CONNECTICUT
LAW REVIEW

VOLUME 44 JULY 2012 NUMBER 5

Essay

Popular Constitutional Interpretation

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This Essay evaluates the theory of popular constitutionalism by exploring the concept of constitutional fidelity and the practical requirements it imposes on the exercise of interpretive authority within constitutional democracies. Popular constitutionalists argue that the people ought to play a greater role in the process of constitutional interpretation, and advocate for reforms that would make this command a reality. Popular constitutionalism's opponents reject such reforms on the ground that final interpretive authority over the Constitution lies properly with the justices of the U.S. Supreme Court. Neither side of the debate has devoted much effort to uncovering what the people know about interpreting the Constitution or the implications their level of knowledge has for the theory of popular constitutionalism. This Essay's inquiry into constitutional fidelity reveals two important reasons why they should: (1) all who exercise interpretive authority, including the people, must faithfully exercise that authority; and (2) the ability of any interpreter to faithfully interpret the Constitution depends upon her acquisition of particular knowledge and reasoning-based competencies. The Essay identifies the essential content of these competencies, and then considers the extent to which the people and the justices possess them. The empirical evaluation conducted suggests that the people lack these competencies and the justices possess them. The Essay concludes by explaining why this finding justifies rejecting popular constitutionalist proposals to delegate interpretive authority to the people.

ESSAY CONTENTS

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MICHAEL SEROTA*

I. INTRODUCTION

Who ought to be the Constitution's authoritative interpreters: the people or the justices? Over the past decade, the rise of the theory of popular constitutionalism[1] has brought this question to the forefront of American constitutional discourse.[2] This Essay seeks to shed new light on this enduring question by exploring the concept of constitutional fidelity and the practical requirements it imposes on the exercise of interpretive authority within constitutional democracies.

The inquiry pursued in this Essay is founded upon a competence-based conception of interpretive authority, which suggests that the legitimacy of any authoritative constitutional interpreter is contingent upon her ability to faithfully interpret the Constitution. If true, then the normative valence of popular constitutionalism's foundational tenet—that the American people ought to play a more authoritative role in the interpretation and enforcement of constitutional norms[3]—hinges on whether the people[4]

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* J.D., University of California, Berkeley, School of Law. The author would like to thank Michelle Singer, Robert Dolehide, Ethan Leib, and Larry Kramer for their comments and insights. Special thanks to Paul Costa, Abby Langer, Jennifer Brooks-Crozier, and the rest of the *Connecticut Law Review* for their hard work and careful editing.

[1] *See, e.g.*, Andrew B. Coan, Response, *Well, Should They? A Response to* If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213, 238 (2007) ("[P]opular constitutionalism . . . has taken constitutional theory by storm over the last decade."); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048 (2010) ("Few schools of constitutional thought have commanded more attention in recent years than popular constitutionalism."); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)) (describing popular constitutionalism as "the theory *du jour*").

[2] *See, e.g.*, Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 316 (2008) (explaining that popular constitutionalists argue that "it is 'the People,' and not federal judges, who hold the ultimate interpretative authority on disputed constitutional questions"); Suzanna Sherry, Lecture, *Democracy and the Death of Knowledge*, 75 U. CIN. L. REV. 1053, 1057 (2007) (noting that popular constitutionalists "suggest that the task of constitutional interpretation should . . . fall to popular majorities" rather than judges).

[3] *See, e.g.*, Pozen, *supra* note 1, at 2049 ("To sustain the democratic legitimacy of our legal order, scholars associated with popular constitutionalism urge that the people reassert their authority over the construction and enforcement of constitutional norms."); Lee J. Strang, *Originalism As Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 255 (2011) ("Popular constitutionalism's central commitment is to a greater popular role in the practice of constitutional interpretation.").

actually possess this ability.[5] This conceptualization requires popular constitutionalists to confront the following two-part question: what do the people know about the act of constitutional interpretation, and is this knowledge sufficient to enable them to faithfully interpret the Constitution?

Until now, constitutional theorists have eschewed the foregoing inquiry in favor of the prevailing view that questions relating to the people's interpretive competencies are not empirical questions, but rather, are "a matter of competing sensibilities."[6] As Andrew Coan phrases it, supporters of popular constitutionalism "instinctively trust ordinary people to make reasonably good decisions about their own social life," whereas its opponents do not.[7] In so doing, each side has reduced the question of popular constitutional fidelity to a tenet of faith: One either believes the people have what it takes to faithfully execute the authoritative role that popular constitutionalists would afford them, or one does not.[8] This Essay responds to this state of affairs by arguing that the question of popular constitutional fidelity not only can be confronted empirically, but that it must be, given the central role constitutional fidelity plays within the

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[4] The Essay's use of the term "the people" refers to "th[at] collection of human persons who are the citizens or residents of [the American] polity." Alexander & Solum, *supra* note 1, at 1606. Further, wherever the Essay uses the word "popular" as a prefix—for example, in the phrases "popular constitutional interpretations" or "popular constitutional fidelity"—it is intended to signify "the people's." (Thus, popular constitutional interpretations are the people's constitutional interpretations.) The only exception to this rule is the use of the prefix "popular" in the term "popular constitutionalism," which denotes a particular academic theory, rather than "the people's" favored approach to constitutional theory. *Cf.* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 925–26 (2005) (reviewing data that suggests the theory of popular constitutionalism would be disfavored by the people).

[5] The Essay's use of the term "ability" refers to the state of possessing a particular skill in the present, and not to an individual's *capacity* to acquire that skill at some future time. *See Ability Definition*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/313 (last visited Sept. 7, 2012). Thus, when the Essay considers whether the people have the ability to faithfully interpret the Constitution, the Essay is addressing whether the average American citizen presently possesses the knowledge and reasoning-based skills necessary to faithfully interpret the Constitution, and not whether that citizen, currently lacking those skills, has the capacity to acquire them if she so desires. *See infra* Part III.A.

[6] Andrew Coan, Commentary, *Toward a Reality-Based Constitutional Theory*, 89 WASH U. L. REV. 273, 278 (2011); *see* KRAMER, *supra* note 1, at 246 (noting that questions relating to the public's interpretive competencies do not "turn on evidence or logic," but are instead based upon "differing sensibilities about popular government and the political trustworthiness of ordinary people").

[7] Coan, *supra* note 6, at 278.

[8] *See* KRAMER, *supra* note 1, at 247 (noting that "those with a democratic sensibility have greater faith in the capacity of their fellow citizens to govern responsibly"); Coan, *supra* note 6, at 278 (characterizing Kramer's view); Pettys, *supra* note 2, at 341 ("[P]opular constitutionalists share a deep faith in citizens' ability to constrain themselves and their elected officials in the kinds of desirable ways that lead us to value the Constitution in the first place."); Pozen, *supra* note 1, at 2058 (noting that popular constitutionalists place a "progressive faith in the capacity of lay persons to interpret and implement the Constitution in a principled fashion").

