex Marriage Support at New High*, L.A. TIMES (May 21, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-poll-majority-americans-support-same-sex-marriage-20140521-story.html>, *archived at* <http://perma.unl.edu/8LJ3-3M> TF. A relatively recent *New York Times* article looked at various polling numbers from 2013 and determined that “support for same-sex marriage now exceeds opposition to it,” but that majority support was a slim one of only 51%. Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES (Mar. 26, 2013), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how>

Instead, this Article seeks to examine the process that occurred in Utah, and which occurs regularly throughout the country in a wide variety of circumstances. We take it for granted that courts are the ultimate arbiters of justice and equity, but does it really make sense that one person (or cabal of people) should overrule a whole state? If so, when does that make sense? This Article attempts to tackle these questions and ultimately argues that more people should be troubled by cases like this (whatever your personal views) and by the role that courts often take upon themselves.

This is because, in the end, courts risk losing legitimacy if they deviate too far from perceived social and cultural norms when addressing legal issues. Such a limitation is fundamental to the nature of our legal system and is baked into the American jurisprudential system. Our courts ignore it at our peril.

The nature of this limitation can be seen when one looks at our legal system in a broader context. Part I begins by examining our mechanisms of enforcement. In America, laws are enforced by force or by consent. Though a rough statement encompassing many facets of legal, ethical, and even moral behavior, that is essentially what laws reduce to: actors<sup>11</sup> follow laws either because they choose to do so voluntarily or because they are compelled to do so by force.<sup>12</sup> This is interesting (and relevant) because, while most laws are enforced by both force and consent, court rulings and directions are generally enforced by consent. Indeed, court rulings and judge-made law function almost entirely because our society *chooses* to follow and obey them.

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opinion-on-same-sex-marriage-is-changing-and-what-it-means/, *archived at* <http://perma.unl.edu/E9CH-4D9U>. The article suggests that a number of controversial and complex issues complicate same-sex marriage polling, including the “increasing variety of propositions relat[ed] to same-sex marriage on the ballots, from those that seek to ban it . . . to those that ask voters to approve it . . . to those that would alter the state constitution . . . [and] whether or not civil unions were also included.” *Id.* Based on historical polling patterns, the article predicts support to continue to grow by “one and a half percentage points nationally per year.” *Id.*

11. Those subject to American laws include citizens, residents, natural persons, business entities, and, potentially, any legally recognized “person” anywhere in the world. *See, e.g.*, TEX. TAX CODE ANN. § 171.0002 (West 2012) (identifying which business entities are subject to franchise tax in Texas); Estate of Casimir *ex rel. v.* New Jersey, No. 09-4004, 2009 WL 2778392, at \*5 (D.N.J. Aug. 31, 2009) (“A person found within the United States cannot somehow exempt himself or immunize himself from the application of state or federal law by declaring himself a non-citizen or diplomat.”).
12. “Force” is a broad concept, but so is its application. You may pay your taxes because you truly believe in the American Experiment and really believe, in your heart of hearts, that the U.S. Government will use those funds wisely. Most people, though, probably pay because they fear the penalties arising from nonpayment—penalties which are enforced by force, or a threat thereof.

The consensual nature of court-created law has a number of consequences. Most relevant here is that the cooperative relationship that exists between the law-giver and the law-follower ultimately requires the law-giver to take into account the views of the law-follower. When put generically, this proposition seems relatively uncontroversial, but Part II explores it in depth and reaches the relatively surprising conclusion that courts follow legal actors as much, or more, than the other way around. This is surprising because it inverts our general view of the way that laws work. Indeed, though we usually view courts as helping to craft and enforce society's agenda, courts actually act within a broader spectrum of social norms. This means, as is discussed in Part III, that courts that ignore (or exceed) these norms risk their very legitimacy (and, ultimately, whatever "cause" they seek to champion).

The Article concludes, then, that courts must be ever mindful of their role in our society and always cognizant of social norms and mores, and that they fail to do so to the peril of their own prerogatives and legitimacy.

## II. THE GUN OR THE SALUTE

Most Americans take law enforcement for granted. Certainly, in academic settings, most scholars spend their time arguing about what the law should be or why the law is the way it is—few spend much time contemplating the pedestrian issue of whether or not rules are actually followed. They presume that people either follow the law or suffer punishment.<sup>13</sup> Here, though, it is important to spend a bit more time on this basic proposition.

Why is it, exactly, that people follow the law? Obviously, there are a host of reasons (moral, ethical, social, etc.). In large part, however, people follow the law for one of two reasons: either they are forced to

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13. Indeed, the very phrase "force of law" presupposes that laws have some inherent ability to compel compliance. There are, of course, some exceptions to this general point of view. See, e.g., John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 111 (2007) ("Civil disobedience is a form of protest that, while usually peaceful, involves violating the law—usually by trespassing on government property, blocking access to buildings, or engaging in disorderly conduct."); Frank Menetrez, *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, 47 UCLA L. REV. 859, 860 (2000) ("An efficient breach of contract is a breach that will, in some economically defined sense, make society better off—it will lead to a more efficient use or allocation of resources."). However, generally speaking, the concept that people may simply not follow the law is excluded from most scholarly consideration, probably, in part, because it would not feel very useful to spend an entire article propounding a view of the law only to ultimately acknowledge that such vehemence is not likely to affect anyone's actual behavior.

do so, or they choose to do so—either they bow to the gun or they salute the flag.

Of course, voluntary compliance is not unique to the courts. Much of our system of American democracy is staked upon society's willingness to follow the rules.<sup>14</sup> Without its citizens agreeing to do so, the polity would fall apart under the burden of enforcement.<sup>15</sup> Certainly, this does not mean that there is never controversy surrounding the promulgation or enforcement of laws. No law will please all of the people all of the time. But our system has been constructed with this difficulty in mind. Representative democracy dictates that the majority will elect representatives who will, eventually, reflect the "general will."<sup>16</sup>

The alternative to this voluntary compliance (the salute) is enforced compliance (the gun). Many rules are enforced at the point of a gun.<sup>17</sup> When you pay taxes, for instance, you do so for fear of prison (to which you will be escorted by a man with a gun). Similarly, when you refrain from attacking the driver who cuts you off, you do so for fear of prison (or worse). Indeed, even when you register your car, you do so for fear that you may be fined or go to jail or have your car taken—all of which will be enforced by a man with a gun. Consent

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14. "The heart of the democratic faith is government by the consent of the governed." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 27 (1962).

15. See Jeffrey Friedman, *Introduction* to JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Legal Classics Library, Division of Gryphon Editions 1994) (1690) (indicating that government, in order to be legitimate, must have the consent of the governed). In fact, that consent is at the very heart of our system, which is, at its most basic, a contract between the governed and the governors. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 264 (Legal Classics Library Special Edition 1994) (1690). Put more articulately:

But though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of the Society, or Legislative, constituted by them, can never be suppos'd to extend farther than the common good; but is obliged to secure every ones Property by providing against [defects of Nature] that made the State of Nature so unsage and uneasie.

*Id.* at 264–65.

16. See LOCKE, *supra* note 15, at 265 ("And so whoever has the Legislative or Supreme Power of any Commonwealth, is bound to govern by establish'd standing Laws, promulgated and known to the People and not by Extemporary Decrees; by indifferent and upright Judges, who are to decide Controversies by those Laws . . . And all this to be directed to not other end, but the Peace Safety, and publick good of the People.").

17. See, e.g., Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479 (2012).

and force are not necessarily mutually exclusive,<sup>18</sup> and most of us do not dwell on the governmental threat hanging over our heads. Nevertheless, it is unavoidably the case that legislative and executive rules significantly rely on the omnipresent threat of physical violence.<sup>19</sup>

There is nothing wrong with either method of enforcement. Neither force nor acquiescence is inherently superior to the other, and both ultimately contribute to a more just and verdant society.<sup>20</sup> The distinction is interesting here, though, because compliance with judge-made law is overwhelmingly voluntary.

“Ultimately courts depend upon federal executive or legislative support in order to see that judicial orders and policies are carried out.”<sup>21</sup> This is because the courts have no direct form of control over the public.<sup>22</sup> Indeed, even the Supreme Court of the United States, the highest judicial authority, relies on the voluntary compliance of

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18. *See id.* at 486 (“The existence of consent . . . does not preclude the existence of force. Already at the time of consent, there is always a question of whether the consent was induced by force. Afterward, moreover, the government often relies on force—indeed, the force of law—to implement its conditions.”).

19. *See id.* at 490 (“[M]any conditions, most clearly those that are regulatory or that bind into the future, are backed with constitutionally significant government force.”); cf. Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014) (discussing America’s extraordinary incarceration rates); Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853 (2014) (discussing the role of fines and penalties in our legal system). This is a long-standing element of the American legal system. In 1832, for example, Andrew Jackson “asked Congress to empower him to use force to execute federal law” in order to combat nullification efforts of several southern state legislatures. *Andrew Jackson Denounces Nullification in a Presidential Proclamation*, DIGITAL HIST. (2012), [http://www.digitalhistory.uh.edu/disp\\_text\\_book.cfm?smtID=3&psid=371](http://www.digitalhistory.uh.edu/disp_text_book.cfm?smtID=3&psid=371), archived at <http://perma.unl.edu/JG4J-7QYE>. Congress promptly did so. *Id.*

20. “Government, by accreting to itself a monopoly of force, removes from other agencies of society the possibility of equating right with might.” Symposium, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O’Connor, From the Stanford Archives, Chapter IV: The Moral Basis of Individual Rights*, 58 STAN. L. REV. 2028, 2035 (2006).

Thus we have here two basically opposite tendencies of government, both of which endear it to men. One is that it increases ability and opportunity, the other is that it represents the possibility of achieving a state of affairs where force is not the solution to all questions. This latter state of affairs can be achieved, however, only by the state exercising moral as well as physical self-limitation upon itself. When it fails to do this, might once more equals right.

*Id.* at 2036.

21. Barry Freidman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 768 (1992) [hereinafter *Federal Remedies*].

22. Courts have no armies, police, or budgetary authority that would permit them to forcefully effect their rulings. *See* Ralph George Elliot, *Public Trust Is a Fragile Bond*, 77 CONN. B.J. 41, 42 (2003) (“The Judicial Branch . . . has neither the power of the purse nor the personnel to implement its decisions.”).



the public.<sup>23</sup> The primary exception to this concept relates to a court's ability to find parties in contempt, but even this power is relatively benign and does not ultimately grant courts significant, direct control of citizen behavior.<sup>24</sup> Ultimately, courts are toothless.<sup>25</sup>

Voluntary compliance is relevant here because it greatly affects how the courts and the public interact. In the context of judge-made law, society is markedly divorced from its creation and promulgation. Elsewhere, the citizenry has a direct stake in the mechanisms of the law, so it seems relatively just and straightforward for the citizenry to willingly participate in the execution of the same.<sup>26</sup> In the case of

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23. Without it, the Supreme Court (like all courts) must appeal to the help of the other branches of government. See *Cooper v. Aaron*, 358 U.S. 1, 26 (1958) (Frankfurter, J., concurring) ("Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support."). *Cooper* is illustrative. There, legal action began because a local school district asked for extra time to implement a judicially-approved school integration plan. *Id.* at 4. The Supreme Court declined but was not able to enforce the original order, and compliance was ultimately enforced only when the President sent in troops. See Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957). In effect, all court orders are more or less analogous to civil judgments: they are pronouncements that may or may not be enforced.

24. "[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." *Shillitani v. United States*, 384 U.S. 364, 370 (1966). In fact, some states statutorily designate ignoring a court order as civil contempt. *E.g.*, N. C. GEN. STAT. § 5A-21 (2015). And there is no question that courts at all levels attempt to utilize this power to control parties and enforce their rulings. *E.g.*, *Spallone v. United States*, 493 U.S. 265 (1990). In *Spallone*, the lower court issued a negative injunction disallowing discriminatory housing practices and requiring the municipality to build low-income housing. *Id.* at 268–69. The city undertook some steps to comply but ultimately abandoned its efforts. *Id.* at 270–71. The court imposed contempt citations, escalating daily fines for the municipality, and daily fines and imprisonment for noncompliant councilmembers. *Id.* at 271–72. The Second Circuit and the Supreme Court ultimately affirmed the concept of fines and contempt (though they modified the lower court's orders significantly). See *id.* at 272, 280. However, as *Spallone* itself makes clear, this is not an ideal method of enforcement. If "justice delayed is justice denied," then, surely, an enforcement mechanism that takes *years* to come to fruition is lacking. See *id.* (deciding this case more than two years after the initial contempt order). Moreover, even a swiftly effected contempt order can simply be denied unless it is enforced by another branch of government with the actual ability to impose force upon recalcitrant parties. See *supra* note 23. As such, contempt is not a significant exception to the powerlessness of courts.

