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Backlash's Travels

Cass R. Sunstein

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ABSTRACT

Sometimes the public greatly opposes the decisions of the Supreme Court; sometimes the Court seems to anticipate public backlash and even to respond to it when it occurs. Should a social planner want the Court to anticipate or to respond to backlash? No abstract answer is possible; the appropriate conclusion depends on assumptions about the capacities of courts and the capacities of those who engage in backlash. This point is demonstrated through an exploration of four imaginable worlds: Olympus, the Land of the Ancients, Lochnerland, and Athens. The four worlds are based on radically different assumptions about judicial and public capacities to think well about constitutional problems. The proper analysis of backlash depends, in large part, on the prevailing theory of constitutional interpretation and on whether judges have privileged access to constitutional meaning. If judges lack such access, backlash is a healthy part of dialogue between judges and the public, and the judiciary should sometimes yield. If our world is Olympus, the argument for attention to backlash is severely weakened.

Let us define "public backlash," in the context of constitutional law, in the following way: Intense and sustained public disapproval of a judicial ruling, accompanied by aggressive steps to resist that ruling and to remove its legal force.

It is easy to imagine cases in which a controversial judicial ruling is likely to produce public backlash. Perhaps the ruling involves property rights, presidential power in connection with the war on terror, the use of the words "under God" in the Pledge of Allegiance, the placement of the Ten Commandments on public property, or same-sex marriage.

Let us simply stipulate that if the Court rules in a certain way in such cases, public outrage could significantly affect national politics and undermine the very cause that the advocates of the ruling are attempting to promote. Perhaps the ruling would prove futile or counterproductive, or produce overall social harm. Perhaps the ruling would set in motion forces

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that would ultimately lead to its own demise. How should a social planner want courts to respond to the risk of backlash?

My principal claim in this Essay is that no sensible answer to this question can be given in the abstract. Any judgment inevitably must depend on certain assumptions about institutional capacities and characteristics.[1] Under easily imaginable assumptions, courts should ignore the risk of backlash and rule as they see fit. Under assumptions that are different, but also easily imaginable, the restraining effect of backlash is highly desirable, and it is very good when courts are affected by it. The risk of backlash has sometimes proved a deterrent to desirable rulings from the Court; it has also helped to deter rulings that are not at all desirable. If these conclusions are right, they raise serious questions about a tempting view within the legal culture—that courts should decide as they see fit and let the chips fall as they may. That view might ultimately be right, but it depends on contentious judgments about the fact-finding and theory-building abilities of both courts and the public.

As we shall see, those who believe in "popular constitutionalism"[2] on normative grounds might well be led to the conclusion that judges should pay careful attention to the risk of backlash. For example, Larry Kramer writes that under the original understanding, "[f]inal interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments."[3] On this view, backlash deserves careful attention when it occurs. If judges anticipate backlash, they would do well to limit themselves accordingly, perhaps by invoking justiciability doctrines to avoid the merits, perhaps by ruling narrowly, perhaps by deferring to the elected branches.

If the argument here is correct, the claim that judges should attend to the prospect of backlash stands or falls on particular judgments about constitutional method and institutional capacities. If we believe that the meaning of the Constitution is settled by the original understanding, then "the people themselves" may be ill equipped to uncover that meaning, and judges should pay little or no attention to the public's desires. But if we believe that the meaning of the Constitution is legitimately settled by reference to

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[1] Robert Post and Reva Siegel, this issue, argue on behalf of a model of democratic constitutionalism in which courts retain a prominent role. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. ____ (2007). Celebrating *Planned Parenthood v. Casey*, 550 U.S. 833 (1992), they seek to defend the judicial role against some of its critics who emphasize the value of popular constitutionalism. As we shall see, their illuminating discussion cannot be evaluated in the abstract; a great deal depends on judgments about institutional capacities. I believe that Post and Siegel have something in common with Bickel: they believe that, to some extent, we live in Olympus. My principal goal here is not to question that conclusion but to clarify the need for and nature of the underlying institutional judgments.