American polity.[9]

With the importance of this question in mind, I develop a framework to facilitate its resolution. To do so, I first present the concept of Interpretive Competence, which is that baseline level of legal knowledge and reasoning capability any interpreter must possess to be able to faithfully interpret the Constitution. I then translate Interpretive Competence into two particular competencies, Constitutional Knowledge and Constitutional Reasoning, and describe the essential content of each. Based on this rendering, I construct an Interpretive Competence-based framework, and apply it to both the people and the justices with the hopes of evaluating the extent to which each entity possesses the ability to faithfully interpret the Constitution. Ultimately, the inquiry reveals why popular constitutionalist proposals to delegate interpretive authority to the people should be rejected.

The analysis proceeds as follows. Part II presents the theory responsible for elevating the people-versus-justices debate, popular constitutionalism, with a particular emphasis on Larry Kramer's influential book, *The People Themselves: Popular Constitutionalism and Judicial Review* ("*The People*"). *The People*'s proposal for transferring final interpretive authority over the Constitution to the American people—what I refer to as "popular constitutional review"—highlights the substantial shortcomings in the greater popular constitutionalist quest to afford the people a more prominent role in the American constitutional order. Part II concludes by explaining why the routinely overlooked question of what the people know about constitutional interpretation may also be the single most important question confronting popular constitutionalists.

Part III establishes the centrality of the question by exploring the role constitutional fidelity plays within the American polity. Part III first outlines the diverse benefits the practice of constitutional fidelity redounds to constitutional democracies, and explains why the essential nature of these benefits compels those with interpretive authority to exercise that authority faithfully. Part III next explains why this obligation of constitutional fidelity suggests that the viability of popular constitutionalist proposals to delegate interpretive authority to the people turns upon whether the people have the ability to faithfully interpret the Constitution. Part III then discusses the particular competencies necessary to facilitate the practice of constitutional fidelity—Interpretive Competence's two-fold dimensions of Constitutional Knowledge and Constitutional Reasoning—and expands upon the essential content of each. Part III concludes by

[9] The Essay's empirical analysis of popular constitutionalism builds upon the empirical inquiries in Coan, *supra* note 6; Gewirtzman, *supra* note 4; and Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004). *See* Part III *infra*.

explaining how this conceptualization can facilitate an empirical evaluation of the theory of popular constitutionalism.

Part IV applies the framework of Interpretive Competence to the people. Part IV first analyzes a range of data on civic literacy and public reasoning skills. This inquiry reveals just how little the public knows about interpreting the Constitution, thereby suggesting that the people lack both Constitutional Knowledge and Constitutional Reasoning. Part IV then addresses three potential objections as to why these deficiencies still may not justify withholding interpretive authority from the people. The first objection, which asserts that the people would acquire Interpretive Competence after being delegated interpretive authority, is addressed by considering the literature on voter knowledge and political participation. The second objection, which asserts that the justices themselves lack Interpretive Competence, is addressed by considering the justices' training, experience, and written opinions. The third objection—what I refer to as the law-as-politics objection—asserts that the justices' political preferences, rather than their Interpretive Competence, are the primary drivers of their constitutional interpretations. Because of the salience of this objection, it is individually treated in the final Part of the Essay.

Part V addresses the law-as-politics objection by evaluating the role Interpretive Competence plays in the justices' constitutional interpretations. Part V first considers empirical scholarship on judicial decision-making, which suggests the dual impact of both Interpretive Competence and political preferences on the Court's work, with Interpretive Competence playing the predominant role. Part V then considers the cognitive psychology literature on decision-making to illuminate how Interpretive Competence and political preferences plausibly interact in the minds of the justices. The literature reviewed suggests that the justices' Interpretive Competence is the foremost influence on their constitutional interpretations; the impact of political preferences operates primarily through unconscious cognitive bias; and the impact of this bias is bounded by the justices' Interpretive Competence. Part V concludes by explaining why these findings justify the rejection of popular constitutionalist proposals to delegate interpretive authority to the people.

II. THE THEORY OF POPULAR CONSTITUTIONALISM

At the heart of popular constitutionalism is the idea that the American people ought to play a more authoritative role in the process of constitutional interpretation. Part II discusses the details of this view, with a particular emphasis on the work of preeminent popular constitutionalist Larry Kramer, whose book, *The People*, advocates for popular constitutionalism in its purest form: the replacement of the Supreme Court's final interpretive authority over the Constitution with that of the American people. Part II then considers the critical response to *The*

People, as well as the important questions Kramer and other popular constitutionalists leave unanswered. Part II concludes by explaining why the largest shortcoming of popular constitutionalism is its failure to analyze whether the people could responsibly execute the demanding civic responsibility the theory affords them.

A. *The Rise of Popular Constitutionalism*

At some point over the last decade, many constitutional theorists seem to have lost respect for the judiciary as the Constitution's authoritative interpreter. Drawing upon themes of popular sovereignty, constitutional redemption, and civic republicanism, these theorists began arguing that the American people ought to play a more authoritative role in the interpretation and enforcement of constitutional norms.[10] In so doing, they rejected the juricentric view of the Constitution, whereby final interpretive authority rests with the Supreme Court, and sought to replace it with something more democratic.[11] This basic idea is the core of the theory of popular constitutionalism, which in recent years "has taken constitutional theory by storm."[12]

While popular constitutionalism may be "the theory *du jour*,"[13] the popular constitutionalist field is not monolithic.[14] The popular constitutionalist umbrella is expansive, covering both positive accounts[15] and normative approaches,[16] as well as various shades of each.[17]

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[10] Pozen, *supra* note 1, at 2049, 2061.

[11] *See, e.g.*, Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 723 (2006) ("All of the concrete legal proposals advanced by 'popular constitutionalists' seek to qualify judicial supremacy."); Pettys, *supra* note 2, at 316 ("In recent years . . . a number of scholars—falling loosely under the banner of 'popular constitutionalism'—have skeptically set their sights squarely on the Court's claim that its constitutional interpretations bind the nation.").

[12] Coan, *supra* note 6, at 238.

[13] Alexander & Solum, *supra* note 1, at 1640.

[14] For useful summaries of the various strands of popular constitutionalism and the central claims of each, see Pozen, *supra* note 1, at 2053–64; Alexander & Solum, *supra* note 1, at 1621–26.

[15] The positive strand emphasizes how popular constitutional interpretations *actually* influence constitutional meaning. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

[16] The normative strand emphasizes why popular constitutional interpretations *should* influence constitutional meaning. *See, e.g.*, KRAMER, *supra* note 1; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

[17] For approaches that have both positive and normative elements, see generally JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, *in* THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006).

Notwithstanding such intra-theory variance, however, all strands of popular constitutionalism share one common trait: the ability to generate robust scholarly debate on the role of the people in the American constitutional order. A panoply of law review articles, books, and symposia have been devoted to engaging the people's interpretive status, thereby ushering the people-versus-justices debate to the forefront of our nation's academic discourse.[18]

Arguably, no theorist has been more influential in guiding the debate than Larry Kramer.[19] Kramer's visibility is unsurprising, however, given both his prolific writing[20] in the area of popular constitutionalism and the fact that he advocates for popular constitutionalism in its purest form:[21] a transfer of final interpretive authority over the Constitution from the

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[18] For engagement with the normative strand, see for example Erwin Chemerinsky, Lecture, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673 (2004) [hereinafter Chemerinsky, *Perils*]; James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377 (2005); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461 (2009). For engagement with the positive account, see for example *A Symposium on* THE WILL OF THE PEOPLE, 2010 MICH. ST. L. REV. 551 (2010); Tom Goldstein & Amy Howe, *But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 MICH. L. REV. 963 (2011) (reviewing BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009)).