25. This impotence was famously driven home by President Jackson's well-known response to the case of *Worcester v. Georgia*, 31 U.S. 515 (1832): "John Marshall has made his decision; now let him enforce it." See Elliot, *supra* note 22, at 41. In fact, this reliance leaves the courts fundamentally exposed to the pressures of the other branches of government. See *Federal Remedies*, *supra* note 21, at 778 (citing Roosevelt's Court-packing plan as an example of the judiciary's vulnerability).

26. See, *e.g.*, Elliot, *supra* note 22, at 41; *Federal Remedies*, *supra* note 21, at 778. Note that these sources generally refer to statutory constructs, which flow from the legislature, which flow from the citizenry. Of course, this connection is often

judge-made law, however, this just is not so. Judges are appointed by politicians who are answerable to the body politic, but, once appointed, they are largely insulated from the public.<sup>27</sup> The very area of the law, then, that calls for the least amount of public participation is that area that requests the most obeisance. As is discussed at length in Part III, this means that courts must generally remain cognizant of public attitudes and preferences if they are to maintain their role and law-making credibility.<sup>28</sup>

### III. THE LIMITS OF VOLUNTEERISM

Broadly speaking, the role of courts in our society is well understood and not particularly controversial. There is room for a variety of opinion as to how courts perform that function, but the concept that judges have historically acted to protect fundamental rights against a tyranny of the majority is well accepted. This has often placed courts in opposition to large swaths of the public, but not to the extent one would perhaps expect. The reason for this unexpected harmony is the voluntary nature of judge-made law, discussed above.

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attenuated (particularly in the case of regulations arising from the executive power). However, the principle generally holds that much of society's willingness to follow rules and regulations relates to the rules and regulations that society can directly affect.

27. This is not universal, in that some judges are elected, not appointed. See Cynthia Kelly, *Testimony by Cynthia Kelly Before the Joint Select Committee on the Judiciary of the Texas Legislature*, 72 JUDICATURE 158 (May 27, 1988) (delivered in Austin, Texas) (“[Forty] states select at least some of their judges through elections—either partisan, nonpartisan, or retention—which means that almost 80 per cent of our nation’s judges will participate in an election campaign at some point during their judicial careers.”). However, there is some reason to believe that, even under such circumstances, judges remain removed from the public. See Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, n.62 (2014) (“[E]ven in jurisdictions where judges are elected, we have no theory of representation that allows judges’ votes to reflect the utility-prospects of those who elected them.”). But see Sandra Day O’Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 484 (2009) (noting Roscoe Pound’s well-known complaint that “putting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench”) (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906)).
28. The concept is commonly referred to as “buy-in.” See, e.g., Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (discussing the efficacy of police officials “gain[ing] the cooperation of the people with whom they deal” because doing so “facilitate[s] immediate acceptance and long-term compliance”). Buy-in is important in many contexts because “[p]eople are more likely to adhere to agreements and follow rules over time when they ‘buy into’ the decisions and directives of legal authorities.” *Id.*

It would be a wonderful thing, no doubt, to have everyone jump at your every word and be ever eager to do your bidding.<sup>29</sup> This is not, however, how the world works. People are not ever-pliable entities, willing to do whatever they are told, no matter how little they like it or how little it makes sense to them. This means that, unless you have the wherewithal to enforce compliance, you must reach some sort of accommodation with those whom you govern. As is discussed below, courts have traditionally understood this because they have historically appreciated the voluntary nature of society's compliance with their rulings and how that affects their role in society.<sup>30</sup>

The courts serve as a guard against the majoritarian, public pressures that flow through the legislative and executive branches of government. The great danger in republics is that the majority will not respect the rights of minority.<sup>31</sup> This concern for minority rights was important to the founders,<sup>32</sup> so they created the courts. In particular, the courts do not stand for election.<sup>33</sup> As such, they do not have to react to public sentiment or majority rule, so they are an institution uniquely divorced from public participation and charged with enforcing principled positions and doctrines.<sup>34</sup>

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29. Imagine, for instance, being able to tell the entire state of Utah that it is wrong and that it must conform to your views of how society should work, regardless of how many people agree and regardless of hundreds of years of social norms and accepted behavior. One could perhaps be forgiven for becoming a bit mesmerized by that sort of power, instantly conferred by a robe and a gavel.

30. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 26 (1958) (Frankfurter, J., concurring).

31. THE FEDERALIST NO. 10 (James Madison).

32. In his first inaugural address, Thomas Jefferson stated that, "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate which would be oppression." Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) (transcript archived at <http://perma.unl.edu/X2DQ-5BKW>).

33. *See* Waldron, *supra* note 27.

34. *See* Judge John E. Jones III, *Inexorably Toward Trial: Reflections on the Dover Case and the "Least Dangerous Branch,"* THE HUMANIST (Dec. 17, 2008), <http://thehumanist.com/magazine/january-february-2009/features/inexorably-toward-trial-reflections-on-the-dover-case-and-the-least-dangerous-branch>, archived at <http://perma.unl.edu/R5MQ-HKED> ("Articles 1 and 2 [of the U.S. Constitution] designate the legislative branch and the executive branch, respectively, as majoritarian—they are subject to the will of the people; they stand in popular elections. But article 3 is counter-majoritarian."). In 2008, Judge Jones was awarded the American Humanist Association's Humanist Religious Liberty Award at the World Humanist Congress in Washington D.C. *See id.* He received the award because of his 2005 ruling that the teaching of intelligent design in public schools was unconstitutional. *See id.* This ruling, as one might expect, exposed Judge Jones to significant criticism (from numerous well-known public figures, including Bill O'Reilly, Phyllis Schlafly, and Ann Coulter), which he largely attributed to the nature of the courts' role in our society.

The judicial branch protects against the tyranny of the majority. We are a bulwark against public opinion. And that was very much done with a

And, generally speaking, the courts have served that role well. Courts routinely strike down popular laws or rules that do not pass constitutional muster. From school integration to abortion to criminal defendant protection to the more recent Supreme Court decision on “Obamacare,” the courts have consistently stood up for unpopular constitutional principles.<sup>35</sup> This is, given the discussion above about the risks of majoritarianism, exactly what they are supposed to do—take advantage of their insulated position, ignore popular sentiment, and dispassionately apply fundamental values in spite of public disapproval.<sup>36</sup>

And yet, the courts cannot enforce their own rulings.<sup>37</sup> The obvious problem, then, is that the courts’ wonderfully protective impulses will come to naught if the recipients of those rulings decide not to fol-

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purpose, and I think that it really has withstood the test of time. The judiciary is a check against the unconstitutional abuse and extension of power by the other branches of government.

*Id.*; see also JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 6 (1980) (“Despite the tendency of many classical and modern democratic political theorists to equate democracy with pure majoritarianism, ‘the attempt to identify democracy with the unlimited power of majorities has usually gone hand in hand with an attempt to include in the definition some concept of restraints on majorities.’” (quoting ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 35 (1956))).

35. See, e.g., Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (finding it within Congress’s taxing power to include an individual mandate to purchase health insurance); Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010) (upholding the right of corporations to donate money to politics under the First Amendment right to political speech); Bush v. Gore, 531 U.S. 98 (2000) (deciding that a violation of the Equal Protection Clause occurred when different counties counted votes in different manners); Texas v. Johnson, 491 U.S. 397 (1989) (allowing flag burning over a Texas statute outlawing it as a form of expressive conduct protected by the First Amendment); Coker v. Georgia, 433 U.S. 584 (1977) (agreeing with the petitioner that the death penalty was an excessive punishment for the crime of rape); Roe v. Wade, 410 U.S. 113 (1973) (holding that laws limiting a woman’s right to obtain an abortion before the end of the first trimester are unconstitutional); Miranda v. Arizona, 384 U.S. 436 (1966) (reversing petitioner’s conviction because he was not properly apprised of his Fifth Amendment rights); Brown v. Bd. of Educ., 349 U.S. 294 (1955) (declaring racial discrimination in public education to be unconstitutional and requiring states to desegregate “with all deliberate speed”).
36. Often, the minority groups who receive protection from the court are, by definition, not well-positioned to afford “the Court organized political support.” See CHOPER, *supra* note 34, at 133. These are the very situations, then, that the founders conceived of as requiring a neutral arbiter to buck public opinion. See *id.* at 132 (“Thus, in a recent statewide survey in Michigan, nearly four-fifths of those polled believed ‘that the courts have gone too far in making rulings which protect people who get in trouble with the law.’”).
37. See *supra* Part II.

low them.<sup>38</sup> Simply put, you cannot lead if nobody is following. An implicit contradiction exists at the heart of our American judicial system. On the one hand, the courts are removed from public purview, in order to grant them the independence required to resist unjust majorities. On the other hand, that very independence and insulation means that the courts cannot enforce the orders that act to resist majority impulses.

Courts, then, walk a very fine line.<sup>39</sup> They have to battle the public<sup>40</sup>—but only when it is appropriate and feasible to do so.<sup>41</sup> The key, ultimately, is that the courts must work with society—they must stand up for values but do so in a way in which society acknowledges (even if begrudgingly) the legitimacy and justness of the courts' actions.<sup>42</sup>

Before acknowledging this need for accommodation and intellectual decorum, however, one must explicitly acknowledge the balancing of interests discussed herein. And commentators on our court system tend not to do so. Instead, they tend to adopt one of two views about our judicial system and to thereafter advocate for either an active or a restrained judiciary, never acknowledging the inherent difficulties faced by our judges. The next section identifies these specific points of reference and argues both are flawed because they fundamentally ignore the courts' need to reconcile their dueling interests.

#### IV. DIFFERENT VIEWS OF HOW COURTS VIEW THEIR ROLE

These polar pressures placed upon the courts have resulted in two distinct views of how courts both shape, and react to, society. These two views are often referred to as the “dynamic view” and the “con-

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38. Refer again to Andrew Jackson's famous quote: “John Marshall has made his decision. Now let *him* enforce it.” ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 14 (1987).

39. “[S]ociety not only will want to satisfy the immediate needs of the greatest number but will also strive to support and maintain enduring general values.” BICKEL, *supra* note 14, at 27.

40. *Id.* (“[E]lected institutions are ill fitted, or not so well fitted as the courts, to [support and maintain enduring general values]. This rests on the assumption that the people themselves, by direct action at the ballot box, are surely incapable of sustaining a working system of general values specifically applied. . . . [M]atters of principle, which require . . . more intensive deliberation [should not be submitted to direct referendum].”). This imperfection is as true with respect to elected representatives as it is with the public in general. *See id.* at 39 (“It does not take a lunatic legislature to enact measures that are irrational. It only takes a legislature more than normally whipped up, very intent on the expedient purpose of the moment, acting under severe pressure, rushed, tired, lazy, mistaken, or, forsooth, ignorant.”).

41. *See id.* at 16–23 (discussing the problems caused by unelected judges invalidating laws passed with majority consent).

42. *See infra* section IV.B; Tyler, *supra* note 28.

strained view.” They differ in how they view the courts’ level of activity and social prerogative. In the end, though, this oppositional paradigm is misplaced, and, in fact, both views belong on a spectrum of behavior, on which all points ultimately derive from the courts’ need to work with, and answer to, social mores.

#### A. The Dynamic Court View and the Constrained Court View of the Courts

The first view of how the courts properly function is called the “dynamic court view.”<sup>43</sup> This viewpoint stresses the protective quality of the courts rather than their lack of enforcement power, and emphasizes their potentially proactive role in society.<sup>44</sup> Here, courts are viewed as “important producers of political and social change.”<sup>45</sup> This view ignores compliance issues and is based largely on politically unpopular, and socially progressive, cases the courts have ruled upon.<sup>46</sup>

Courts, here, are viewed as the last line of defense for protecting important values and rules, acting “when other branches of government have failed to act.”<sup>47</sup> In fact, courts are often seen as actively *opposing* those other branches, as the Executive and the Legislature collectively constitute a manifestation of the very sort of majoritarianism that can lead to oppression of minorities and the suppression of progressive causes.<sup>48</sup>

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

44. “[O]ne of the great strengths of courts is the ability to act in the face of public opposition.” *Id.* at 22. They can do so and advance important social change “even when the other branches of government are inactive or opposed.” *Id.* at 2.

45. *Id.*

46. *See supra* note 35; *see also* ROSENBERG, *supra* note 43, at 2 (citing *Brown* and *Roe* as cases “heralded as having produced major change”).

47. ROSENBERG, *supra* note 43 (“While officious government officials and rigid, unchanging institutions represent a real social force which may frustrate popular opinion, [socially progressive litigation] suggests that courts can produce significant social reform even when the other branches of government are inactive or opposed.”).