[2] *See* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (contending that the public should create and contest constitutional meaning).

[3] *Id.* at 8.

moral and political judgments, and if courts are not especially good at making those judgments, then popular constitutionalism and attention to backlash have far more appeal. My purpose, however, is not to indicate a final view on appropriate response to the risk and occurrence of backlash.[4] I aim instead to explore the grounds on which such a view must be defended.

I attempt that exploration through an admittedly unusual route. I specify a diverse array of nations, or lands, in which the analysis of backlash must take a distinctive form. Unlike Gulliver, backlash is not a person; but we can learn a great deal, I am hoping, by investigating backlash's travels.

I. OLYMPUS

Let us imagine a nation—call it Olympus—in which judicial judgments are reliably right, from the relevant point of view, and in which public opposition to those judgments, when it exists, is reliably wrong. To make the example simple and intuitive, let us begin by stipulating for present purposes that judicial decisions about constitutional meaning require moral judgments of one or another sort.[5] On this assumption, the constitutionality of racial segregation, restrictions on the right to choose abortion, or bans on same-sex marriage turns, in significant part, on moral judgments. Perhaps the relevant practices are valid if and only if they can be supported by reference to justifications that are at once legitimate and weighty. If we suppose that judges can assess that question reliably, and that any public backlash is based on grounds that are either illegitimate or weightless, the argument for taking account of backlash seems very weak. At first glance, the duty of judges is to rule on the Constitution's meaning by reference to the relevant sources; if backlash occurs, it is by hypothesis irrelevant to the judges' job.

The first glance is essentially right. For those who believe that our world is Olympus, it is usually inappropriate for judges to attend to backlash. But things are not quite so clear, even in Olympus. To see why, consider the debate between Alexander Bickel and Gerald Gunther about judicial exercise of the "passive virtues," captured in the Supreme Court's refusal to decide certain controversial questions.[6] Bickel seemed to think that

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[4] *See* Cass R. Sunstein, *If the Public Would Be Outraged by Their Rulings, Should Judges Care?*, STAN. L. REV. (forthcoming 2007).

[5] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter DWORKIN, FREEDOM'S LAW] (arguing that decisions should be based on a "moral reading" rather than specific original understandings or majoritarian sentiment); RONALD DWORKIN, JUSTICE IN ROBES (2006) [hereinafter DWORKIN, JUSTICE IN ROBES] (challenging models of adjudication that deny the role of moral arguments); JAMES FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE FOR AUTONOMY (2006) (arguing that judges should perfect the Constitution to assure "deliberative autonomy" and "deliberative democracy").

[6] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed., Yale Univ. Press 1986) (1962); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Re-*

the United States is, in an important sense, Olympus. He insisted that the Court's role was to announce certain enduring values—to discern principles that would properly organize constitutional life. Bickel believed that courts were in a unique position to carry out that role. In his view, "courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess."[7] Indeed, "[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar . . ." in thinking about those enduring values.[8]

To this extent, Bickel showed great faith in the capacities of judges to think about what political morality requires. "Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."[9] Thus, "[n]o other branch of government is nearly so well equipped to conduct" a kind of "vital national seminar," through which the most basic principles are discovered and announced.[10] Pressed by expediency and by short-term pressures, other institutions are poorly equipped to understand what principles are required, at least by comparison with the judiciary.

Nor was Bickel especially enthusiastic about "the people themselves." On the contrary, he wrote that "the people themselves, by direct action at the ballot box, are surely incapable of sustaining a working system of general values specifically applied."[11] In his view, "matters of principle" require "intensive deliberation" and should not be submitted to a direct referendum.[12] It should be clear that this is an emphatically Olympian conception of the role of the Supreme Court. What is perhaps most remarkable about that conception is how many people have shared it in the decades since Bickel first wrote.[13]

At the same time, Bickel believed that a heterogeneous society could not possibly be principle ridden. Too much of the time, such a society would resist the imposition of principles, even if they were entirely sound. In this respect Bickel invoked the example of Abraham Lincoln, who seemed to him a model for the Supreme Court itself.[14] Bickel read Lincoln to be unambivalent in his condemnation of the institution of slavery, but also to believe that immediate abolition was impractical, simply because it would meet with such widespread opposition. In Lincoln's view, the feeling of

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view, 64 COLUM. L. REV. 1 (1964) (criticizing use of justiciability doctrines to avoid principled decisionmaking).