[19] *See* Pozen, *supra* note 1, at 2054 n.17 (noting that Kramer's work has "proven especially influential"); Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 160, 163 ("Perhaps no single figure is more closely associated with popular constitutionalism than Larry Kramer."). For engagement with Kramer's work, see for example *A Symposium on* The People Themselves, 81 CHI-KENT L. REV. 810 (2006); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013 (2004) [hereinafter Chemerinsky, *Judicial Review*]; Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); L.A. Powe, Jr., *Are "The People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539 (2005) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)); Norman R. Williams, *The People's Constitution*, 57 STAN. L. REV. 257, 258 (2004) (reviewing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004)); Alexander & Solum, *supra* note 1.

[20] *See* KRAMER, *supra* note 1; Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439 (2006); Larry D. Kramer, *2000 Supreme Court Term Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173 (2006) [hereinafter Kramer, *Response*]; Larry D. Kramer, Lecture, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697 (2006); Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343 (2005).

[21] *See* Alexander & Solum, *supra* note 1, at 1640 ("*The People Themselves* has the virtue of taking an idea to its limits and thereby inviting us to see its implications more clearly. . . . It takes contemporary constitutional theory to the precipice.").

Supreme Court to the American people.[22] I refer to this proposal as a system of popular constitutional review. Popular constitutional review receives its fullest treatment in Kramer's book, *The People*, which the next Section describes in greater detail.

B. *Popular Constitutional Review*

At first glance, *The People* appears to be a work of constitutional history.[23] Most of the book is devoted to providing a thorough, if somewhat controversial, historical accounting of the development and practice of popular constitutionalism.[24] Kramer culls evidence from over two centuries of American political thought and legal practice to detail how the people's role in the constitutional decision-making process has dissipated over the years.

Notwithstanding the entrenched legitimacy most Americans confer on judicial review today, Kramer explains how there was once a time in our nation's history when "[t]he community itself had both a right and a responsibility to act when the ordinary legal process failed, and unconstitutional laws could be resisted by community members who continued to profess loyalty to the government and to follow its other laws."[25] Through "clear, convulsive expressions of popular will," the people rendered their own extra-judicial judgments on constitutional meaning—through mobbing, petitioning, and even violence, if necessary.[26] Kramer further outlines how the idea of popular interpretive sovereignty

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[22] KRAMER, *supra* note 1, at 107 (explaining that within "a world of popular constitutionalism . . . final interpretive authority rests with the People themselves").

[23] The summary of *The People* offered in this Section borrows from Michael Serota, *Book Review: Kramer's* The People Themselves: Popular Constitutionalism and Judicial Review, CONCURRING OPINIONS (May 27, 2010, 10:40 AM), http://www.concurringopinions.com/archives/2010/05/book-review-kramer%E2%80%99s-the-people-themselves-popular-constitutionalism-and-judicial-review.html.

[24] For dissenting views on Kramer's historical accounting, see for example William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 967 (2006) ("Kramer is wrong about the character and significance of popular constitutionalism in America, particularly during the last century."); Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 822 (2006) ("Kramer's development of popular constitutionalism is seriously lacking in grounding in colonial social history."); Robert J. Kaczorowski, *Popular Constitutionalism Versus Justice in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1438 (2005) (noting that Kramer's historical account of popular constitutionalism after the Civil War may be "overstated"); Keith E. Whittington, *Give "The People" What They Want?*, 81 CHI.-KENT L. REV. 911, 913 (2006) ("Kramer's positive account of the rise of judicial supremacy is . . . inaccurate . . . as a matter of history.").

[25] KRAMER, *supra* note 1, at 25.

[26] *Id.* at 15; *see id.* at 27–28, 109–11, 128, 168. *But see* Kramer, *Response*, *supra* note 20, at 1175 ("Mobs were fine in their context and in their time, but no one, least of all me, is suggesting that this is a good way to go about doing things today.").

has faded from the public consciousness: "Sometime in the past generation or so . . . Americans came to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others."[27]

Based on this historical rendering, *The People* takes a prescriptive turn. Kramer argues that although the people may have lost touch with their popular constitutionalist roots, it is time to consider a return. And while *The People* is not explicit about what, exactly, the polity should be returning to, Kramer's guiding principle is clear enough: that popular constitutionalism prescribes that final interpretive authority rest with the people themselves. As Kramer puts it,

> [t]he assumption that final interpretive authority must rest with some branch of the government belongs to the culture of ordinary law, not to the culture of popular constitutionalism. In a world of popular constitutionalism, government officials are the regulat*ed*, not the regulat*ors*, and final interpretive authority rests with the people themselves.[28]

Within such a system, the people would be empowered to play an active and ongoing role over both the interpretation and enforcement of the Constitution, and the people's authority would trump that of the judiciary whenever they choose to exercise it. In other words, popular constitutional review "does not simply encourage lay persons to engage the Constitution in some active and sustained fashion; it assigns lexical priority to their views whenever they do so."[29] Under such a regime, the justices would live with the omnipresent possibility that the people would overturn their decisions if they did not afford due deference to the people's constitutional views. In this way,

> Supreme Court Justices would come to see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions . . . .[30]

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[27] KRAMER, *supra* note 1, at 229.

[28] *Id.* at 107.

[29] Pozen, *supra* note 1, at 2061–62.

[30] KRAMER, *supra* note 1, at 253.

Herein lies *The People*'s basic prescription: transferring the Court's final interpretive authority over the Constitution to the people.

C. *The Critical Response to Popular Constitutionalism*

Although *The People* presents a powerful argument in favor of a more democratized approach to constitutional interpretation, Kramer provides few details as to how this reform would operate in practice. Many have thus criticized *The People* for its failure to address the wide range of questions that implementing such a broad and sweeping transformation would raise.[31] As Larry Alexander and Larry Solum articulate the critique, the question confronting popular constitutional review is: "'How?' How can the people themselves interpret and enforce the Constitution through direct action?"[32]

Yet, when it comes to a lack of specificity, Kramer is not alone. *The People*'s failure to provide a roadmap for implementing popular constitutional review is part of a more general trend of abstraction in popular constitutionalist scholarship: as Suzanna Sherry notes, "few (if any) of [popular constitutionalism's] advocates make any concrete suggestions about how to implement popular constitutional

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[31] *See, e.g.*, Pozen, *supra* note 1, at 2062 ("How exactly a society could . . . [substitute popular constitutional interpretations for judicial interpretations] is unclear."); Powe, Jr., *supra* note 19, at 857 ("Kramer's interpretation of what constitutes popular constitutionalism may be so elusive that only he can apply it.").

[32] Alexander & Solum, *supra* note 1, at 1635. In responding to his critics, Kramer has acknowledged this shortcoming, calling upon popular constitutionalists to shift their focus to the question of institutional design. As Kramer argues,

> [i]f there is an agenda for constitutionalism today, its first concern is not substantive. It is institutional. . . . We should . . . be asking what kind of institutions we can construct to make popular constitutionalism work, because we need new ones. We need to start rethinking and building institutions that can make democratic constitutionalism possible. And we need to start doing so now.