48. *See id.* Something should be said here about the interplay between the concepts of “progressivism” and “oppression.” For a variety of reasons, which are generally outside the scope of this Article, the idea of progress or “reform” is generally associated with openness, minority rights, and a host of other wonderful things. On the other hand, the status quo tends to be associated with oppression and tyranny and a host of other awful things. However, “progress” is truly in the eye of the beholder. Every new law or regulation is progress in that it is a change from the present state of affairs; but that does not mean that every new law or regulation is an unalloyed good that serves to protect people from evil majoritarian impulses. If the current set of rules is superior (from the standpoint of the values underpinning our constitutional guidelines), then progressivism would, in fact, be a negative thing. This can be seen throughout history, whenever majorities change the laws to harm minorities—in such a situation, reform clearly is not a positive or beneficial thing. And, if such a situation were to present itself in

Of course, the dynamic court view is not without criticism. For one, its supposed attractiveness (the ability of the courts to resist majority temptations) seems unlikely and contrary to the larger American system.<sup>49</sup> To some extent, this vaunted view of the courts and their powers may be due in part to the unduly high view of itself held by the legal profession at large and its associated “mystification” of the judiciary.<sup>50</sup> More relevant here, this view also entirely ignores the courts’ inability to enforce unpopular decisions.

The opposing view of the courts is the “constrained court view.” This is summed up in Hamilton’s statement that the judiciary is the “least dangerous” branch of government by design.<sup>51</sup> Courts, lacking in budgetary and physical powers (in Hamilton’s words, power over either the sword or the purse) are inherently unable to produce either political or social change.<sup>52</sup> As such, the courts are intended to “do little more than point out how actions have fallen short of constitutional or legislative requirements and hope that appropriate action is taken.”<sup>53</sup>

The constrained court view of the world recognizes the need for social change and progressivism, and it “acknowledges the role of popular preferences and social and economic resources in shaping outcomes.”<sup>54</sup> It nevertheless discounts the power of the courts (or society’s need for that influence), instead placing its faith in the formal process of republican democracy.<sup>55</sup> But this faith exposes the constrained court view to substantial criticism. Importantly, it requires one to essentially ignore the plain fact that “the formal process doesn’t always work.”<sup>56</sup>

So we are left with two conflicting<sup>57</sup> views of how one-third of our government functions, with neither seeming to fully recognize or ex-

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America, the courts would then be charged, not to defend unpopular progress, but to defend unpopular status quo. For purposes of this Article, however, it is convenient (and well within the popular zeitgeist, particularly in the context of the American academy) to conflate the concepts of progressivism and laudatory values.

49. *See id.* (“Indeed, in a political system that gives sovereignty to the popular will and makes economic decisions through the market, it is not obvious why courts should have the effects it asserts.”).

50. *See id.* 2–3.

51. *See id.* at 3.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See id.* at 336 (“Courts will . . . be ineffective in producing change, given any serious resistance because of their lack of implementation powers.”).

56. *Id.* at 3 (“[S]ocial and political forces may be overly responsive to unevenly distributed resources. Bureaucratic inertia, too, can derail orderly, processional change.”).

57. The two views do not always clash. *See id.* at 4. (“American legislatures do not habitually threaten liberties, and courts do not regularly invalidate the acts of

plain the basic underpinnings of how courts relate to society and the other branches of government. The question becomes, then, how to reconcile the two views and what such a reconciliation means to the larger issue of this Article.

The key, I believe, is to recognize that the two views are not, in fact, opposed. They are distinct, and they do acknowledge basic, inherent difficulties of the American system of government. But they do not, in truth, constitute separate arguments as to the role of courts. Instead, they are points on the same spectrum of judicial efficacy.<sup>58</sup> The choice, then, is not between strong courts and weak courts. The courts are both strong, because they very much have the ability and power to affect society in a concrete manner, and weak, in the sense that they cannot force society to accept those changes. The courts, then, can do much, but not on their own. In short, they need the cooperation of society.

### B. All Views Eventually Answer to Society

So the courts are designed to lead, but (due to their inherent limitations) they cannot do so without the support of society. This is a deceptively simple statement, due in part to the wide variety of definitions and connotations associated with the word “lead.” Indeed, much of this Article reduces to an argument about how best to view that word. As used here, the concept of judicial leadership means that courts have a unique ability to articulate values and how those values can shape and apply to social circumstance. They are not, as the founders intended they would not be, tied to public opinion, and the values

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elected officials or require certain actions to be taken.”). But, of course, the really interesting questions arise when the views *do* clash. What occurs “when activist courts overrule and invalidate the actions of elected officials, or order actions beyond what elected officials are willing to do”? *Id.* If one were to strictly adopt just one of these views, one would need to ultimately conclude either that courts are “effective producers of change” or that they are largely impotent, doing “little more than point[ing] the way to a brighter, but perhaps unobtainable future . . .” *Id.*

58. Of course, the idea of a “goal” in the judicial setting is, in and of itself, a freighted concept. Many believe courts must remain impartial arbiters of external values and rules, a view well encapsulated by Chief Justice Roberts’s statement that a judge’s role is to call “balls and strikes” as best he can. Timothy P. Terrell, *The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth*, 8 Nw J. L. & Soc. POL’Y 35, 37 (2012). As such, the idea that courts are pursuing goals raises the specter of a judiciary abandoning its role and impermissibly attempting to influence society with its extraordinary powers and place of influence and seems to inherently reflect the “dynamic” role of courts. Indeed, this Article is largely intended to respond to situations where courts seem to have done as much. That said, the word “goal” can be safely used, in a manner not likely to be controversial to anyone, to describe the courts’ charge to apply constitutional and statutory principles, recognizing that even one’s perception of those constraints is subject to interpretation.



they espouse<sup>59</sup> often lie outside the norm and run counter to presently popular opinion. On the other hand, they are not a power unto themselves, and the rules they create and the underlying values they espouse must find purchase with the public.

The practicality within this formulation of the courts' role is the key to reconciling the dueling conceptions of our legal system encapsulated by the seemingly alternative dynamic court view and constrained court view. The courts are neither dynamic nor constrained. They are either. "[D]emocracies do live by the idea, central to the process of gaining consent of the governed, that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy."<sup>60</sup> But the courts can momentarily step outside of this "ultimate power" and suggest alternatives to current practices. If society agrees, it will follow. If not, then it will not follow, and the courts' efforts will come to naught, regardless of the damage to minority rights or society at large.<sup>61</sup>

Another way to put this is that the courts, at their best, should demonstrate a constrained dynamism. The Legislative and Executive Branches are enormously volatile and often ignore or harm minority interests.<sup>62</sup> However, courts are not separate worlds unto themselves, and their efforts to stand against the other branches (and the public opinion they represent) has to be tempered by a deep and abiding respect for the people they seek to lead.<sup>63</sup> This modified view of the courts leads to a more reasonable set of expectations for the judicial branch. Courts can change society, but only in a cooperative manner,

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59. "Espouse" is also a word freighted with meaning and judgment. Here, it merely means the expression (in either an express or implied manner) of a value or set of values that underlay a particular court ruling.

60. See BICKEL, *supra* note 14, at 27.

61. "[T]hat a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." *Id.* at 23 (emphasis omitted) (quoting Judge Learned Hand). Indeed, "Under no system can the power of courts go far to save a people from ruin." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893).

62. See *supra* note 35.

63. Seen this way, courts need to stand up to the public not by ignoring it but by remaining steadfast in the service of underserved members of the public. See, e.g., ROSENBERG, *supra* note 43, at 2. Of course, in a sense, this change of emphasis merely masks the fact that the judiciary will sometimes (perhaps oftentimes) fail to effect the changes it would like implement. To acknowledge this, however, is not to admit defeat. It is merely to acknowledge the actual nature of our system, as prescribed by the founders. See *id.* at 13 ("The bounded nature of constitutional rights prevents courts from hearing or effectively acting on many significant social reform claims[] and lessens the changes of popular mobilization."); see also BICKEL, *supra* note 14, at 238-39 (acknowledging and discussing the policy-making role of the judiciary).

rooted in current facts and circumstances.<sup>64</sup> They must act to harness incipient social progress and to so act as a “reflection of significant social reform already occurring.”<sup>65</sup>

This obviously is not the sort of rapid and directed progress that many desire and believe necessary, but it is a holistic approach that comports with our system of divided governance and authority and is far more likely to protect constitutional values.<sup>66</sup> In truth, this is a deceptively simple diagnosis and recommendation. It seems rather simplistic to state that courts should “pay attention to society,” yet it is anything but simple when contrasted against the role that courts are ostensibly intended to play. It is logically implausible to simultaneously acknowledge that courts are intended to stand against majoritarian rule and to state that they must pay careful attention to majoritarian sentiment.

What this Article is really articulating, then, is that the courts are not the stolid protectors of constitutional values that so many perceive them to be.<sup>67</sup> They do serve a role in producing positive, progressive

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64. “Judgment must ‘rest on fundamental presuppositions rooted in history,’ Mr. Justice Frankfurter wrote, ‘to which widespread acceptance may fairly be attributed.’” BICKEL, *supra* note 14, at 238. This rises, at least in part, from the fact that the only real enforcement mechanism possessed by the courts comes from the legislative and executive branches, which are themselves answerable to the public. “Ultimately courts depend upon federal executive or legislative support in order to see that judicial orders and policies are carried out.” *Federal Remedies*, *supra* note 21, at 768. And, “If the Court is seriously out of line with majoritarian concerns, the other branches might refuse to support the Court.” *Id.* at 770.

65. See ROSENBERG, *supra* note 43, at 6; see also BICKEL, *supra* note 14, at 239 (“The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own . . . .”); *id.* at 251 (“The task of the Court is to seek and to foster assent, and compliance through assent.”).

66. Compare Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (maintaining that the judiciary is crucial and essential to social progress), with Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 765–66 (1991) (“The Court is far more effective at vetoing a decision of another government entity than it is at effecting social change on its own.”). This Article, obviously, sides with the latter view. Of course, this is not a binary decision—it is not the case that the judiciary either will or will not exercise an appropriate amount of “involved constraint,” as discussed herein. Indeed, it appears likely that the courts have many methods for maintaining a proper amount of remove and discipline. See, e.g., Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE W. RES. L. REV. 1031, 1035–36 (2006) (“[T]he U.S. Supreme Court has employed avoidance techniques selectively over the past three decades and often in categories of cases involving controversial issues or ‘sensitive area[s] of social policy.’” (quoting *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 498 (1941))). However, a prolonged discussion of the methods courts have used to properly (or improperly) avoid controversy is outside the scope of this Article.

67. See *supra* Part III.

change—but it is not, by design,<sup>68</sup> an active role. Instead, they are meant to provide a venue through which society can effect the change it is ready to accept. Providing this venue takes wisdom and élan because the courts have to recognize when issues are ripe and when the parties and circumstances before them provide sufficient context for significant change, and they then have to reach out and take advantage of those opportunities. But, again, that is a receptive role—taking what society gives them and using that appropriately.

Importantly, this should not be seen as minimizing the place of the judiciary. Courts really do play a role in social change and the preservation of constitutional values—but they are the instrument of these things, rather than vice versa. They should serve as a sort of “stress test” to review and analyze issues to ensure that society is properly positioned for recommended change, and, having done so, they then serve the incredibly useful role of altering tradition-bound and bureaucratic inertia. The American politic is designed to be conservative.<sup>69</sup> And that design has worked very well—it is rare and exceedingly difficult, in our republican democracy, to put into place significant changes without overwhelming public support (which is generally desirable if one is worried about tyranny of the majority).<sup>70</sup>

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68. Again, this runs contrary to much historical and contemporary thought regarding our court system. See *supra* Part III.

69. One of the most challenging aspects within the democratic process is reaching political compromise, even on popular issues. See Amy Gutmann & Dennis Thompson, *The Mindsets of Political Compromise*, 8 PERSPS. ON POL. 1125, 1125 (2010) (noting that, while compromise is essential to our government, resistance to compromise is also important despite it “stand[ing] in the way of change that nearly everyone agrees is necessary”). When a political system is designed to force politicians with shifting mindsets to reach political compromise, results are normally tedious and difficult to obtain.

[The] democratic process [requires] dual demands of campaigning and governing . . . . To campaign successfully, politicians must mobilize and inspire their supporters, . . . articulate a coherent vision distinct from that of their opponents, and present their opponents as adversaries to be mistrusted and ultimately defeated. But to govern effectively, politicians must find ways to reach agreements with their opponents; [the same opponents they presented to society as mistrusting].