[7] BICKEL, *supra* note 6, at 25.

[8] *Id.*

[9] *Id.* at 26.

[10] *Id.*

[11] *Id.* at 27.

[12] *Id.*

[13] *See, e.g.*, DWORKIN, JUSTICE IN ROBES, *supra* note 5.

[14] BICKEL, *supra* note 6, at 66–70.

"the great mass of white people" would not permit abolition.[15] In his most striking formulation, Lincoln declared: "Whether this feeling accords with justice and sound judgment, is not the sole question, if indeed, it is any part of it. A universal feeling, whether well- or ill-founded, can not be safely disregarded."[16]

Bickel argued that the Supreme Court maintained a kind of Lincolnian tension, and that it did so through the use of the passive virtues, by which it stayed its own hand in deference to anticipated public resistance. In his view, a court that invalidates legislative policy "must act rigorously on principle, else it undermines the justification for its power."[17] The same is true when the Court validates a legislative action.[18] But the Court might also refuse to decide. It might give the political processes relatively free play, because it has neither upheld nor invalidated their decisions. In his view, "No good society can be unprincipled; and no viable society can be principle-ridden."[19] The task of judicial review is to maintain both "guiding principle and expedient compromise"[20]— and to do so by staying its hand in the face of strong popular opposition, however indefensible the opposition might be.

In response, Gunther was mostly aghast.[21] In his famous phrase, Gunther wrote that Bickel seemed to believe that the Supreme Court should maintain "the 100% insistence on principle, 20% of the time."[22] By contrast, Gunther thought that the Court should be one hundred percent insistent on principle, one hundred percent of the time. Accepting Bickel's basic conception of the Court's role as the elaborator of sound principles, he insisted that the passive virtues should not be invoked as a basis for judicial refusals to invalidate unconstitutional action.

We should be able to see that both Bickel and Gunther write as if our world is Olympus—as if the Supreme Court has special access to constitutional meaning, understanding that concept in terms that acknowledge the Court's creative role in discerning the governing principles. Both believed, moreover, that public backlash is not well founded—that it is essentially unprincipled, a refusal to act in accordance with constitutional commands. Undoubtedly they were influenced in this regard by their distinctive time, when the Warren Court was engaged in a series of projects that seemed (to many) required from the moral point of view. Recall here that Bickel's model frames the conflict as between Lincoln's moral commitments and the intransigence of those who defended slavery. Recall too

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[15] *Id.* at 66 (quoting Abraham Lincoln, Speech at Peoria, Illinois (Oct. 16, 1854), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 256 (Roy P. Basler ed., 1953)).

[16] *Id.*

[17] *Id.* at 69.

[18] *Id.* at 70.

[19] *Id.* at 64.

[20] *Id.*

[21] Gunther, *supra* note 6.

[22] *Id.* at 3.

that the ban on racial intermarriage is the problem in which Bickel praised, and Gunther condemned, the Court for exercising the passive virtues.[23]

The simple conclusion is that to the extent that our world is Olympus, it is not easy to defend the proposition that courts should care about backlash. The most that can be said is that even in Olympus, courts might plausibly use the passive virtues so as to preserve the Lincolnian tension between principle and expediency. This is an important point, but it is merely a qualification of the basic point, which is that because judges are right and an outraged public is wrong, backlash deserves consideration only rarely and only for prudential reasons.

II. The Land of the Ancients

Now let us adopt different assumptions. Let us imagine that we have arrived at the Land of the Ancients, in which constitutional meaning is best understood in originalist terms. In this land, the meaning of the document is captured by the intentions of the ratifiers,[24] or perhaps by its original public meaning.[25] (We need not pause over the distinction between the two approaches, even though it might be important in some cases.) In the Land of the Ancients, all judges are self-conscious and unambivalent originalists.