Kramer, *Response*, *supra* note 20, at 1182. Kramer's more recent work, as well as that of other popular constitutionalists, reflects this enhanced concern with finding ways to make popular constitutionalism work. *See* Larry D. Kramer, Lecture, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 748–54 (2006); Donnelly, *supra* note 19, at 187–89 (discussing the "People's Veto" as one way of implementing popular constitutionalism).

This Essay responds to Kramer's institutional call—and to those popular constitutionalists who would embrace the notion of placing a greater share of interpretive authority in the hands of the American public—with a cautionary note. Before beginning a discussion regarding pathways of popular constitutionalist reform that would increase the influence of popular constitutional interpretations, it is essential to first consider in greater detail what ordinary citizens know about interpreting the Constitution and what implications, if any, this has for the American polity. The project of popular constitutionalist institutional design cannot proceed without an adequate empirical accounting of the people's interpretive capacities.

interpretation."[33] David Franklin similarly comments that "popular constitutionalis[ts] have said very little about the particular institutional mechanisms that would make their vision a reality in today's world."[34] Thus, while the command of popular constitutionalism is straightforward enough—afford popular constitutional interpretations a more authoritative role within the American polity—how to realize that command in the real world is less than clear.

Interestingly, the lack of clarity in the theory of popular constitutionalism has not prevented the theory's proliferation. While most scholars are unwilling to go as far as Kramer, the basic idea underlying the normative strand of popular constitutionalism—that the people ought to have a greater share of interpretive authority over the Constitution—retains its overall appeal.[35] From at least one perspective, the growth of popular constitutionalism is understandable: the theory taps into a deeply American populist sensibility through its rhetorically powerful, if somewhat vague, message of citizen empowerment.[36] And without any specific reforms to critique, opponents of popular constitutionalism are otherwise forced to grapple with what seems like an invisible target—a challenging task, to be sure. As a result, the people-versus-justices debate wages on, with no clear means of resolution.

Or is there? While many have focused on the failure of popular constitutionalists to clearly elucidate how their interpretive authority-enhancing reforms would operate, there is yet another shortcoming that may provide a fruitful avenue of exploration: an accounting of what the people actually know about the act of constitutional interpretation.[37] This accounting is crucial because even assuming popular constitutionalists were able to identify a means of delegating interpretive authority to the people, such reforms would necessarily provide the people with significant interpretive burdens. It is therefore important to consider whether the people are adequately prepared to meet these burdens.

Unfortunately, popular constitutionalists have not devoted significant effort to discovering an answer. In *The People*, for example, Kramer

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[33] Sherry, *supra* note 18, at 463; *see, e.g.*, Pettys, *supra* note 2, at 354 n.191 ("[P]opular constitutionalists have not yet rallied behind specific proposals concerning the ways in which the American people might reveal their constitutional interpretations.").

[34] David L. Franklin, *Popular Constitutionalism As Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069 (2006).

[35] *See* Pozen, *supra* note 1, at 2063 (noting that the theory of popular constitutionalism presented in *The People* "does not command significant support in the academy. It remains on the fringe.").

[36] *See* Serota, *supra* note 23.

[37] Although the empirical dimension of popular constitutionalism has mostly been overlooked, two notable exceptions to this trend are Gewirtzman, *supra* note 4, at 901 (exploring empirical data "to examine how the people relate to, engage with, and feel about constitutional culture"), and Coan, *supra* note 6, at 279 (discussing the "substantial empirical dimension" underlying the theory of popular constitutionalism).

argues that the question of whether the people would faithfully execute their responsibilities under popular constitutional review is not one that "turn[s] on evidence or logic," but rather is rooted in "the differing sensibilities about popular government and the political trustworthiness of ordinary people."[38] In so doing, Kramer subscribes to what Andrew Coan labels the "sensibility-driven intuitions" approach to constitutional theory.[39] As Coan describes it,

> [t]he disagreements among supporters and proponents of judicial supremacy, as they have actually played out in contemporary constitutional theory, have largely been a matter of competing sensibilities. . . . [I]f you instinctively trust ordinary people to make reasonably good decisions about their own social life, you are likely to side with Kramer; if not, you are likely to side with his opponents.
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> . . . .
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> What is missing from this picture is any sense that things could be otherwise—any sense that normative constitutional theory could aspire to be more than a battle of sensibility-driven intuitions.[40]

This type of approach is problematic because it reduces the viability of popular constitutionalism to a matter of faith.[41] But, as the next Part of the Essay explains, this question is simply too important to leave to faith given the importance of constitutional fidelity to the American polity.

III. CONSTITUTIONAL FIDELITY AND INTERPRETIVE COMPETENCE

This Part discusses the concept of constitutional fidelity and the central role it plays within constitutional democracies. Part III first argues there is a general obligation of constitutional fidelity that attaches to the exercise of interpretive authority in general, and to the exercise of popular constitutional authority in particular. Part III then explains why the viability of popular constitutionalist reforms depends upon whether the people possess the ability to fulfill this obligation as a matter of course. Part III next discusses the particular competencies that constitute this ability—Interpretive Competence's two-fold dimensions of Constitutional Knowledge and Constitutional Reasoning—and identifies the basic content

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[38] KRAMER, *supra* note 1, at 246.

[39] Coan, *supra* note 6, at 279.

[40] *Id.* at 278–79.

[41] *See supra* notes 5, 8.

of each. Based upon the foregoing, Part III concludes by explaining how the concept of Interpretive Competence can be used to evaluate the theory of popular constitutionalism.

A. *The Concept of Constitutional Fidelity*

Constitutional fidelity, or the act of "being faithful to the Constitution in interpreting it," is an essential part of any constitutional democracy.[42] As a general matter, the practice of constitutional fidelity finds support in the triptych of comprehensive moral doctrines—deontology,[43] consequentialism,[44] and virtue theory[45]—as well as in arguments grounded in public reason.[46] From a political perspective, the practice of constitutional fidelity enables a constitution to redound the cooperation and coordination-inducing norms essential to the functioning of a polity.[47] And in America, where individual rights have been constitutionalized, the practice of constitutional fidelity is what entrenches them,[48] thereby

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[42] James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1335 (1997). For discussion of the concept of constitutional fidelity, see for example Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997); H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 80–103 (2008); BALKIN, *supra* note 17, 103–39.

[43] *See generally, e.g.*, IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., Oxford Univ. Press 2002) (1785); THOMAS SCANLON, WHAT WE OWE TO EACH OTHER (2000).

[44] *See generally, e.g.*, CONSEQUENTIALISM AND ITS CRITICS (Samuel Scheffler ed., 1988); Philip Pettit, *Consequentialism*, *in* A COMPANION TO ETHICS 230 (Peter Singer ed., 1991).

[45] *See generally, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., 2d ed. 1999); ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999).