*Id.* at 1128, 1137. In such a system, voters with opposing mindsets embrace slow moving change because they “prefer to get nothing from an uncompromising representative over getting something from [one] willing to hammer out judicious compromises . . . .” Russell Muirhead, *The Political Virtue*, 49 TULSA L. REV. 251, 260 (2013) (book review). By contrast, when individual mindsets evolve into a strict partisan divide, the governing process is slowed such that “it is difficult to pass any legislation.” *Id.* at 252 (emphasis added). At that stage, it is no longer about compromise, but about “scoring symbolic points.” *Id.* at 253.

70. Each Congress considers at least 10,000 bills, and fewer than one in ten survive both chambers. See *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (last visited Oct. 2, 2014), *archived at* <https://perma.unl.edu/NFW6-A6AQ>. Public support may help accelerate the process, but the process remains slow by design. For example, in 2014, despite grow-

Courts can cut through all that—but only when their mandates will be followed. In this fashion, courts can, and do, serve the role the founders intended. However, if courts ignore these realities—if they put their own desires and agendas above those of society—they run significant risks.

#### V. WHEN COURTS EXCEED PERCEIVED SOCIAL NORMS, THEY RISK THEIR OWN LEGITIMACY

Courts, then, walk a very fine line. On the one hand, they are charged with protecting minorities from harmful majoritarian impulses and protecting constitutionally enshrined values; on the other, they cannot stray too far from the norms established by the very majorities they are charged to police. This difficulty is so great because of the nature of human psychology and its natural reaction to being directed to behave contrary to its inner desires. And, while courts are generally excellent at walking this fine line, examples abound where they have gone too far in ordering the citizenry to ignore its own instincts. These examples uniformly support the thesis of this Article that doing so is ultimately harmful to the legitimacy of the courts and to the causes they seek to protect.

#### A. The Resistant Psychology of Contrary Directives

Courts must take care when attempting to affect public policy because their unique position in our government means they run a very real risk of triggering public-wide pushback to policies society is not

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ing concern over border security amid a soaring increase in the number of “unaccompanied minors” illegally crossing into the country, virtually no legislative action was taken. See *Southwest Border Unaccompanied Alien Children*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited Oct. 2, 2014), *archived at* <http://perma.unl.edu/5LV9-NBZA>. Out of the 168 bills introduced by members of the 113th Congress, only eight made it to the President, and almost all of these did so in the form of consolidated appropriation bills, which had little to no direct impact on imminent border concerns. See *Border Security and Unlawful Immigration*, GovTRACK, [https://www.govtrack.us/congress/bills/subjects/border\\_security\\_and\\_unlawful\\_immigration/6207#congress=113](https://www.govtrack.us/congress/bills/subjects/border_security_and_unlawful_immigration/6207#congress=113) (last visited Aug. 11, 2015), *archived at* <https://perma.unl.edu/CLK5-9RQX>. On the other hand, a genuine (and bipartisan) outpouring of concern can effect change. In 2013, the appropriations bills for Homeland Security, and eleven other governmental agencies failed to pass Congress. See *Appropriations Legislation for Fiscal Year 2013*, LIBRARY OF CONGRESS (Apr. 10, 2015), <http://thomas.loc.gov/home/approp/app13.html>, *archived at* <http://perma.unl.edu/4AF2-L9GS>. After the public almost uniformly registered its disdain, the Consolidated Appropriations Act of 2014—outlining the budget for all twelve agencies—passed through Congress in approximately twenty-four hours and with overwhelming support. See *Appropriations Legislation for Fiscal Year 2014*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/home/approp/app14.html> (last visited Oct. 2, 2014), *archived at* <http://perma.unl.edu/9H32-V4TJ>.

yet prepared to accept. Having no authority or ability to enforce any edicts, they essentially have to hope that society will do so of its own volition. And one American ideological precept is that liberty means no one can be told what to do when those instructions contradict deeply- or strongly-held beliefs. Indeed, such instructions are likely to trigger a psychological reaction known as reactance, which substantially undermines the efficacy of said instructions.<sup>71</sup>

Reactance is a negative response. When a free behavior is threatened, individuals may respond negatively, seeking to maintain their prior behavior or perhaps attaching even more importance to the behavior than previously.<sup>72</sup> Courts can trigger this by ordering “society” (the enormous composite of hundreds of millions of individuals) to cease behaving in a particular manner.<sup>73</sup> Such rulings can trigger large levels of social reactance.<sup>74</sup> This is particularly true given the extremely controversial and weighty issues that our courts are repeat-

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71. See generally JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE (Leon Festinger & Stanley Schachter eds., 1966).

72. Indeed, the more important a behavior is to someone, the greater the magnitude of his or her reactance upon such free agency being removed. See *id.* at 15–16 (indicating that reactance “is defined as a motivational state directed toward the re-establishment of the threatened or eliminated freedom, and it should manifest itself in increased desire to engage in the relevant behavior and actual attempts to engage in it”). That is, the level of reactance one experiences is directly related to the importance of the freedom to the individual. See *id.* at 16 (“Basically, the magnitude of reactance is a direct function of (1) the importance of the freedom which is eliminated or threatened, and (2) the proportion of free behaviors eliminated or threatened.”). Additionally, when there is loss of a single free behavior (whether by a particular group or even of some other, visible group), people may infer a related threat of removal of other free behaviors. See Jack W. Brehm, *Psychological Reactance: Theory and Applications*, in 16 ADVANCES IN CONSUMER RES. 72 (Thomas K. Srull ed. 1989).

73. Courts do not only prohibit behaviors, of course. They can also issue affirmative injunctions. See, e.g., Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL’Y REV. 259, 315–16 (2009) (discussing affirmative injunctions, which “order the offending government or official to take specific action,” in the context of capital punishment). However, even affirmative injunctions are, for purposes of this discussion, essentially negative in nature; ordering people to behave in a certain manner has the same effect as prohibiting them from engaging in any other type of activity. See *id.* at 315 n.306 (“Though affirmative injunctions have been historically disfavored, the distinction between negative and affirmative injunctions has less practical importance today, given courts’ willingness to grant affirmative decrees where some injunctive relief is warranted.”). For example, rather than forcing states to utilize a particular type of capital punishment, a court can prohibit a host of procedures that do not comport with the particulars of its chosen method. Thus, no matter the precise nature of the order, courts (when propounding public policy via mandatory social change) risk triggering reactance by reducing freedom of choice.

74. See BREHM, *supra* note 71, at 4 (“Given that a person has a set of free behaviors, he will experience reactance whenever any of those behaviors is eliminated or threatened with elimination.” (emphasis omitted)).

edly asked to address.<sup>75</sup> Indeed, the more significant (and presumably necessary) the social change being shepherded by the courts, the higher the danger of provoking this reaction. “[H]ow effective law will be in changing behavior depends on how central the behavior in the life of the affected community. In general, the more . . . connected to other behavior—the more resistant the conduct is likely to be to efforts to alter it.”<sup>76</sup>

Moreover, the danger of this negative reaction to judicial leadership is likely to be significantly increased due to the judiciary’s distance from public purview.<sup>77</sup> Reactance exists whenever people are given orders contrary to their natural inclinations, but the effect is heightened when the orders arise in an arena where individuals are particularly invested in the idea that they should have freedom of choice.<sup>78</sup> Put differently, people’s reactions are shaped by their expectations, and, when they expect that they will be able to make their own choices, the surprise of having their agency taken from them will cause a very strong, negative reaction that makes compliance unlikely.<sup>79</sup> Extrapolated to the subject of this Article, public reactance to court rulings that ignore social norms is likely to be significant because the American public is accustomed to participating in the decision-making process (via direct elections). The judiciary is outside this participatory process,<sup>80</sup> so there is a danger that the public will view court mandates as “meddling”<sup>81</sup> or illegitimate.<sup>82</sup>

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75. Think, particularly, of court decisions that weigh in on issues such as race and racism, gun control, abortion, gay rights, etc. See *infra* sections V.B–C. The courts are routinely called upon as the last resort for issues of this sort. See, e.g., *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014) (upholding the constitutionality of Connecticut’s assault weapon ban after recognizing the ban infringes upon the Second Amendment); *Shaw v. Shaw*, No. 2D14–2384, 2014 WL 4212771 (Fla. Dist. Ct. App. Aug. 27, 2014) (per curiam) (requesting the Florida Supreme Court decide whether a lesbian couple who married in Massachusetts had a right to divorce), *review denied*, No. SC14–1664, 2014 WL 4403366 (Fla. Sept. 5, 2014); *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013) (striking down Arizona’s law banning abortions after twenty weeks of pregnancy), *cert. denied*, 134 S. Ct. 905 (2014).

76. See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 58 (1977) (quoting Franklin Zimring & Gordon Hawkins, *The Legal Threat as an Instrument of Social Change*, J. OF SOC. ISSUES, Spring 1971, at 33, *passim*).

77. See *supra* note 27 and accompanying text.

78. See BREHM, *supra* note 71, at 7–8 (indicating that the legitimacy and justification of interference with choice are important elements in determining the level of reactance).

79. See *id.* at 4 (“The magnitude of reactance is a direct function of (1) the importance of the free behaviors that are eliminated or threatened, (2) the proportion of free behaviors eliminated or threatened, and (3) where there is only a threat of elimination of free behaviors, the magnitude of that threat.”).

80. See *supra* note 27 and accompanying text.

81. This concern has a long history and continues apace. See Grant M. Hayden, *The Supreme Court and Voting Rights: A More Complete Exit Strategy*, 83 N.C. L.

Additionally, as discussed above, the judiciary is, in part, charged with resisting majority impulses.<sup>83</sup> This, too, means that the courts will naturally provoke reactance. “The importance of the freedom to take a given position is a direct function of how closely that position

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REV. 949, 950 (“By the 1990s, judicial intrusion into politics became a full-fledged invasion . . . [M]any observers viewed this sort of judicial meddling in political affairs as quite troubling, [but courts] never seemed to get the message.”). The media continues to remind society of judicial meddling. *See, e.g.*, Michael F. Cannon, *Decision to En Banc Halbig v. Burwell Is Unwise, Unfortunate, and Appears Political*, FORBES (Sept. 4, 2014, 11:07 AM), <http://www.forbes.com/sites/michael-cannon/2014/09/04/decision-to-en-banc-halbig-v-burwell-is-unwise-unfortunate-and-appears-political/>, archived at <http://perma.unl.edu/DG6E-P7QN> (“Today’s decision by the D.C. Circuit to grant *en banc* review . . . is unwise and unfortunate. It has the appearance of a political decision . . . [and] consider[ing] the dynamics surrounding the decision . . . [it is] hard to explain this decision [as] anything other than political.”); Erik Voeten, *Judges as Principled Politicians*, WASH. POST (Feb. 20, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/20/judges-as-principled-politicians/>, archived at <http://perma.unl.edu/NRD4-95W8> (“Today there are few serious observers who deny that political factors play a role in shaping how judges (and the Court) make their decisions. Only judges continue to uphold the image of the judge who merely implements the law.”); *The Political Ginsburg*, WALL ST. J. (July 2, 2014, 7:13 PM), <http://online.wsj.com/articles/the-political-ginsburg-1404342819> (“Justice Ginsburg’s dissent is so far removed from the legal reality that it doesn’t qualify as a judicial opinion. It is a political opinion whose purpose seems to . . . motivate Democrats to turn out at the polls. . . . Justice Ginsburg’s [opinion] is a flight from the law.”).

82. Dr. Brehm provides the following example to illustrate the risk of perceived illegitimacy:

If Mr. Smith says to Mr. Brown ‘You cannot have Betty for baby-sitting this evening,’ when Mr. Brown might have wanted Betty, then Brown should experience reactance. It will be obvious, however, that Brown’s reaction will be affected by the justification and/or legitimacy of Smith’s interference. If Smith adds that Betty’s mother has gone to the hospital for an emergency operation, thus justifying the restriction, Brown will not show a strong negative reaction. If Betty is a young teenager and Smith happens to be her father, then Smith can legitimately control Betty’s activities and again, Brown is not likely to show a strong negative reaction.

BREHM, *supra* note 71, at 7. Similarly, when Congress passes a law, voted upon by an individual’s duly elected representative, that individual may experience reactance—but she is likely to experience it to a greater degree when the Supreme Court issues a ruling (even if the law and the ruling have the same ultimate effect) because she had no direct role in selecting the Supreme Court Justices and so may see the ruling as less justified or legitimate. This heightened reactance is due, at least in part, to the fact that illegitimate or unjustified interference causes people to fear future interference. *See id.* at 8. If one understands an instance of interference, one can attempt to predict future such instances. If, on the other hand, one does not understand, then one may fear (justifiably) that such interference can occur at any moment. *See id.* (“If Smith is *not* the father of Betty and has no more legitimate control over her than does Brown, then Smith’s attempted interference (without justification) also carries the implication that Smith may well attempt similar interferences on future occasions. From Brown’s point of view, if Smith gets away with this, what can’t he get away with?”).