Let us assume as well that the Supreme Court is especially good at discerning constitutional meaning, thus understood, and that the public is very bad at that task. Perhaps the public is essentially uninterested in the outcomes dictated by originalism; perhaps the public is incompetent in thinking about what originalism requires. When backlash occurs in the Land of the Ancients, it is because the public's (legally irrelevant) judgments of policy and principle have been rejected by the Court's (legally sound) judgments about the original understanding. In this particular land, some members of the public are skeptical of originalism as such; some people reject the outcomes that originalism produces; many people reject originalism *because* it produces the relevant outcomes.

In the Land of the Ancients, judges are entirely comfortable with democratic corrections to the outcomes required by originalism—at least if those corrections take the form of using constitutionally specified channels to invalidate actions that the original understanding permits. Suppose, for example, that if we refer to that understanding, the Constitution is best taken not to create a right to choose abortion, or not to include protection against discrimination on the basis of sex. If political majorities seek to use political processes to protect the right to choose abortion, or to ban sex

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[23] *See* Bickel, *supra* note 6, at 71, 126, 174 (discussing Naim v. Naim, 350 U.S. 985 (1956)); Gunther, *supra* note 6, at 11–13 (same).

[24] *See* Saikrishna Prakash, *Radicals in Tweed Jackets*, 106 Colum. L. Rev. 2207 (2006) (book review).

[25] *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997).

discrimination, judges in the Land of the Ancients will have no complaint. Of course such judges will not permit democratic majorities to defy the original understanding—by, for example, denying African Americans the right to vote or allowing legislation to have the force of law when it has not been presented to the President. But originalists agree that these majorities can engage in constitutional change through the lawful use of the ordinary channels for amendment.

If judges are right to commit themselves to originalism, the social planner should not, at first glance, want the Court to take account of backlash. By hypothesis, the Court is correct on the relevant question and the public is wrong. Indeed, the situation here is exceedingly close to the situation in Olympus. Even or perhaps especially if the favored interpretive method is originalist, the public's views about the meaning of the Constitution are irrelevant. The Court should rule as it sees fit, whatever the public's response.[26] With respect to backlash, we could easily imagine a working alliance between Olympians, who read the Constitution in moral terms,[27] and originalists, whose lodestar is history. The alliance is joined by people with diverse interpretive methods who nonetheless agree that the Court ought not to attend to the risk and reality of backlash.

But there is a counterargument, or at least a contrary consideration. Perhaps a Bickelian approach is appropriate in the Land of the Ancients. Perhaps a Bickelian could be convinced that originalism is the correct approach and that the original understanding exhausts constitutional meaning—while also acknowledging that *no society can be one hundred percent originalist one hundred percent of the time*. One reason might be the existence of longstanding departures from the original understanding, some of which were permitted, and others engineered, by the Supreme Court itself. Perhaps a theory of stare decisis, or of respect for settled social practices, is necessary or appropriate in the Land of the Ancients.[28] If the nation has long allowed independent regulatory agencies, or if the Court has long banned sex discrimination, judges in the Land of the Ancients might not try to change the status quo, even if originalism condemns independent regulatory agencies and permits sex discrimination. Perhaps such judges are attuned not merely to reliance interests, but to a large set of considerations of which public backlash is a part.

A variation on this view is Lincolnian. Perhaps there are quasi-Bickelians even in the Land of the Ancients, who believe that adherence to the original meaning is what principle requires, while also insisting that prudence—understood as caution in implementing understandings rejected by the public—has an important place. Even if in principle nothing can be

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[26] Consider the comments of Justice Scalia in Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[27] *See* DWORKIN, FREEDOM'S LAW, *supra* note 5.

[28] See Justice Scalia's admission of possibly proving to be a "faint-hearted originalist" in Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

said to support the public's resistance to judicial adherence to the original understanding, the social consequences of judicial insistence on that understanding might well be unacceptable. Those consequences are especially likely to be unacceptable if the public is genuinely outraged. It follows that originalist judges might stay their hand, at least if they can do so without greatly compromising the rule of law.