[46] *See* Lawrence B. Solum, *Semantic Originalism* 9, 149–60 (Ill. Pub. Law and Legal Theory, Research Papers Series No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (describing the deontological, consequentialist, aretaic, and public reason-based justifications for the practice of constitutional fidelity) [hereinafter Solum, *Semantic Originalism*]. For the paradigmatic work on public reason, see JOHN RAWLS, POLITICAL LIBERALISM (2005). For an engaging essay on the implications of public reason for legal theory, see Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006).

[47] *See* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 82–140 (1999) (discussing constitutionalism as coordination); BALKIN, *supra* note 17, at 108 ("[I]f we reject fidelity as a political and legal virtue, we undermine the mutual expectations of cooperation that ground a constitutional system."); *see also* Frank I. Michelman, *Constitutional Fidelity/Democratic Agency*, 65 FORDHAM L. REV. 1537, 1539 (1997) (noting that "some measure of constitutional fidelity [to ancestral prescription] is prerequisite to [intergenerational] democratic agency. Without an established set of norms to draw upon, there is no telling what events ought to count as an expression of 'the people's' will or 'the people's' judgment in any generation").

[48] *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 697–98 (2011) ("At a formal level, constitutionalizing legal rules and institutional arrangements entrenches them against legal change. But formal constitutional commitment is neither necessary nor sufficient to create functional political entrenchment. . . . An effective system of constitutional law—one that can serve as a mechanism of political commitment—thus depends on the success of an underlying sociopolitical commitment to play by the constitutional rules.").

securing intrinsically beneficial goods[49] such as public equality,[50] human dignity,[51] and respect for the self-ruling status of citizens.[52]

But the case for constitutional fidelity can be made in even stronger terms. As Jack Balkin puts it, "[f]idelity is not a virtue but a precondition. It is not just a good thing, but the point of the practice of constitutional interpretation. To claim to interpret the Constitution is already to claim to be faithful to it."[53] H. Jefferson Powell subscribes to a similarly essentialist perspective, arguing that the language of the American constitutional tradition "implies it to be the faithful interpretation of a fundamental law that is this republic's chosen means of self-governance."[54] On this view, constitutional fidelity is more than just a normatively desirable mode of behavior, pathway for grounding a constitutional system, or mechanism for protecting individual rights—it actually inheres in the very idea of the Constitution.

Each of the foregoing perspectives highlights the importance of the faithful exercise of interpretive authority to the American polity. With respect to the normative arguments, those with interpretive authority must exercise their authority faithfully to ensure the values and benefits of the Constitution are realized. And under the essentialist arguments, those with interpretive authority derogate from the telos of their station when they fail to faithfully exercise that authority. When viewed together, these dual justifications suggest that all who exercise interpretive authority must do so faithfully.[55] I refer to this as the constitutional fidelity obligation.

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[49] For a discussion on intrinsic goods, and the difference between intrinsic goods and instrumental goods, see Derek Parfit, *Equality and Priority*, *in* DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY (Derek Matravers and John Pike eds., 2003).

[50] *See generally* THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS (2011).

[51] *See generally* GEORGE KATEB, HUMAN DIGNITY (2011); JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press 1988).

[52] *See generally* COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT (2011).

[53] BALKIN, *supra* note 17, at 76; *see* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 436 (2007) ("[T]he point of constitutional interpretation is fidelity . . . ."); Jack M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703 (1997) ("[I]t's not really possible to be against fidelity if one is seriously interested in interpreting the U.S. Constitution. Fidelity is the whole point of the enterprise.").

[54] POWELL, *supra* note 42, at xv–x (2008); *see id.* at 84 (noting that, without constitutional fidelity, "American constitutionalism makes no sense").

[55] This Essay sets aside the important question of when derogation from that obligation might be justified. Because fidelity is the default position, the Interpretive Competence-based analysis of popular constitutionalism which flows from the obligation is generally unaffected by the possibility that, under particular circumstances, derogation can be justified. *See infra* II.B. Furthermore, to be able to determine whether a particular constitutional provision is so unjust as to justify derogation from the obligation of constitutional fidelity, one must still be able to determine the meaning of the Constitution in the first instance. Thus, the possession of Interpretive Competence nonetheless remains a central part of the interpretive calculus.

The constitutional fidelity obligation has important implications for the theory of popular constitutionalism. First, the obligation not only confirms the basic proposition that judges, the traditional holder of interpretive authority, must exercise that authority faithfully, but also suggests that the people, operating within the context of popular constitutionalist reforms, must as well.[56] Second, the obligation suggests, as the flipside of the first proposition, that the normative desirability of popular constitutionalist reforms is necessarily rooted in the people's ability to meet that obligation as a matter of course. For if constitutional fidelity is essential to the exercise of interpretive authority, then the ability of the people to demonstrate constitutional fidelity must be central to justifying the grant of popular interpretive authority in the first instance.

At this point in the analysis, it's appropriate to say a few words about what, exactly, "an ability to demonstrate constitutional fidelity" is. As Powell explains, the concept of fidelity has at least two different facets—there is "faith as the intellectual activity of belief, and faith as the practical activity of commitment"[57]—and the distinction between the two is significant. Under the first facet, an interpreter is faithful so long as she *believes* the Constitution has an "intelligible meaning."[58] From this perspective, an interpreter demonstrates constitutional fidelity by understanding the Constitution to be something more than "an empty vessel into which [she] can pour whatever values or preferences [she] choose[s]."[59] Under the second facet, however, an interpreter is faithful by governing herself "in accordance with the Constitution's intelligible meaning."[60] Fidelity in this second sense, then, is not a matter of credence, but rather, actual practice—that is, it is "the practical activity of [constitutional] commitment."[61]

This latter understanding is the competence-based dimension of constitutional fidelity, and is what I refer to as an interpreter's "ability" to

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[56] The universal application of the obligation of constitutional fidelity does not mean that the interpretive discretion afforded to different classes of interpreters must be the same—material differences between presidentially appointed and Senate-confirmed judges, democratically elected politicians, and the people themselves, very well may dictate certain variances in interpretive discretion. *See* SCOTT J. SHAPIRO, LEGALITY 358, 369, 372 (2011) (describing the relationship between an actor's interpretive discretion and her "particular place within the system's economy of trust"); Solum, *Semantic Originalism*, *supra* note 46, at 9 ("The obligation of *general constitutional fidelity* applies to all citizens. The obligation of *special constitutional fidelity* applies only to officials. The question whether the general and special obligations of constitutional fidelity have *identical content* is an important one, but both obligations create (at minimum) a defeasible obligation of fidelity to the semantic content of the Constitution.").

[57] POWELL, *supra* note 42, at 85.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

faithfully interpret the Constitution. It embodies the basic idea that the practice of constitutional fidelity requires an interpreter to know something about both the object and process of interpretation. One cannot be faithful, as a matter of interpretive practice, by simply desiring to be; one must also possess some baseline level of knowledge and reasoning ability relevant to interpreting the Constitution. I refer to this body of knowledge and reasoning ability collectively as Interpretive Competence.

To briefly recap, the two basic insights of this Section are: (1) the exercise of all interpretive authority, including popular interpretive authority, must be done faithfully; and (2) the ability to faithfully interpret the Constitution requires, at minimum, the acquisition of certain competencies. With these two tenets in mind, the empirical question confronting the theory of popular constitutionalism begins to coalesce: Do the people possess those interpretive competencies necessary to enable them to faithfully interpret the Constitution—that is, do the people possess Interpretive Competence? The viability of popular constitutionalist reforms will turn upon the answer to that question. But before it is possible to uncover an answer, we must first identify the particular competencies that compose Interpretive Competence. That is the focus of the next Section.