83. *See supra* note 34 and accompanying text.

represents what one believes to be correct.”<sup>84</sup> Yet again, then, the very nature of our courts—meant to push back against norms held by the public that are discordant with constitutional values—means that the judiciary is almost certain to provoke reactance.<sup>85</sup>

This is, of course, harmful to the enterprise at issue. If the judiciary provokes reactance, then it will ultimately undermine the very position it is advocating and so undercut the values it seeks to promote.<sup>86</sup> “When a person experiences reactance from having his freedom to adopt his own opinion threatened, he will attempt to re-establish his freedom by *not* taking the position advocated by the communicator.”<sup>87</sup>

The real-world consequences of this are not difficult to perceive. Return to the introductory material. Presuming that Judge Shelby believes that gay marriage must be mandated in order to honor Constitutional requirements and so is a “good” thing,<sup>88</sup> issuing a judicial

84. See BREHM, *supra* note 71, at 92.

85. See *id.* at 93 (“Whether or not these behavioral freedoms have importance will depend upon whether or not they are closely tied to important values which the individual holds.”).

86. This is a uniquely judicial challenge, given the courts’ lack of enforcement power. Rules or regulations (or any other sort of legal mandate) will provoke reactance, from whatever source, but the Executive and Legislative Branches have the ability to enforce their directives, regardless of public reaction (to an extent). This immediate and continual enforcement ensures that the directives are effected and also begins to wear down and overcome resistance, particularly when that immediately reinforced behavior conforms with broader social values:

Because people value approval, intrinsically or instrumentally, such beliefs influence behavior. Updating one’s beliefs to account for the law, an individual will infer the prospect of greater disapproval costs from behavior the law condemns, which gives the individual an incentive to obey the law that is independent of the legal sanctions.

Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 389 (2000).

87. See BREHM, *supra* note 71, at 95. Brehm explains:

[D]espite the pressure to change toward the position advocated by the communicator, we can expect that when important freedoms of position are threatened, the individual will . . . show boomerang attitude change . . . . When an individual feels free to adopt his own position on an issue, an attempt to force him to take a specified position or to influence him will threaten his freedom and arouse reactance. He may re-establish his freedom by avoiding opinion compliance or positive influence, and he can most clearly re-establish his freedom by moving away from the advocated position.

*Id.* at 95, 117.

88. Unfortunately, this discussion may, for some people, raise the appearance of taking sides—of stating that gay marriage is “good” or “bad.” This is probably a side effect of an increasingly polarized political environment wherein people feel compelled to take absolutist positions and attack any idea that is at all inconsistent with such positions. See, e.g., Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach*, 11 CARDOZO J. INT’L & COMP. L. 89, 97–98 (2003) (“Fractious and highly polarized poli-



mandate is not necessarily a positive step toward furthering gay marriage. Indeed, if the order is made despite strong public opposition, then society may experience a collective case of reactance and experience a “boomerang” of opinion, moving gay marriage ever further from political reality.<sup>89</sup> Interestingly, this has happened repeatedly throughout American history, as courts have often “overstepped” so-

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ties . . . cannot make progress unless citizens abandon absolutist positions and make concessions and compromises whenever necessary to ensure social equilibrium and political stability.”). However, this Article takes no position on any social or moral value or judgment. The ultimate effect of the analyses and recommendations discussed herein *may* well be that the courts should be more circumspect or hesitant when it comes to judicially mandating social recognition of gay marriage (or any other “cause”)—or it may also be that the courts should seize the moment and mandate nationwide recognition of the same. Whatever the result, the idea is that such a conclusion should flow from a neutral perspective, removed from the personal opinions and prejudices of a relatively small number of individuals who just happened to be appointed to a judgeship. Indeed, the thesis of this Article is that judges should pay attention to *society’s* beliefs and act accordingly, given the constitutional issues and mores present before them—not that any particular belief is “good” or “bad.” And there is no real doubt that the courts are *not* doing this, at present. *See, e.g.,* United States v. Windsor, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting) (“By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition . . . . The result will be a judicial distortion of our society’s debate over marriage.”); Baskin v. Bogan, 766 F.3d 648, 656 (7th Cir. 2014) (“[T]he only rationale that the states put forth with any conviction—that same-sex couples and their children don’t *need* marriage because same-sex couples can’t *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously.”); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973–74 (S.D. Ohio 2013) (interpreting the issue to be whether states can “discriminate against same-sex couples . . . simply because the majority of the voters don’t like homosexuality (or at least didn’t in 2004)”), *aff’d*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Whitewood v. Wolf, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (“We are a better people than what these laws represent, and it is time to discard them into the ash heap of history.”). If, however, courts would remove themselves and instead focus on socially acceptable reform, then much of the vitriol and absolutism present in society’s view of the judiciary would fade, as various elements of society would no longer view the courts as part of a larger game or contest, where the winner invariably takes all, regardless of the issue of reactance and the present willingness of the public to adopt such views. *See* CHOPER, *supra* note 34, at 133 (“All judicial decisions produce losers, and many exercises of judicial review . . . find the losers incensed over a burning issue of national moment with scant hope of change through democratic processes.”). Courts, in such a setting, “present[] a convenient focal point for unhappiness and invective.” *Id.* at 134. Perversely, then, “defeat seems to be the greater energizer, even when the attackers have been previous beneficiaries of the Court’s rulings.” *Id.* Courts could avoid this if they did not insert themselves into issues and instead attempted to marshal through publicly tenable reforms in the context of constitutional mandates. Doing this—advancing important issues *in accordance* with the political will of society—is the only legitimate and feasible way to effect concrete and meaningful reform.

89. *See* Oko, *supra* 88, at 95.

cial boundaries and thereby done unintentional harm both to their own clout and to the very people seeking their aid and protection.<sup>90</sup>

### B. Examples of Courts Stretching Social Norms

Examples of the judiciary acting in spite of public will are legion. This ubiquity provides ample opportunity to examine these rulings, the public reaction to them, and the ultimate effect of these mandates on both the values being espoused and the credibility of the court.

The first example that immediately comes to mind is *Roe v. Wade*.<sup>91</sup> As virtually everyone knows, *Roe* involved the issue of abortion. Therein, the Supreme Court ruled unconstitutional a Texas state statute that criminalized most forms of abortion, holding that the Due Process Clause of the 14th Amendment guaranteed a fundamental, implied right to privacy, which granted a variety of rights regarding abortion.<sup>92</sup> To call this controversial would be an understatement. There was not broad public support for this ruling at the time of its issuance.<sup>93</sup> And, important here, there is no broad public support for the ruling now.<sup>94</sup> The fact that public opinion has not changed is no coincidence. The Supreme Court effectively forced the public to accept abortion, something it was not prepared to do.<sup>95</sup> This

90. Again, the response to this reactance, as propounded in this Article, is not difficult or overly complex. Courts simply must take care to understand and take account of public opinion and social norms. Doing so avoids societal reactance and makes public adoption of judicially-mandated values much more likely. BREHM, *supra* note 71, at 97–98. There, Dr. Brehm points out that, in order to affect subjects' opinions on a particular matter, those attempting to persuade must take care to do so in a non-threatening manner. The courts should take heed of this by taking full account of public opinion prior to attempting to persuade via mandate, thus insulating themselves from being perceived as a threat.

91. 410 U.S. 113 (1973). By its very nature, this Article requires a careful consideration of numerous controversial topics, but, again, the Article takes no actual position on any of them. *See supra* note 88.

92. *Roe*, 410 U.S. at 153. Specifically, the Court held it unconstitutional for the State to interfere with a woman's right to abortion up until the point of fetal viability or the end of the first trimester. *Id.* at 163.

93. *See generally* KARLYN BOWMAN & JENNIFER MARSICO, AEI PUBLIC OPINION STUDIES: ATTITUDES ABOUT ABORTION (Am. Enter. Inst. for Pub. Policy Res. ed., 2014), archived at <https://perma.unl.edu/LR28-XWBA?type=pdf>. In 1975, two years after *Roe*, an April 1975 Gallup poll showed 21% people thought abortion should be legal in all circumstances; 54% said legal under certain circumstances; and 22% said illegal in all circumstances. *Id.* at 9.

94. *See generally id.* In May 2013, a Gallup poll showed 25% thought abortion should be legal in all circumstances; 54% said legal under certain circumstances; and 20% said illegal in all circumstances. *Id.* at 10. Gallup has conducted over fifty polls on this topic since 1975, and “the results are remarkably stable.” *Id.* at 9; *see also* David B. Cruz, “The Sexual Freedom Cases?” *Contraception, Abortion, Abstinence, and the Constitution*, 35 HARV. C.R.-C.L. L. REV. 299, 299–300 (2000) (indicating the effect of *Roe*—and its progeny—“remains unsettled to this date”).

95. *See* BOWMAN & MARISCO, *supra* note 93, at 9–10.

triggered reactance.<sup>96</sup> Being forced to accept something, particularly something that ran counter to very strongly held beliefs and customs, did not cause society to change its attitudes and positions. Instead, it caused a significant segment of society's beliefs to harden in opposition<sup>97</sup> to the Supreme Court's progressive ruling.<sup>98</sup>

Of course, there are two sides to the issue, and many people support *Roe*. That is not at issue. What is at issue is how the subject of abortion has festered on and on, never coming to any sort of resolution. The thesis of this Article is that that lack of resolution and continuing discontent is, in fact, created by the very cases that are seeking to create finality and shape society. If the Supreme Court would have taken more care to assess public attitudes and to draft its opinion accordingly, the nagging issue of abortion would not be what it currently is. "A more restrained judgment would have sent a message while allowing momentum to build at a time when a number of states were expanding abortion rights."<sup>99</sup>

Another example, again well known, is *Brown v. Board of Education*<sup>100</sup> and its progeny. In *Brown*, the Supreme Court famously decided an assortment of challenges to the prevailing practice of racial segregation then prevalent in public schools.<sup>101</sup> The Court found that the doctrine of "separate but equal" was unconstitutional and was impermissible in the public school system.<sup>102</sup> This reasoning eventually extended to other areas of segregation and signaled a significant shift in the Supreme Court's view on racial inequality.<sup>103</sup>

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96. See *supra* section V.A.

97. See *supra* note 8 and accompanying text.

98. See Curt M. Hapward, *The "Right to Die" Is Dead: A Constitutional Analysis of Physician-Assisted Suicide*, 7 SETON HALL CONST. L.J. 165, 189 n.160 (1996) (citing well-known political pundit Charles Krauthammer for the proposition the judicial legislation in *Roe* has spawned decades of "social and political turmoil").

99. Jason Keyser, *Ruth Bader Ginsburg: Roe v. Wade Ruling Flawed*, HUFFINGTON POST (May 11, 2013 10:12 p.m.), [http://www.huffingtonpost.com/2013/05/11/ruth-bader-ginsburg-roe-v-wade\\_n\\_3261187.html](http://www.huffingtonpost.com/2013/05/11/ruth-bader-ginsburg-roe-v-wade_n_3261187.html), archived at <http://perma.unl.edu/8V6G-DR9M>. Justice Ginsburg further indicated that a more thoughtful decision "might have . . . denied opponents the argument that abortion rights resulted from an undemocratic process in the decision by 'unelected old men.'" *Id.* But see ROSENBERG, *supra* note 43, at 238 ("None of our time series on public views regarding abortion indicates that the Supreme Court decisions had an important effect on [public] opinion." (quoting Judith Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, SCIENCE, Feb. 1971, at 540) (internal quotation marks omitted)).

100. 347 U.S. 483 (1954).

101. See *id.* at 486-87.

102. See *id.* at 495; see also Jason Belmont Conn, *Race Against the Machine: An Argument for the Standardization of Voting Technology*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 181, 223-24 (2006) (discussing *Brown* and its after-effects).