Notwithstanding the large differences in interpretive methods, it emerges that the Land of the Ancients is relevantly close to Olympus. There is a strong presumption that backlash is immaterial. But there might well be a prudential argument, in extreme cases, for anticipating backlash, and for refusing to cause it, at least if the consequences would be very bad. An Olympian judge might hesitate before declaring that the Constitution requires states to recognize same-sex marriages. A judge in the Land of the Ancients might hesitate before ruling that the Endangered Species Act is beyond congressional power under the Commerce Clause, or that racial segregation, if required by the national government, offends no provision of the Constitution—even if such a judge believes that the original Constitution does not allow the Endangered Species Act and fails to forbid racial segregation at the national level.

It is true that in the Land of the Ancients, the views of the public have no interpretive authority; they tell us nothing about what the Constitution means. But a judge who works there might be willing to use doctrines of justiciability in order to avoid especially bad consequences. Crucially, such a judge will want to see that the use of such doctrines can itself be justified by reference to the original understanding. Perhaps the relevant doctrines can be so justified, and perhaps they will allow courts some room to maneuver. At the very least, an originalist judge might dare to hope so.

III. LOCHNERLAND

Now let us alter our assumptions in a more significant way. In the land that I now propose to investigate, things are closer to Olympus than to the Land of the Ancients in the following respect: Constitutional meaning is properly, or even inevitably, a product of the political or moral judgments of the interpreter. Let us assume further that interpreters, to qualify as such, cannot be freestanding moral or political arbiters; they owe a duty of fidelity to the relevant legal materials. Nonetheless, these materials contain significant ambiguities or gaps, so that ultimate judgments often depend on contestable views about policy and principle. Let us assume finally—and this is the key step, the departure from Olympus—that judicial views about policy and principle are systematically unreliable and that public backlash, when it occurs, is founded on good grounds, in the sense that the public's judgments are simply better than that of the Supreme Court.

In short, we are now speaking of Lochnerland, in which judicial errors are inevitable. How, if at all, should the analysis of backlash be affected?

A. Judicial Error

It should be clear that under the stated assumptions, the social planner would very much want the Court to take account of the risk of backlash. By hypothesis, consideration of backlash will move the Court in better directions. At a minimum, the social planner might insist that the judges of Lochnerland pay attention to public judgments as they are reflected in backlash—perhaps by staying their hand, or by invoking justiciability doctrines, if the risk of significant backlash is high. But the social planner might well go much further. Indeed, the supposition that we are in Lochnerland would help to explain the influential views of James Bradley Thayer on the appropriate posture of the Supreme Court.[29] Thayer believed that the Court should strike down legislation only if the violation of the Constitution was "so manifest as to leave no room for reasonable doubt."[30] We can think of Thayerianism as a generalization of the idea that courts should anticipate backlash and be cautious if it is likely to occur.

But Thayer was far more ambitious than that. Thayer suggested, much more broadly, that the Court should generally defer to the public's judgments, and to their judgments about constitutional commands, unless those judgments are palpably wrong.[31] To say that courts should hesitate in the face of backlash is simply to offer a modest specification of Thayer's general view. It is a specification because Thayer's general plea for judicial deference surely entails hesitation in the face of intensely held public convictions; it is modest because those who ask courts to attend to backlash need not embrace Thayer's general position.

To be sure, Thayer's approach leaves a large gap, one that Thayer himself did not fill: By what theory can we tell whether there is a constitutional violation? Thayerianism cannot possibly be a *complete* account of the judicial role, because the question whether there is a clear violation depends on the method by which the Constitution is read. We could imagine originalist Thayerians, who believe that legislation must be upheld unless the violation of the original understanding is palpable. On this view, the legislature would receive the benefit of all reasonable doubts in the face of originalist challenges. We could also imagine Olympian Thayerians, who

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

[30] *Id.* at 140 (quoting Commonwealth v. Smith, 4 Binn. 117 (Pa. 1811)).