B. *The Concept of Interpretive Competence*

Within the realm of constitutional law, the debate over methodology is among the most divisive, controversial, and well-fought areas of inquiry. And yet, not everything is contested. While varying normative commitments may ultimately lead to incontrovertible disputes over the relevance of some sources of authority, there is a reasonable consensus on the essentials. Scholars and jurists generally accept that traditional sources of constitutional argument[62]—the text and structure of the Constitution, relevant history, and precedent—are central to faithfully interpreting the Constitution.[63]

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[62] *See, e.g.*, David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1313 (2000) (noting that the "traditional sources of constitutional argument" are "text, structure, precedent, and history"); Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 560 (2001) (same).

[63] *See, e.g.*, Lackland H. Bloom, Jr., *Interpretive Issues in* Seminole *and* Alden, 55 SMU L. REV. 377, 387 (2002) ("Along with text, original understanding, and precedent, constitutional structure is also considered a legitimate and significant method of constitutional interpretation."); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987) ("With only a few dissenters, most judges, lawyers, and commentators recognize the relevance of . . . arguments from the plain, necessary, or historical meaning of the constitutional text; arguments about the intent of the framers; arguments of constitutional theory that reason from the hypothesized purposes that best explain either particular constitutional provisions or the constitutional text as a whole; [and] arguments based on judicial precedent . . . .") (footnote omitted); Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 9 (2009) (noting that "[m]ost constitutional lawyers

That's not to say, of course, that competing methodologies afford these sources equal weight in the interpretive calculus or consider them the only relevant sources of constitutional meaning. But notwithstanding such inter-methodological variance, these sources do remain a part of that core body of knowledge that most, if not all, methodologies presuppose. For that reason, a basic understanding of the actual content of these sources, in addition to the legal principles upon which they rest,[64] is a foundational part of any interpreter's ability to faithfully interpret the Constitution. They therefore constitute the knowledge-based dimension of Interpretive Competence—what I refer to as Constitutional Knowledge.

And yet, while Constitutional Knowledge may be necessary to demonstrate constitutional fidelity, it cannot constitute the whole of it. There are many constitutional questions that cannot be answered by merely referencing the Constitution's text, structure, history, and relevant precedent. This is because the Constitution is not merely a document of "hardwired" rules,[65] but rather contains a mix of standards,[66] principles,[67] and silences,[68] whose proper application to diverse factual circumstances is often unclear.[69] To further complicate matters, there are also internal tensions within the Constitution insofar as it embodies competing principles such as majority rule and minority rights, liberty and equality, religious exercise and religious establishment, and governmental powers and accountability.[70] Consequently, Constitutional Knowledge cannot alone facilitate faithful interpretation; one must also possess an ability to

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consider original understanding . . . precedent, [and] unwritten implications from constitutional structure . . . relevant."); STEPHEN M. GRIFFEN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 148 (1996) (explaining that interpretive "pluralism," which consists of reliance upon text, structure, precedent, and history, is the "best descriptive-explanatory account of constitutional interpretation" in America).

[64] For example, knowledge of the structure of the Constitution necessarily entails a basic understanding of legal principles such as federalism, separation of powers, and individual rights; knowledge of precedent entails an understanding of the doctrine of stare decisis, etc.

[65] BALKIN, *supra* note 17, at 42–43. Examples of hardwired rules include "the requirement that the president must be thirty-five years of age, that there are two Houses of Congress, and that each state has two senators." *Id.*

[66] *Id.* For example, "the Fourth Amendment's requirement that searches and seizures must not be 'unreasonable.'" *Id.*

[67] *Id.* For example, "the First Amendment's guarantee of freedom of speech, and the Fourteenth Amendment's guarantee of equal protection of the laws . . . ." *Id.*

[68] *Id.* For example, "the text [of the Constitution] says nothing about how many justices serve on the Supreme Court, whether there will be a secretary of agriculture, the structure and organizational duties of the Social Security Administration, and how much the government charges for a first-class postage stamp." *Id.*

[69] *Cf.* Alan M. Dershowitz, *The Right to Know Your Rights*, *in* TEACHING AMERICA: THE CASE FOR CIVIC EDUCATION 27, 31 (David Feith ed., 2011) ("Memorizing the words of the Bill of Rights is a far cry from knowing what your actual rights may be in practice.").

[70] DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 23 (2009).

weigh, evaluate, and scrutinize the Constitution's text, structure, history, and precedent in a principled, logical fashion. In other words, the practice of constitutional fidelity also requires the ability to engage in constitutional reasoning.

As Daniel Farber and Suzanna Sherry explain, the *sine qua non* of constitutional decision-making is "a reasoned (and reasonable) application of the factors considered."[71] While conducting a reasonable application surely demands the ability to think logically, this ability is not alone sufficient, given that one can construct an argument that is "logical but far-fetched" or "rational but not reasonable."[72] With that in mind, and given the level of discretion inherent in the process of applying the Constitution's "general and abstract language . . . to particular situations,"[73] constitutional reasoning also requires a sense of judgment—that is, the ability to distinguish between competing arguments in an independent and objective manner.[74]

But this conceptualization raises the following question: are independence and objectivity, properly understood, competencies in the same way that knowledge of the Constitution's text, structure, history, and precedent or the ability to think logically are? Or are they something altogether different? While a comprehensive answer to this question is beyond the scope of this Essay, there is at least one competency, foundational to the practice of constitutional fidelity, that is likely necessary to facilitate any amount of independence and objectivity in constitutional interpretation: the ability to make second-order judgments.[75]

To understand what second-order judgments are, it's easiest to begin by distinguishing them from what they are not: the type of policy-based (or first-order) judgments concerned with "making the best decision for the [specific] problem or task at hand."[76] That is, second-order judgments account for long-term values that go beyond the particular facts of an individual problem.[77]

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[71] *Id.* at 53.

[72] *Id.* at 54.

[73] *Id.* at 22.

[74] *See id.* at 56–57.

[75] *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 88–93 (1991); Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5 (1999).

[76] *See* Fredrick Schauer, *Is There a Psychology of Judging*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103, 108 (David Klein & Gregory Mitchell eds., 2010) ("When engaged in ordinary (first-order) reasoning and decision making, people . . . make the best decision for the problem or task at hand. Their aim is typically to reach the right result for *this* case—the present case.").