103. See Conn, *supra* note 102, at 223-24.

Important here, it also signaled a significant shift in the Supreme Court's view on injunctive relief.<sup>104</sup> Prior to *Brown*, American courts generally viewed their injunctive powers (grounded in, and made enforceable by, courts' contempt powers) as limited and inapplicable in the context of personal rights.<sup>105</sup> In *Brown*, however, the Supreme Court approved the use of injunctive relief as a far-ranging power that could be utilized to address virtually any wrong.<sup>106</sup> The courts have since utilized this power to "engage in a substantial restructuring of institutions whose ingrained practices violate civil rights."<sup>107</sup> This is important because this shift signaled precisely the sort of mandate with which this Article is concerned—it represents a direct incursion by the judiciary into the basic norms and social fabric of society. Notably, *Brown* is often hailed as a "triumph."<sup>108</sup> And there are probably few people who would now argue with its intrinsic correctness or its moral underpinnings. Again, though, the thesis of this Article does not relate to the underlying correctness of any particular decision. Instead, it relates to the efficacy of the judiciary's willingness to engage in social diktat, and (despite the near unanimity of praise for, and belief in the righteousness of, *Brown*) there is considerable reason to believe that the case was, in fact, deleterious to its ultimate aims.<sup>109</sup>

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104. See 1 DAN B. DOBBS, LAW OF REMEDIES § 2.9(5) at 241 (2d ed. 1993).

105. See *id.*

106. See *id.*; see also OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (arguing that civil rights litigation, such as *Brown*, ushered in a new and more powerful type of injunctive relief). *Brown* is often referred to as a single case, but it was actually an aggregate of cases that went through multiple rounds of appeals. It was the second *Brown* case that resulted in the most well-known injunction, wherein the Supreme Court gave effect to the ruling of the first *Brown* case and ordered the relevant federal courts to supervise and administer school desegregation. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

107. See DOBBS, *supra* note 104, § 2.9(5) at 241.

108. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 75–77 (Free Press 1990) (calling *Brown* a "great and correct decision" that led to "the greatest moral triumph [that] constitutional law has ever produced"). But see Richard Posner, *Appeal and Consent*, THE NEW REPUBLIC, Aug. 16, 1999, at 36, 39 (arguing *Brown* "was a triumph of enlightened social policy . . . in the short term," but in "a longer perspective . . . the decision seems much less important, even marginal"); DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 20–28 (2004) (criticizing *Brown* for its ineffectiveness and claiming that a decision that upheld "separate but equal" but required equalization and black representation and involved additional judicial oversight would have been more effective).

109. See ROSENBERG, *supra* note 43, at 157 ("I have found little evidence that the judicial system, from the Supreme Court down, produced much of the massive change in civil rights that swept the United States in the 1960s . . . . In this chapter, I will marshal evidence suggesting that pro-civil-rights forces existed independent of the Supreme Court and could plausibly have accounted for eventual congressional and executive branch action as well as for Court action.").

Almost immediately after *Brown*, large portions of society began to demonstrate reactance. Ninety-six U.S. Congressmen from the southern United States promised to maintain segregation through the use of “all lawful means.”<sup>110</sup> In addition, there was wide-spread pressure on school boards to defy segregation, with many groups criticizing the “communist-tainted” Supreme Court and utilizing the social rift exposed by *Brown* as an opportunity to mobilize and energize their constituents.<sup>111</sup> This ultimately had an effect, with many schools simply refusing to comply with *Brown*.<sup>112</sup> Because courts have no intrinsic enforcement power, this defiance had no real consequence. Schools that did not integrate, and that refused to comply with the Supreme Court’s explicit order, continued to operate without consequence, and moderate and liberal activists received very little support from any quarter.<sup>113</sup>

Indeed, additional litigation sprang up surrounding the very inefficacy of *Brown*, further emboldening the opponents of progress and compounding the futility of the Supreme Court’s orders. *Cooper v. Aaron*<sup>114</sup> was an attempt to force Arkansas, which had responded to *Brown* with a strong manifestation of reactance, to desegregate.<sup>115</sup> This is an instructive case because it demonstrates just how deleterious decisions can be when they occur prior to society’s willingness to accept them. Here, the Little Rock school district had actually begun to desegregate based upon the *Brown* ruling, showing at least some willingness to constructively engage civil rights issues.<sup>116</sup> Reactance intervened, however, as the state constitution was amended to “flatly command[] the [state legislature] to oppose ‘in every Constitutional manner the Unconstitutional desegregation decisions [in *Brown* and its progeny].’”<sup>117</sup> The Supreme Court reacted strongly, ruling that school board members and school superintendents were agents of the state bound by the Fourteenth Amendment and obligated to provide

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110. See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 41 (1961).

111. See *id.* at 42.

112. See Michal R. Belknap, *The Real Significance of Brown v. Board of Education: The Genesis of the Warren Court’s Quest for Equality*, 50 WAYNE L. REV. 863, 872–73 (2004).

113. See Peltason *supra* note 110, at 46–47. *But see infra* note 120.

114. 358 U.S. 1 (1958).

115. See *id.*

116. See, e.g., ROSENBERG, *supra* note 43, at ch. 5 *passim* (discussing the economic and social changes that were positively impacting the civil rights movement during the 1960s); see also *id.* at pt. 2 (“Abortion and Women’s Rights”) (making a similar argument about the inefficacy of judicial action regarding women’s rights and the underlying social reasons for eventual change).

117. *Cooper*, 358 U.S. at 8–9 (quoting ARK. CONST. amend. XLIV, *repealed by* ARK. CONST. amend. LXIX).

equal protection.<sup>118</sup> It also reiterated its own authority, holding that the federal judiciary is “supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by . . . the Country as a permanent and indispensable feature.”<sup>119</sup> Those were comforting words, perhaps, to everyone except the schoolchildren of Arkansas, who waited in vain for the Supreme Court to somehow enforce its “supreme exposition” in the face of violent resistance. In fact, nothing much occurred until President Eisenhower sent in troops.<sup>120</sup>

*Brown*, then, did not directly accomplish much. Years passed after its ruling without significant progress, and the desegregation movement stagnated during that time.<sup>121</sup> It is unknowable whether significant progress would have been made in the Civil Rights Movement during this time period in the absence of *Brown*,<sup>122</sup> but that does not mean that the Supreme Court’s decision was a boon to the movement. To the contrary, there is significant reason to believe that the toothless decree of *Brown* set back the civil rights cause because it forced an issue before society was prepared to constructively approach it—and it did so without a real plan or path toward enforcement.<sup>123</sup> This is a clear demonstration, then, of the judiciary staking out a progressive, controversial position, thereby provoking a negative reaction (via reactance) from society, and then not being in a position to counter that negativity.<sup>124</sup> Invariably, it leaves the position being advocated for in

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118. *See id.* at 16.

119. *Id.* at 18.

120. *See supra* note 23 and accompanying text. President Eisenhower, the face of the Executive Branch, did virtually nothing for three years to enforce *Brown* and only became involved when he sent in soldiers to quell riots that had broken out in Little Rock. *See id.*

121. *See* Belknap, *supra* note 112, at 872–75. Indeed, in 1958, all public schools closed, leading to enormously segregated (private) academies—thus effecting precisely the opposite of what the court intended. *See generally* SONDRÁ H. GORDY, FINDING THE LOST YEAR: WHAT HAPPENED WHEN LITTLE ROCK CLOSED ITS PUBLIC SCHOOLS 33–83 (2009) (illustrating how the local government made continuous attempts to get around federal court injunctions to open and operate private schools for whites while displacing blacks).

122. *See, e.g.,* ROSENBERG, *supra* note 43, at 157 (“While we can never know what would have happened if the Court had not acted as it did (if *Brown* had never been decided or had come out the other way), the existence and strength of pro-civil-rights forces at least suggest that change would have occurred, albeit at a pace unknown.”).

123. “The aftermath of *Brown v. Board of Education* had brought out the worst in the South.” LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008, at 249 (2009). It was not until the Civil Rights Act, which was passed by a body much more reflective of public opinion, that national consensus began to solidify. *See id.* at 250. “The Court had been alone since *Brown*. Now Congress and the [P]resident offered assistance.” *Id.* at 251.

124. This is the equivalent of poking a bear, or kicking a hornet’s nest, with no plan as to how to react.

a far worse position than it would otherwise occupy, with later proponents having to work to make up the negativity created by the impotently advocated position.

Indeed, the *Brown* ruling energized the opposition to the Civil Rights Movement and provoked that opposition into utilizing its considerable advantages to fight against integration.<sup>125</sup> “[W]hile there is little evidence that *Brown* helped produce positive [social] change, there is some evidence that it hardened resistance to civil rights among both elites and the white public.”<sup>126</sup> Resistance to civil rights grew in all areas, including voting, transportation, and others.<sup>127</sup> The case, rather than advancing minority rights, “unleashed a wave of racism that reached hysterical proportions” and “was used as a club by Southerners to fight any civil rights legislation as a ploy to force school desegregation on the South.”<sup>128</sup> This had very extreme and significant consequences. For example, just days before the case was decided, a House committee began consideration of a bill introduced to ban segregation in interstate travel.<sup>129</sup> After *Brown*, though, the bill was no longer politically tenable and died prior to passage.<sup>130</sup> Similarly, “In hearings and floor debates on the 1957 Civil Rights Act, Southerners repeatedly charged that the bill, aimed at voting rights, was a subterfuge to force school desegregation on the South.”<sup>131</sup>

Ultimately, then, the judiciary, because it lacked an executable plan, very concretely gave life to the segregationists it was attempting to undermine.<sup>132</sup> “By stiffening resistance and raising fears before

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125. Legislators opposing integration could simply pass new laws allowing for new appeals or for arguments for new claims. PELTASON, *supra* note 110, at 93 (“As one segregationist said, ‘As long as we can legislate, we can segregate.’”). Additionally, segregationists generally had more resources, so they generally had better lawyers and controlled the direction and scope of litigation. *See id.* at 100. Time and inertia were also on the side of the opposition. School boards often fought harder than students to delay integration, hoping for a political change, and federal judges were sometimes reluctant to face the community opprobrium arising from the segregationists in their social circles. *See id.* at 9, 95. Of course, these are advantages that flow from popularity—more money, more pressure, more support. *See, e.g., supra* note 56. And this is precisely why courts facing important social issues should carefully consider the social circumstances.

126. *See, e.g.,* ROSENBERG, *supra* note 43, at 155.

127. *See id.*

128. *See id.* (quoting ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* 21 (1987)).

129. *See id.* at 155.

130. *See id.* (noting that *Brown* “probably contributed to the demise” of the bill (quoting CATHERINE A. BARNES, *JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT*, 94 (1983)).

131. *See id.* at 155

132. “The law is clear: the United States district court judge has ample power to compel boards to desegregate. Yet six years of litigation produced negligible results. . . . The law is on the side of the plaintiffs [the black students seeking

the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights.”<sup>133</sup> As a result, segregation continued for years.<sup>134</sup> It was not until society—not the judiciary—was ready for change that change actually occurred.<sup>135</sup>

These examples of dynamism gone awry (particularly the example of *Brown*, as immense social importance has for so long been attributed to it) calls into question the entire concept of judicial activism.<sup>136</sup> Again, the key is that courts must take care and carefully consider public opinion and social norms when issuing these sorts of grand mandates. Failure to do so is counter-productive in a variety of ways. Of course, as discussed above, it can prove harmful to the very issues

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integration], but their opponents have most of the advantages.” PELTASON, *supra* note 110, at 93.

133. See ROSENBERG, *supra* note 43, at 156.

134. See Sunstein, *supra* note 66, at 765 (“Ten years after [*Brown*], no more than about two percent of black children in the South attended desegregated schools. It was not until 1964, after Congress and the executive branch became involved, that widespread desegregation actually occurred. The Court is far more effective at vetoing a decision of another government entity than it is at effecting social change on its own.”). As another example, consider Dallas schools, which continued to be *completely* segregated as late as 1960, six years after the original *Brown* decision. See POWE, JR., *supra* note 123, at 248–51. Also consider the case of *Shuttlesworth v. Birmingham Board of Education of Jefferson County.*, 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd*, 358 U.S. 101 (1958), which demonstrates the “boomerang” effect even upon the federal courts. In *Shuttlesworth*, the district court dismissed black students’ claims that they were being denied the opportunity to go to white schools. Such a claim, seemingly in line with *Brown*, gained no purchase with either the district court or the Supreme Court (which ultimately affirmed the decision). See *Shuttlesworth*, 358 U.S. 101. Of course, it is not possible to be certain about the reasoning behind the shift from *Brown* to *Shuttlesworth*, but it is reasonable to wonder if the judiciary was stung by the strong reaction to its earlier attempts and decided to step back and hope that public opinion would “catch up.”

135. “The combination of all these factors—growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communication—created the pressure that led to civil rights. The Court reflected that pressure; it did not create it.” ROSENBERG, *supra* note 43, at 169.