[31] *Id.* For a modern version, see Adrian Vermeule, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006). I am identifying here "the public" with the public's elected representatives, who were Thayer's focus.

believe that legislation must be upheld unless the violation of relevant moral principles is plain.

But the core point is that Thayerian approaches emphasize the likelihood of judicial error. In Lochnerland, attention to the risk of backlash seems obligatory, simply because it produces better results by stipulation. In Lochnerland, it is highly desirable for judges to anticipate public backlash and to attempt to avoid it. The reason is that judges will do better, in principle, if they defer to an excited citizenry.

It is sad but true that the judges of Lochnerland might not willingly adopt Thayerianism or even attend to the risk of backlash. By hypothesis, these are the judges of Lochnerland, and their judgments are systematically unreliable. Such judges are likely to err while also being confident that they are unerring. Perhaps the judges of Lochnerland think they live in Olympus; it would not be the first time. But perhaps a norm or practice of judicial self-discipline might be developed, so that fallible judges, made alert to their own fallibility, adopt measures to limit their own mistakes. Such measures might involve doctrines of justiciability, designed to reduce judicial intervention into American life; or minimalism, designed to ensure a degree of narrowness and shallowness;[32] or generalized deference, designed to impose a heavy burden of proof and persuasion on those who challenge legislatures.

B. Popular Constitutionalism, Jefferson's Revenge, and Condorcet

Let us revisit the idea of "popular constitutionalism"[33] through the lens of Lochnerland. Those who embrace popular constitutionalism might be taken to suggest that constitutional meaning requires judgments of basic principle and to believe those judgments are more reliably made by the public than by the judiciary.[34] A plea for attention to the risk of backlash, and for judicial deference to backlash when it occurs, seems natural in light of the more general view. And in this light, we can see the close links among popular constitutionalism, judicial responses to backlash, and Thomas Jefferson's plea for frequent constitutional amendment by an engaged citizenry.[35] If constitutional meaning turns on judgments of morality and fact, and if those judgments change over time, a "living constitution" might turn out to have a powerful Jeffersonian element—at least if the public, and not the judges, breathes life into the document.

More ambitiously, we can even see a kind of "Jefferson's Revenge" in American processes of constitutional change, to the extent that the rele-

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

[33] *See* KRAMER, *supra* note 2, and accompanying text.

[34] In my view, this is part of the account in *id.*

[35] *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

vant changes are produced through processes of interpretation that are highly sensitive to popular judgments over time.[36] It is certainly plausible to think that most alterations in constitutional meaning have stemmed not from constitutional amendments, and not from freestanding judicial elaboration of principles, but from social practices and constitutional doctrines that show a degree of attentiveness to changing public perceptions and commitments.[37] Jefferson's Revenge, if it has occurred, can be found in new understandings of the Constitution that, in the end, are a product of the beliefs and values of successive generations.

In Lochnerland, the argument for judicial attention to popular judgments in general, and to backlash in particular, might be fortified by reference to the Condorcet Jury Theorem ("CJT").[38] The CJT says that if members of a group are more than fifty percent likely to be right, the likelihood that a majority of the group will be right expands to one hundred percent as the size of the group increases. We can easily imagine a situation in Lochnerland in which (a) large populations have a constitutionally relevant judgment and (b) most individuals are more than fifty percent likely to be right. If so, the majority is overwhelmingly likely to be right. If the population assents to a proposition that is constitutionally relevant, judges would do well to pay attention to them, perhaps especially if their convictions are firm.

These claims raise many questions and serious doubts, not least from the Olympian point of view.[39] The simplest point is that in Lochnerland, the argument for attention to popular backlash is very strong. When judges make constitutional judgments on their own, there is a serious risk of error. Anticipation of backlash and humility in its face reduce that risk. And we can identify a sharp difference, in this light, between Lochnerland on the one hand and Olympus and the Land of the Ancients on the other. In the latter jurisdictions, there is no reason to think that most members of the public are more likely than not to be right on a constitutionally relevant proposition. Hence, judges lack an epistemological reason to care about what the public thinks. In Lochnerland, things are altogether different.