[77] *See* Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1046 n.2 (2004) ("At the heart of the distinction between first-order and second-order reasons is the idea that excluding first-order reasons may at times better protect the long-term values embodied in

Consider, for example, the paradigmatic legal example of stare decisis. Under the doctrine of stare decisis, a legal decision-maker applies earlier decisions when the same points arise again in subsequent litigation.[78] Although the application of an earlier rule to a later case may not always produce the fairest result in the instant case—either because the equities at issue are different than in the prior case, or because the earlier decision was itself mistaken—a consideration of the long-term rule-of-law values such as uniformity, predictability, and stability may nonetheless dictate that the best decision is to apply the earlier rule.[79] In this situation, the ability to engage in the second-order judgment is critical.[80]

Second-order judgments also play a particularly important role in the context of interpreting a constitution. Consider, for example, the practice of constitutional review, through which a decision-maker must consider whether a particular law is constitutional. In such a scenario, the first-order judgment consists of a determination as to whether the law being reviewed is desirable; that is, whether the decision-maker believes the law is likely to have a positive impact on society. The second-order judgment, on the other hand, requires the decision-maker to base her decision upon whether the law under consideration accords with the meaning of the Constitution. In this way,

> [t]he second-order judgment permits what is desirable to be brought about in a manner consistent with our constitutional traditions. This practical inquiry concerning desirability and fidelity is an essential feature of constitutional reasoning. In a government without a constitution, political reasoning would issue only first-order judgments about what is desirable. Constitutionalism adds this level of reasoning about fidelity and therefore requires the formulation of second-order judgments.[81]

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second-order reasons and may at other times prevent those first-order decisions that would simply be mistaken at the outset.").

[78] BLACK'S LAW DICTIONARY 1537 (9th ed. 2009); *see* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 415 n.1 (2011).

[79] *See* Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 165 (2006) (noting that "the rule-of-law values . . . [are] predictability, certainty, and stability").

[80] *See* Serota, *supra* note 78, at 427–30 (explaining why rule-of-law values support vertical stare decisis); *cf.* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

[81] Robert Justin Lipkin, *What's Wrong with Judicial Supremacy? What's Right About Judicial Review?*, 14 WIDENER L. REV. 1, 49 (2008); *see* Schauer, *supra* note 77, at 1046 (noting the sense in

Stemming from this account, the ability to make second-order judgments, in addition to the ability to think logically, is a central part of practicing constitutional fidelity. When considered together, these two competencies constitute the reasoning-based dimension of Interpretive Competence—what I refer to as Constitutional Reasoning.

This Section's exploration of Interpretive Competence is now complete. Based upon the foregoing analysis, it should now be clear why the debate over popular constitutionalism need not—indeed, should not—be left to intuition and sensibility. Popular constitutionalism's normative desirability hinges upon whether the people possess the Interpretive Competence necessary to meet the constitutional fidelity obligation. Having elucidated Interpretive Competence's two-fold dimensions of Constitutional Knowledge and Constitutional Reasoning—and the relevant knowledge and reasoning-based competencies that constitute them—that inquiry is now one that can be confronted empirically; that is, by considering the data relevant to gauging the people's possession of each dimension.[82] That's not to say, of course, that such an inquiry is likely to yield precise answers, but it may nonetheless offer the means with which to construct a general picture of how the people measure up to the constitutional fidelity obligation. The next Part explores the literature on civic literacy and public reasoning in order to extract such a determination.

IV. INTERPRETIVE COMPETENCE AND THE PEOPLE

This Part applies the framework of Interpretive Competence to the people. Part IV first analyzes a range of data on civic literacy and public reasoning skills with the hopes of illuminating the people's ability to fulfill the constitutional fidelity obligation. The inquiry reveals just how little the people know about interpreting the Constitution, while more specifically suggesting that the people lack both Constitutional Knowledge and Constitutional Reasoning. Part IV next addresses various objections popular constitutionalists might raise as to why this finding does not justify

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which the purpose of "a constitution [is to] incorporate a series of rules that impose second-order constraints on the first-order policy preferences of the people and of their elected representatives and executive officials.").

[82] For conceptually similar approaches to evaluating the countermajoritarian difficulty and theories of deliberative democracy, see Somin, *supra* note 9, at 1291–92 (considering the countermajoritarian difficulty in light of "the depth and pervasiveness of voter ignorance," and concluding that "[j]udicial invalidation of . . . legislation . . . is not nearly as 'countermajoritarian' as generally supposed" because legislation may not represent the will of the majority); Ilya Somin, *Deliberative Democracy and Political Ignorance*, 22 CRITICAL REV. 253, 253, 257 (2010) (explaining that, although proponents of deliberative democracy "hope that voters will . . . develop a solid factual understanding of political issues . . . [and] debate the moral principles at stake in a rational and sophisticated fashion," "[d]ecades of public opinion research show that most voters are very far from meeting the knowledge prerequisites of deliberative democracy").

withholding interpretive authority from the people. Part IV concludes by explaining why the role Interpretive Competence plays at the U.S. Supreme Court is the largest hurdle facing an Interpretive Competence-based challenge to the theory of popular constitutionalism.

A. *Constitutional Knowledge and the People*

"Decades of research on political knowledge have uniformly showed it to be very low."[83] Indeed, the average American knows precious little about the most foundational aspects of governance.[84] For example, "the majority of American adults do not know the respective functions of the three branches of government, who has the power to declare war, or what institution controls monetary policy."[85] Worse yet, a third of our polity cannot even name a single branch of government, while only about a third can name all three.[86]

Given that the people know so little about the structure and function of government, it should not be surprising to discover they also lack basic knowledge about the judiciary and the operation of the American legal system.[87] To begin with, there is significant public confusion as to the very nature of the judicial role; approximately half of all Americans believes

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[83] Somin, *supra* note 9, at 1304; *see, e.g.*, SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS (2003); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996); W. RUSSELL NEUMAN, THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE (1986); JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION (1992); Stephen E. Bennett, *Trends in Americans' Political Information*, 1967–1987, 17 AM. POL. RES. 422 (1989); Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413 (1998).

[84] *See* Somin, *supra* note 9, at 1305 ("For present purposes, it is important to stress that the majority of citizens lack basic rules of the game knowledge, information about which public officials and agencies are responsible for what issues.") (quotations omitted); Ilya Somin & Sanford Levinson, *Democracy, Political Ignorance, and Constitutional Reform*, 157 U. PA. L. REV. PENNUMBRA 239, 241 (2009) ("The public is also often ignorant of basic structural facts about the political system.").

[85] Somin, *supra* note 9, at 1305.

[86] Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 899 (2007). This study similarly found that "35% [of Americans] think that it was the intention of the Founding Fathers to have each branch hold a lot of power but the President have the final say." *Id.* at 900; *see also* Janet Stidman Eveleth, *Teaching Children About the Law*, MD. B.J. May/June 2006, at 10, 12 (explaining that twenty-two percent of Americans think the three branches of government are Democratic, Republican and Independent and that sixteen percent think they are local, state and federal government).