136. See *id.* at 156 (“Relying on the Dynamic Court view of change, and litigating to produce significant social reform, may have surprising and unfortunate costs.”). Another example is capital punishment. The Supreme Court’s 1972 decision in *Furman v. Georgia*, 408 U.S. 238 (1972) created enormous reactance, as shown by contemporary polling, indicating that the Court’s attempt to force an abandonment of the death penalty. See JEFF JONES & LYDIA SAAD, GALLUP POLL SOCIAL SERIES: CRIME 2 (2013), *archived at* <http://perma.unl.edu/HFK6-55EG> (comparing polling responses from 1936 to 2013 to the question, “Are you in favor of the death penalty for a person convicted of murder?”). Approximately four months prior to the *Furman* decision, fifty percent of those polled favored the death penalty. *Id.* Five months after the *Furman* decision, support for the death penalty jumped by seven points. *Id.* That number has not dipped below sixty percent in thirty-one subsequent polls performed between 1972 and 2013. *Id.*



being litigated.<sup>137</sup> Additionally, though, it can also undermine the very power of the judiciary to accomplish its job. Recall from above that the courts are intended to serve as a “bulwark” against majoritarian impulses that would harm minority rights.<sup>138</sup> A court that repeatedly issues decisions that inflame opposition and that are ultimately unenforceable, though, loses its power.<sup>139</sup> As discussed below, it becomes so weakened that it loses the respect of the majority and thus becomes unable to accomplish its core purpose.

### C. Legitimacy Undermined: The Fallout of Stretching Social Norms

Ignoring the lessons discussed above will stimulate a vicious cycle. The public, experiencing reactance, will rebel against rulings and ultimately ignore, or otherwise disobey, them because of the judiciary’s impotence. This will, in turn, create an atmosphere of apathy, and even disrespect, toward the courts, and, when a person or group becomes accustomed to ignoring orders, future orders have very little currency. The ultimate result of this cycle is a basic undermining of the core legitimacy of the courts.

This argument is somewhat theoretical, but it finds strong support in other areas of human history and social science. George L. Kelling and James Q. Wilson have popularized what is commonly known as the “broken window theory,”<sup>140</sup> and this theory describes the danger of an impotent judiciary deaf to the potential consequences of reactance well. Using Stanford psychologist Philp Zimbardo’s 1969 experiments as a basis for their own study, Kelling and Wilson found that “[u]ntended property becomes fair game for people for fun or plunder and even for people who ordinarily would not dream of doing such things and who probably consider themselves law-abiding.”<sup>141</sup> Effectively, this means that “‘untended’ behavior also leads to the breakdown of community controls.”<sup>142</sup>

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137. That is, far-reaching decisions regarding abortion can set back women’s rights, and far-reaching decisions regarding school segregation can set back civil rights.

138. *See supra* note 34 and accompanying text.

139. *See, e.g.*, Mark Tushnett, *Against Judicial Review* 11, 16 (Harv. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 09-20, 2009), *archived at* <http://perma.unl.edu/8N2A-GTTB> (noting the significance of judicial review and arguing judges should only strike statutes when the democratic process is hindered, but acknowledging the practice will probably remain until society suffers a crisis requiring them to “understand why judicial review really does interfere in important ways with their ability to govern themselves”).

140. *See* George L. Kelling & James Q. Wilson, *Broken Windows*, *THE ATLANTIC MONTHLY*, Mar. 1982, at 29, *archived at* <http://perma.unl.edu/B3AS-5BKM>.

141. *See id.* at 3.

142. *See id.* at 4.

This concept has applicability in a wide variety of circumstances. Famously, Rudy Giuliani used this theory to change many of the practices of the New York City Police Department.<sup>143</sup>

The idea is that people—specifically potential criminals—take cues from their surroundings and calibrate their behavior based on what they see. If a city block is litter-free and its buildings are well-maintained, people will be less likely to litter or vandalize there, because they will sense that they will be held accountable if they do so. “Window-breaking does not necessarily occur on a large scale because some areas are inhabited by window-breakers whereas others are populated by window-lovers,” Wilson and Kelling write, “rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.”<sup>144</sup>

The argument is fairly simple and pretty well-known at this point: once people begin to ignore any rule, they will begin to ignore many rules. “Order begets accountability . . . disorder begets crime.”<sup>145</sup>

The applicability of this idea here is plain. Court rulings that are inconsistent with public sentiment will create a sense of reactance and will be ignored.<sup>146</sup> And, once a single ruling is ignored, it becomes easier to ignore later rulings. Akin to a broken window, an ignored command inculcates a lack of respect for the law-giver, making it easier to ignore later rulings and commands.<sup>147</sup> This becomes a negatively self-reinforcing environment in that, eventually, society begins to ignore *all* rulings,<sup>148</sup> even those that are not highly controversial or that do not incite reactance. Once the public senses that there are no consequences to ignoring the judiciary, and once it begins to do so on a

143. See, e.g., Lauren Kirchner, *Breaking Down the Broken Windows Theory*, PAC. STANDARD (Jan. 7, 2014), <http://www.psmag.com/navigation/politics-and-law/breaking-broken-windows-theory-72310/>, archived at <http://perma.unl.edu/E9WW-ESJS>.

144. *Id.*

145. *Id.* This precise nature of this theory, and the correct manner in which to apply it, is not without controversy. See, e.g., Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1374 (2010) (“[T]he practice of broken windows policing . . . [has] provoked considerable . . . controversy”). However, the core theory—that ignoring rules and laws at any level has a deleterious effect on the rule of law—is sensible and applicable to the discussion herein.

146. Or worse: such decision can actually provoke active rebellion. See *supra* sections V.B–C.

147. This seems particularly acute in this context, given the implicit blessing of apathetic Executive and Legislative Branches. As discussed above, the judiciary relies on these other two branches to provide real enforcement, when necessary. The problem discussed here is only acute, then, when the Executive and the Legislature do not do so. However, when that occurs—when those two branches do fail to enforce the law—the public receives an incredibly strong signal that they can also ignore the law without consequence. Again, the judiciary is simply in a very difficult position.

148. Or, at least, to give them less credence than a healthy justice system would seem to expect and require.

recurring basis, a widespread lack of respect for the courts takes hold, and the credibility of the justice system is irreparably undermined.<sup>149</sup>

This issue seems to be, if anything, even more serious in our current, fractious political atmosphere. In an environment where the various branches of government do not agree on many significant issues, and where they do not seem overly concerned with the niceties and technicalities of legal constraints, an overriding lack of respect for the government could easily take hold.<sup>150</sup> This means that the judiciary must be more careful than ever to behave responsibly and in a manner that takes account of social circumstances.

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149. This issue is laced throughout our system of governance.

If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mocker; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals.

United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809). Ignoring the law inevitably leads to lawlessness, with effects at all levels of society. For an enormous effect, simply consider the U.S. Civil War, provoked as it was by the *Dred Scott* case. See, e.g., John A. Powell & Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 ST. LOUIS U. L.J. 1153, 1155 (2008) (“The principal recognition accorded the *Dred Scott* case in the American mythos is its role in ‘precipitating’ the Civil War.” (citation omitted)). But this has many smaller effects, as well, and there are many examples of how this apathy towards the law occurs in our everyday lives and how it contributes to lawlessness. One need only peruse the local penal code to find numerous examples of laws that are systematically not enforced. See, e.g., *The Law You Probably Ignore Every Day*, ABC 13: EYEWITNESS NEWS (Nov. 6, 2013), <http://abclocal.go.com/ktrk/story?section=news/local&id=9315437>, archived at <http://perma.unl.edu/6XW2-XW93> (indicating that few people follow the Texas law that prohibits drivers from driving in the left hand lane unless for the purposes of passing another vehicle or making a left turn). Many of these sorts of rules are ignored because they are not well known, of course. But the underlying problem is that they are ignored because they are not enforced. And when minor rules go unenforced, people begin to lose respect for the system as a whole. That is the danger for a judicial system staffed by judges who do not ultimately care about whether anyone will follow their rulings.

150. See, e.g., *Hornbeck Offshore Servs., LLC v. Salazar*, 713 F.3d 787 (5th Cir. 2013). *Hornbeck* and its progeny provide examples of just how direct and blatant official lawlessness can become and how insidiously it can assert itself. Here, the Department of the Interior issued a second ban on drilling in the Gulf of Mexico, following the BP Deepwater Horizon oil spill, after a federal judge struck down the initial ban. See *id.* at 791. This was after a judge that struck down the initial ban had issued an injunction prohibiting the DOI from enforcing its moratorium on drilling. See *id.* at 790. The government ignored that injunction and attempted to enforce its second ban, so the court held the DOI in contempt. See *id.* at 793. On appeal, the 5th Circuit sided with the DOI on a technicality, thereby effectively letting the governmental agency ignore the lower court. See *id.* at 795–96. This is problematic, for all the reasons discussed herein.

#### D. A Contemporary Narrative

So what can courts do? The thesis of this Article is that the judiciary must maintain a high level of regard and respect for public opinions and always be wary of the social currents from which the issues before them arise. Nevertheless, they are still charged with protecting the vulnerable members of the citizenry from the capricious choices of the majority. They cannot simply abandon this charge, so what are they to do?

Generally, as discussed above, courts must attempt to interact with the public in a cooperative manner that leads society in a positive direction but that is simultaneously rooted in current social norms and beliefs.<sup>151</sup> They cannot abandon their charge to protect constitutional values and those who require protection, but they have to work with society in a manner society is willing to accept, rather than simply attempting to rule by toothless fiat.<sup>152</sup> In this manner, the courts can walk the fine line between leading and following—of balancing the gun and the salute—and ultimately fulfill their objectives. Failure in either direction (either failing to lead or being too commanding) will lead to a punchless judiciary that is ultimately unable to aid or protect society.<sup>153</sup>

But this articulation is too easy. Based upon the balance of this Article, it is an accurate assessment, but what good is an accurate assessment that is too simple to meet the complex conflicts faced by the courts? The interesting question is how this generic proposition is to be applied in the real world. Of course, the innate complexity of the social and legal issues consistently faced by the courts makes answers difficult, but perhaps some insight can be gained by casting this question in the context of the issue raised in the introduction, and that which spurred the author's interest in this Article—that of gay marriage, as addressed by Judge Shelby in Utah.

Recall that Utah has, not surprisingly,<sup>154</sup> had a very strongly conservative view of this issue. Again, as recently as just ten years ago, over 65% of Utah voters approved a state constitutional amendment that effectively prohibited gay marriage. So what should Judge Shelby have done? This Article argues that, in the face of such overwhelming opposition, he probably should not have done anything. Based on the discussion above, a judicial order directing nearly two-thirds of the public to disregard strongly-held opinions on a sensitive topic simply is not a good idea. It is ultimately inconsistent with the

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151. *See supra* note 64 and accompanying text.

152. *See id.*

153. *See supra* sections V.B–C.

154. A majority of Utah's population belongs to the Church of Jesus Christ of Latter-day Saints, a socially conservative church that has repeatedly taken a strong position against gay marriage.

courts' role—which is to provide protection to minorities, from majorities, consistent with constitutional values—because this leap actually undermines the judiciary's ability to do so.<sup>155</sup> And the facts bear that out here.

Immediately after Judge Shelby's ruling, the State of Utah began to pursue its appeal with vigor.<sup>156</sup> The decision became national news and, to some extent, the foci for those who oppose gay marriage, with both Utah citizens and outside groups contributing money and effort into defeating legally mandated gay marriage.<sup>157</sup> Prior to the ruling, there could be no doubt that public perception of gay marriage was changing. One recent study shows “[a] plurality of Utahns agree that same-sex couples should be allowed to marry in Utah.”<sup>158</sup> Since the

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155. *See supra* section V.C.

156. In denying the State's motion for a stay three days after the court announced its opinion, Judge Shelby explained:

The court had a telephone conversation with counsel from both parties a few hours after it issued its Order. The State represented to the court that same-sex couples had already begun marrying in the Salt Lake County Clerk's Office and requested the court to stay its Order of its own accord. The court declined to issue a stay without a written record of the relief the State was requesting, and asked the State when it was planning to file a motion. The State was uncertain about its plans, so the court advised the State that it would immediately consider any written motion as soon as it was filed on the public docket. The State filed a Motion to Stay later that evening.

Kitchen v. Herbert, No. 2:13-CV-217, 2013 WL 6834634, at \*1 (D. Utah Dec. 23, 2013). After the stay was denied by Judge Shelby, the State immediately filed another application for stay, but this time with the U.S. Supreme Court. On January 6th, 2014, the Supreme Court granted a temporary stay to allow the appeals process to run its course. Herbert v. Kitchen, 134 S. Ct. 893, 893 (2014).