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[36] *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323 (2006).

[37] *Cf.* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 3–8 (1949) (emphasizing that with analogical reasoning, changing judicial judgments develop in a way that is attuned to social commitments).

[38] *See* CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE (2006).

[39] *See* Sunstein, *supra* note 4. An obvious problem is that if most people suffer from a systematic bias, and hence are more likely to be wrong than right, the likelihood that the majority will be wrong approaches one hundred percent as the size of the group expands. Judges in Lochnerland are not likely to be impressed with the wisdom of crowds; believing that people are probably wrong, they might well enlist the CJT to suggest that the view of the crowd is entitled to no weight. *See id.*

IV. ATHENS

Now suppose that there is no particular reason to believe that judges are especially good, or especially bad, at giving meaning to ambiguous constitutional phrases. Let us imagine that we are agnostic on that question, at least over long periods of time. We do not know whether we are in Olympus or Lochnerland. For every *Brown v. Board of Education*,[40] there is a *Lochner v. New York*.[41] For every *Dred Scott v. Sandford*,[42] there is a *Brandenburg v. Ohio*.[43] No global assessment is possible. But let us suppose that the Supreme Court operates in an essentially well-functioning democracy, in which relevant judgments are made through a system that combines reflection and reason-giving with accountability. Let us give this imaginary democracy a familiar name: Athens.

In Athens the social planner might well insist that judges should pay careful attention to the risk or existence of backlash.[44] The reason is that backlash reflects the public's judgments about basic social questions—the best conception of equality and liberty, the proper understanding of religious freedom, the role of property rights, the power of the President. For democratic reasons, such judgments deserve respect whether or not they are likely to be right. A self-governing people deserves to be ruled by its own judgments, at least if those judgments cannot be shown to be wrong in the sense of plainly inconsistent with the founding document.

It is here, in fact, that we might find another reason for Thayerianism—a reason founded not on the risk of judicial error, but on the commitment to democratic self-government. In Athens, that commitment might well be taken to justify a high degree of judicial modesty. But even in Athens, a serious flaw in the use of this commitment to justify Thayerianism is that it grounds its defense on a contentious view of what self-government requires.[45] Perhaps self-government requires insistence on its preconditions, including freedom of speech and the right to vote; perhaps judicial review, indifferent to public commitments, can do well in ensuring those preconditions.[46] Perhaps self-government, properly understood, requires respect for a wide range of individual rights.[47] Perhaps judicial protection of those rights is indispensable.

These are powerful responses to Thayerianism in any form. But if judges do not have the capacity to make superior judgments on the rele-

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[40] 347 U.S. 483 (1954).

[41] 198 U.S. 45 (1905).

[42] 60 U.S. 393 (1857).

[43] 395 U.S. 444 (1969).

[44] Compare the instructive treatment in Post & Siegel, *supra* note 1, emphasizing the relationship between legitimacy and heeding backlash.

[45] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5.

[46] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[47] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 5; FLEMING, *supra* note 5.

vant points, Thayerianism looks much more appealing. At the very least, we might be able to say that on democratic grounds, the Supreme Court should, in Athens, be reluctant to rule in a way that produces significant backlash—and it should attend closely to the existence of backlash when it does occur.

It should be clear that popular constitutionalism is alive and well in Athens. The commitment to popular constitutionalism is not founded on the view, held in Lochnerland, that the underlying questions are likely to be resolved correctly by the public and erroneously by courts. Instead the commitment rests on a judgment in favor of (one account of) self-government as such.

V. Our World and Welcome to It

We have now seen how backlash might be analyzed as it travels through a set of imaginable worlds. For us, however, no simple conclusion has emerged. It is both tempting and far too simple to contend that judges should simply ignore the risk of backlash and refuse to attend to it when it occurs. This was essentially Gunther's view, and it depends on the controversial assumption that we live in Olympus (or perhaps the Land of the Ancients). Undoubtedly Gunther was influenced by the context in which he wrote, involving judicial efforts to vindicate palpably sound principles of racial justice in the face of indefensible public opposition. But it should be unnecessary to say that that context is hardly the inevitable one in American political life. We should also be able to see that Bickel neglected the risk of judicial error in the announcement and elaboration of moral principles, and hence assumed, wrongly, that the only reason for "prudence" was to maintain a Lincolnian tension. The assumption was wrong because judges might stay their hand not only for the sake of expediency, but also out of an awareness of their own limitations and their capacity for error.