157. Restore Our Humanity, the nonprofit group behind the Amendment 3 challenge, raised over \$130,000 within six months of Judge Shelby's decision. Ben Winslow, *Federal Appeals Court Has Another Big Same-Sex Marriage Case Pending*, Fox 13 SALT LAKE CITY (June 26, 2014, 10:16 PM), <http://fox13now.com/2014/06/26/federal-appeals-court-has-another-big-same-sex-marriage-case-pending/comment-page-1/>, archived at <http://perma.unl.edu/DU6W-AJSE>. The group is targeting individual members of society. They teamed with 145Fund.org to launch a fund seeking \$5 from one million people to enable “grassroots participation” in the fight for marriage equality. *145Fund.org Launched to Fund Landmark Lawsuit Against Marriage Discrimination*, BLOOMBERG (Apr. 10, 2014 6:45 PM), <http://www.bloomberg.com/article/2014-04-10/ad63fzNri1uk.html>, archived at <http://perma.unl.edu/8792-T57Q>. On the other side, a Utah lawmaker proposed a statewide “Marriage Defense Fund” that taxpayers could donate to when filing taxes. *Lawmaker Wants Donations to Anti-Gay Marriage Fund on Tax Forms*, N.Y. POST (Jan. 30, 2014), <http://nypost.com/2014/01/30/lawmaker-wants-donations-to-anti-gay-marriage-fund-on-tax-forms/>, archived at <http://perma.unl.edu/FAC9-MZWA>.

158. JOEL BENENSON & AMY LEVIN, RECENT UTAH POLL RESULTS 1 (Benenson Strategy Grp. 2014), archived at <http://perma.unl.edu/6MAS-ZTRA>. The report goes on to suggest the support arises from the absence of any negative impact on other marriages, and “70% of Utahns have a close friend or family member who is gay.” *Id.* Another group conducted a study a year earlier comparing support from 2004 and

ruling, however, Utah succeeded in temporarily staying the decision by pouring significant time and resources into the effort.<sup>159</sup> At the time of this Article, that effort has failed—but the question is whether public attitudes will continue to evolve or will become cemented in place due to judicial intervention.

These are the wages of reactance. Judge Shelby was evidently excited about being a civil rights pioneer,<sup>160</sup> but he may well have pushed those subject to his decisions too far, with potentially disastrous results.<sup>161</sup>

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2012, and found an increase of support from 25% to 36%. See ANDREW R. FLORES & SCOTT BARCLAY, WILLIAMS INST., PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATE 6 (2013), archived at <http://perma.unl.edu/YS4A-JAD6>. Moving from 36% to a plurality in such a short time represents a significant change.

159. It is unclear how much was specifically spent on staying Judge Shelby's ruling, but the entire process of fighting *Kitchen v. Herbert* is believed to have cost anywhere from \$600,000 to \$10 million. The Attorney General originally estimated the appeals process would cost around \$2 million. Brooke Adams & Lindsay Whitehurst, *Supreme Court Halts Gay Marriages Pending Appeal*, THE SALT LAKE TRIB. (Jan. 7, 2014, 11:47 AM), <http://www.sltrib.com/sltrib/news/57357406-78/court-utah-state-stay.html.csp>, archived at <http://perma.unl.edu/3BE4-LVUX>. Shortly thereafter, the Attorney General announced it had hired outside counsel to handle the 10th Circuit appeal at a capped fee of \$300,000. Press Release, Sean D. Reyes, Utah Office of the Attorney Gen., Outside Counsel to Assist with *Kitchen vs. Herbert* Announced (Jan. 16, 2014), archived at <http://perma.unl.edu/S4HV-JUZL>. In October 2014, after learning the Supreme Court denied certiorari, the Attorney General announced the state paid a total of \$600,000 towards the case. Marissa Lang, *Utah Clerks Issue Marriage Licenses to Same-Sex Couples*, THE SALT LAKE TRIB. (Jan. 2, 2015 11:24 AM), <http://www.sltrib.com/specialreports/1676131-155/marriage-sex-court-utah-states-monday>, archived at <http://perma.unl.edu/6AAL-3GAT>. However, a state senator previously indicated Utah “committed around \$10 million” to the *Kitchen v. Herbert* fight. Mori Kessler, *Appeals Court Denies Utah's Request to Stay Recognition of Same-Sex Marriages*, ST GEORGE NEWS (July 11, 2014), [http://www.stgeorgeutah.com/news/archive/2014/07/11/mgk-appeals-court-orders-utah-recognize-sex-marriages/#.V MMS\\_-ktGUm](http://www.stgeorgeutah.com/news/archive/2014/07/11/mgk-appeals-court-orders-utah-recognize-sex-marriages/#.V MMS_-ktGUm), archived at <http://perma.unl.edu/CG2M-39M5> (quoting a statement issued by State Senator James Dabakis).
160. See *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013) (“[T]he State argues that an individual’s right to marry someone of the same sex cannot be a fundamental right. But the Supreme Court did not adopt this line of reasoning in the analogous case of *Loving v. Virginia*, 388 U.S. 1 (1967).” (citations omitted)). The Supreme Court’s decision in *Loving* struck down state laws banning interracial marriages. However, Judge Shelby analogized *Loving* to same-sex marriage on three occasions. See *id.* at 1194, 1202, 1206. He used this comparison to contend “the State’s unsupported fears and speculations are insufficient to justify the State’s refusal to dignify the family relationships of its gay and lesbian citizens . . . . The Constitution therefore protects the choice of one’s partner for all citizens, regardless of their sexual identity.” *Id.* at 1216. It is hard *not* to perceive, in Judge Shelby’s opinion, a desire to be remembered as similarly “pioneering.”
161. Or, at least, disastrous to those desiring the progressive view of marriage. Utah Governor Gary Herbert, for example, decried this ruling as ignoring the will of Utah and its citizens. See Press Release, Utah Governor Gary Herbert, State-

This issue is far from resolved, of course. *Kitchen v. Herbert* was affirmed by the Tenth Circuit Court of Appeals on June 25, 2014.<sup>162</sup> The majority expressly rejected the will of the people, stating that “protection and exercise of fundamental rights are not matters for opinion polls or the ballot box.”<sup>163</sup> The dissent, however, warned judges “should resist the temptation to become philosopher-kings, imposing our views under the guise of constitutional interpretation of the Fourteenth Amendment.”<sup>164</sup> Other courts have struggled with this tension, as well.<sup>165</sup>

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ment on Federal Court Ruling (Dec. 20, 2013), *archived at* <http://perma.unl.edu/PW33-2SFP>. Similar rulings have resulted in concern of judges trumping the “will of the people.” *See, e.g.*, John Lyon, *Legislators Adopt Resolution Opposing Judge’s Ruling on Gay Marriage*, ARK. NEWS (June 20, 2014, 2:14 PM), <http://arkansasnews.com/news/arkansas/legislators-adopt-resolution-opposing-judge-s-ruling-gay-marriage>, *archived at* <http://perma.unl.edu/87KB-7H9R> (discussing legislative efforts to adopt a resolution overturning state court decision on same-sex marriage); Ben Johnson, *Utah Judge Strikes Down State’s Marriage Amendment: Could Force Same-Sex ‘Marriage’ Nation-Wide*, LIFESITE (Dec. 23, 2013, 5:59 PM), <https://www.lifesitenews.com/news/obama-appointed-judges-ruling-in-utah-could-overturn-every-state-marriage-p>, *archived at* <https://perma.unl.edu/5EF8-TRFE> (quoting Brian Brown, president of the National Organization for Marriage) (calling the *Kitchen* holding “a travesty of justice . . . [and one that] should concern every American who cares about the rights of citizens and their involvement in determining the laws that govern us”).

162. *See* 755 F.3d 1193 (10th Cir. 2014).

163. *Id.* at 1228.

164. *Id.* at 1240 (Kelly, J., concurring in part and dissenting in part).

165. On October 6, 2014, the Supreme Court denied certiorari on seven cases from the Fourth, Seventh, and Tenth Circuit Courts of Appeals, including *Kitchen v. Herbert*. *See* *Herbert v. Kitchen*, 135 S. Ct. 265 (2014) (declining to consider Utah marriage law); *Smith v. Bishop*, 135 S. Ct. 271 (2014) (declining to consider Oklahoma marriage law); *Bogan v. Baskin*, 135 S. Ct. 316 (2014) (declining to consider Indiana marriage law); *Walker v. Wolf*, 135 S. Ct. 316 (2014) (declining to consider Wisconsin marriage law). The Court also rejected three cases concerning Virginia’s marriage laws. *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *Rainey v. Bostic*, 135 S. Ct. 286 (2014); *Schaefer v. Bostic*, 135 S. Ct. 308 (2014). Not one of these cases stood behind the democratic process, and each overturned same-sex marriage bans. In *Baskin v. Bogan*, Posner, writing for the Seventh Circuit, struck the bans in Indiana and Wisconsin, noting that “[m]inorities trampled on by the democratic process have recourse to the courts.” 766 F.3d 648, 671 (7th Cir. 2014). In an opinion questioning the same-sex marriage ban in Virginia, the Fourth Circuit contended “the people’s will is not an independent compelling interest that warrants depriving same-sex couples of their fundamental right[s].” *Bostic v. Schaefer*, 760 F.3d 352, 379 (4th Cir. 2014). Exactly a month after the Supreme Court refused to consider the constitutionality of same-sex marriage bans, however, the Sixth Circuit Court of Appeals issued a 2-1 opinion upholding same-sex marriage bans in Ohio, Tennessee, Michigan, and Kentucky. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d* 135 S. Ct. 2584 (2015). The court recognized an overwhelming number of voters in each state supported the bans. *Id.* at 409–10. It should be for the voters to decide when societal values have evolved. *See id.* at 416 (“A principled jurisprudence of constitutional evolution turns on evolution in *society’s* values, not evolution in *judges’* values.”). Had

Regardless of how the Supreme Court resolves this iteration of the conflict between the courts and the public, however, the courts should take care to consider the generic articulation, above: The judiciary must pay attention to its public. Of course, this is not an absolute proposition. If Judge Shelby could credibly claim that society was ready for his marching orders, then his ruling would be sound. It is difficult to be certain what would justify such a conclusion, in the face of such overwhelming opposition, but it is conceivable.<sup>166</sup> A corollary to that is perhaps that judges would do well to be cognizant of their geographic reach.<sup>167</sup> It is difficult, if not impossible, for judges in relatively isolated areas to credibly evaluate larger social sentiment. For example, the District of Utah is relatively small, covering just 82,000 square miles and with a population of 2.8 million residents.<sup>168</sup> And yet Judge Shelby issued an order that conceivably affects hundreds of millions of people and that should only be issued if those hundreds of millions of people are ready for it. This suggests that district courts, in exercising caution regarding public opinion, should be very, very careful to not overstep their bounds, as it is far more likely that higher courts have a better vantage point to make such decisions.

## VI. CONCLUSION

Ultimately, the thesis presented above is not terribly complicated. The judiciary must be ever aware of society's temperature, as courts lack the ability to enforce their orders, and unwelcome, unenforceable orders tend to provoke resistance and hostility. This simplicity is deceiving. The courts walk a very fine line, having to effectively tame a majority that it cannot control. Compounding the problem is the fact

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Judge Shelby, and others similarly situated, respected the political process, "thirty-one States would continue to define marriage the old-fashioned way." *Id.* By ignoring the voice of democracy, judges "perpetuate the idea that they are the] heroes in these change events." *Id.* at 421. As such, there was a finally a split among the courts of appeals, and the Supreme Court granted certiorari on January 16, 2015, for all four Sixth Circuit cases. *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015); *Tanco v. Haslam*, 135 S. Ct. 1040 (2015); *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015); *Bourke v. Beshear*, 135 S. Ct. 1041 (2015). On June 26, 2015, the United States Supreme Court overruled the Sixth Circuit cases and ruled same-sex marriage bans unconstitutional in all fifty states. *Obergefell*, 135 S. Ct. 2584.

166. Assume, for instance, that public opinion was breaking strongly in a particular direction (as is perhaps the case here). *See supra* note 158 and accompanying text. In such a situation, extant opposition would perhaps not be a barrier, as momentum and time would be on the side of the progressive ruling.
167. HOROWITZ, *supra* note 76, at 60 ("In general, it has been thought that court decisions would be more effective if there were fewer target populations.").
168. *See* U.S. Dep't of Justice, *About the District of Utah*, U.S. ATTYS. OFF., <http://www.justice.gov/usao/ut/about.html> (last updated Mar. 13, 2015), *archived at* <http://perma.unl.edu/VU7D-TSGW> (noting the physical size and 2011 population estimate of the district).



that missteps are likely to backfire, creating more resistance and hostility than originally existed. Much thought and analysis, then, must go into controversial decisions to ensure that they accurately assess the direction of public sentiment. If, however, courts do this, they have the unique ability to help society seize opportunities for growth and change and to guide the public in constructive and positive ways.