Which world is our own? That question cannot be answered without making contestable normative and empirical judgments. One person's Olympus will be another's Lochnerland. In any case our world does not fit any of the ideal types, and for that reason it is not possible to reach any unambivalent conclusion about the relevance of backlash.[48] But one point is clear, and it involves the importance of distinguishing between validations and invalidations. Much of public backlash operates against validations of statutory enactments. By 1953, *Plessy v. Ferguson*[49] was widely viewed as outrageous; the same was true of *Bowers v. Hardwick*[50] by 2002. The most visible public backlash in recent years operated against the *Kelo v.*

[48] Sunstein, *supra* note 4, explores this issue in some detail.
[49] 163 U.S. 537 (1896).
[50] 478 U.S. 186 (1986).

City of New London decision,[51] in which the Court offered a broad reading to the "public use" requirement of the takings clause. In cases of validation, there is an evident remedy: The democratic process can usually eliminate the practice against which backlash has occurred.

The point is hardly speculative. In the aftermath of *Bowers v. Hardwick*, a number of states took steps to decriminalize sodomy, whether homosexual or heterosexual. In the aftermath of *Kelo*, many steps were proposed, and some taken, to give greater protection to property rights. Perhaps most visibly, President Bush signed an executive order that would disallow national "takings" under circumstances permitted by the Supreme Court.[52] To be sure, any particular democratic corrective may be inadequate. Perhaps the practice that the Court has allowed is accepted in one state but rejected in the rest; if so, the practice of the particular state might turn out to be intractable. Perhaps interest-group power operates to entrench practices that the public largely rejects. Nonetheless, it remains true that unjustified validations do far less damage than they might seem to do, simply because a mobilized public is usually in a good position to respond.

Invalidations are of course quite different. If the Court wrongly strikes down a law, and if the invalidation produces bad consequences, it is difficult for the public to supply a corrective. Perhaps new appointments will eventually change the situation. Perhaps the Court can be persuaded of the error of its ways.[53] Perhaps a constitutional amendment will be enacted. But to the extent that Olympus does not describe social reality, and to the extent that ours is not the Land of the Ancients, the Court may well have an epistemic ground, rooted in a sense of humility, for hesitating before invalidating legislation if there is a strong risk of public backlash, at least in the most extreme cases.

In light of the risk that the Supreme Court might err, we can now identify some of the relevant questions. If judges anticipate backlash, and tailor their rulings accordingly, what would be the consequences? Would anticipation of backlash produce undue timidity, in the form of hesitation in vindicating constitutional requirements? Or would anticipation of backlash produce a salutary political check on misdirected judgments on the part of the judiciary? Do judges have the capacity to predict public outrage and its effects, or are they more or less at sea? Would consideration of public

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[51] 545 U.S. 469 (2005). For a valuable treatment of the controversy, see JANICE NADLER & SHARI SIEDMAN DIAMOND, GOVERNMENT TAKINGS OF PRIVATE PROPERTY: KELO AND THE PERFECT STORM (Northwestern Public Law Research Paper No. 07-05, 2007), *available at* http://ssrn.com/abstract=962170.

[52] The order says that the federal government must use eminent domain "for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken." Press Release, Office of the Press Sec'y, Executive Order: Protecting the Property Rights of the American People (June 23, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/06/20060623-10.html.

[53] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

backlash produce both undue timidity and erroneous forecasts? Are the public's judgments on morally charged questions more likely to be right or wrong?

My goal here has not, however, been to reach a final judgment on the normative questions.[54] It has been to suggest the kinds of assumptions on which any such judgment must be based. An understanding of backlash's travels might well provide a place to start.

[54] *See* Sunstein, *supra* note 4.