[87] *See* Janet Stidman Eveleth, *Advancing the Public's Understanding of the Law: The Value of Law-Related Education*, MD. B.J. Apr./May 2003, at 44 ("Today's average citizen knows little about our justice system, and understands even less."); JOEL F. HENNING ET AL., A.B.A., SPECIAL COMM. ON YOUTH EDUC. FOR CITIZENSHIP, LAW RELATED EDUCATION IN AMERICA: GUIDELINES FOR THE FUTURE 1 (1975) ("Today's citizen not only lacks an understanding of the day-to-day functions of government—how a bill becomes a law, the counter-balancing relationships among the three branches of government—he also knows very little about the American legal system.").

judges are charged with enforcing, rather than interpreting, the law.[88] Further, more than a third of all Americans are confused as to one of the most basic tenets of our criminal justice system: that a criminal defendant is innocent until proven guilty. Rather, these individuals believe—somewhat unsettlingly—just the opposite: "that the defendant must prove innocence rather than that the prosecutor must prove guilt."[89] And the vast majority of the public, seventy-eight percent, also believes any decision made by a state court can be reviewed and reversed by a federal court.[90]

The people similarly know very little about the Supreme Court, how it operates, and the cases it decides. Consider, for example, the following set of statistics culled by Kathleen Jamieson and Michael Hennessy from two nationally representative surveys: (1) close to a majority of Americans (45%) either affirmatively believes the Supreme Court cannot strike down a statute as unconstitutional (22%) or does not know (23%); (2) a near majority (47%) believes the justices do not regularly give written reasons for their rulings (18%) or does not know (29%); and (3) a majority (53%) believes a five-to-four decision by the Supreme Court carries a different amount of legal weight than does a unanimous decision, while 39% believes this split decision must either be referred to Congress for resolution (23%) or reheard by lower courts (16%).[91] Studies similarly reveal that a majority of Americans cannot identify the holdings of some of the Court's landmark decisions, such as *Roe v. Wade*, *Miranda v. Arizona*, or *Webster v. Reproductive Health Services*,[92] while less than one in ten Americans can name the Chief Justice of the U.S. Supreme Court.[93] In

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[88] A.B.A., *American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1313 (1999); *see also* Mary Deutsch Schneider, *Trumpeting Civil Gideon: An Idea Whose Time Has Come?*, 63 BENCH & B. MINN. 22, 22 (2006) (noting that the vast majority of Americans, seventy-nine percent, also erroneously believe that indigent people have a guaranteed right to free counsel in civil cases).

[89] A.B.A., *supra* note 88, at 1313.

[90] *Id.* at 1332 tbl.

[91] *See* Jamieson & Hennessy, *supra* note 86, at 899–900 (referencing two national surveys conducted by Princeton Survey Research Associates for the Annenberg Public Policy Center of the University of Pennsylvania); *id.* at 902 app. (supplementing with details of the "Annenberg Supreme Court Survey: Lawyers and the Public, 2005" and the "Judicial Independence Survey, September 2006," respectively).

[92] DELLI CARPINI & KEETER, *supra* note 83, at 70–71 (noting that fifty-five percent of survey participants were not able to state the holding of *Miranda v. Arizona*, seventy percent were not able to state the holding in *Roe v. Wade*, and seventy-one percent were not able to state the holding of *Webster v. Reproductive Health Services*); David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y Q. 405, 407 (1983) ("Only about half the public can recall any Supreme Court decision . . . ."); *see also* Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 WM. & MARY L. REV. 1379, 1382 (2009) ("[N]onlawyers are rarely familiar with the precedents, particularly when the precedents are thick on the ground.").

[93] *See* Seth Schiesel, *Former Justice Promotes Web-Based Civics Lessons*, N.Y. TIMES, June 9, 2008, at E7 (quoting Justice Sandra Day O'Connor). For a comparative perspective, consider that about two-thirds of Americans can name at least one of the judges on the Fox TV show "American

short, "large segments of the public are essentially ignorant about the Court and its work."[94]

But as bad as the foregoing data may appear, this is not the worst of it. The literature on constitutional literacy demonstrates that the people know surprisingly little about the very document over which popular constitutionalists would assign them interpretive authority. As Neal Devins rhetorically phrases it, "How Much Does the Public Know about the Constitution? Next-to-nothing."[95] The following statistics make this point clear enough: 72% of Americans cannot identify three First Amendment rights;[96] 98% cannot identify two Fifth Amendment rights;[97] 55% believe the right to education is part of the First Amendment;[98] 80% cannot identify the content of the Tenth Amendment;[99] and a majority of Americans is unable to identify how many senators the Constitution mandates.[100] More generally, a 2010 poll found that American adults provided correct answers on basic questions regarding the "Bill of Rights and freedoms it protects" a mere 32% of the time.[101] As the Executive

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Idol." *Id.*; *see also The Polls—Supreme Court Awareness*, EMPIRICAL LEGAL STUD. (Feb. 23, 2006, 2:00 AM), http://www.elsblog.org/the_empirical_legal_studi/2006/02/supreme_court_a.html ("While the specific ability to rattle off Supreme Court justices is not particularly important in and of itself, the public's poor performance in these surveys is a good indication that little is known about the Court in general.").

[94] Gewirtzman, *supra* note 4, at 920.

[95] Neal Devins, *The D'oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1340–41 (2007) (reviewing JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006)); *see also* Ilya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300, 305 (2011) ("Ignorance about basic aspects of the Constitution is also extensive.").

[96] McCormick Tribune Freedom Museum, *Americans' Awareness of First Amendment Freedoms*, FORUM FOR EDUC. & DEMOCRACY (Mar. 1, 2006), http://www.forumforeducation.org/node/147. That same survey noted that greater than one-third of Americans believes that rights such as the right to gun ownership, the right to an attorney, the right against self-incrimination, and the right of women to vote come from the First Amendment. *Id.*

[97] DELLI CARPINI & KEETER, *supra* note 83, at 71.

[98] Rachel Gillespie, *Do You Think Teens Know the Difference Between Madison and Marx?*, A MORE PERFECT BLOG (Dec. 15, 2010), http://blog.billofrightsinstitute.org/2010/12/do-you-think-teens-know-the-difference-between-madison-and-marx/.

[99] BILL OF RIGHTS INST., 42 PERCENT OF AMERICANS ATTRIBUTE COMMUNIST SLOGAN TO AMERICA'S FOUNDING DOCUMENTS (2010), *available at* http://www.harrisinteractive.com/vault/BillofRightsInstitute_BillofRightsDayPollResults_FINAL.pdf.

[100] Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1435 (1999).

[101] BILL OF RIGHTS INST., *supra* note 99; *see also Highlights of Survey*, NAT'L CONST. CTR, http://ratify.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCNationalPoll/HighlightsofthePoll.shtml (last visited Apr. 2, 2012) (finding that only five percent of those polled could answer ten rudimentary questions about the Constitution). It is worth noting here that forty percent of Americans "think that the Constitution permits the president to ignore a Supreme Court ruling if he believes that doing so will protect the country from harm." Sandra Day O'Connor, *The Democratic Purpose of Education*, *in* TEACHING AMERICA, *supra* note 69, at 3, 8. For a comparative view, consider that about

Director of the Center for Civic Education, Charles Quigley, sums it up: Americans have "an appalling lack of knowledge of a document that impacts their daily lives."[102]

When the foregoing data is considered together, the implication for gauging whether the people possess Constitutional Knowledge is clear: The people almost certainly lack it. The data instead coalesces to depict a body of potential constitutional interpreters who, on average, know little about even the most basic aspects of the Constitution—let alone possess an understanding of the Constitution's structure and history, as well as the relevant precedents and legal principles necessary to facilitate the practice of constitutional fidelity.[103] With that in mind, the next Section considers whether the people possess the second dimension of Interpretive Competence, Constitutional Reasoning.

B. *Constitutional Reasoning and the People*

Most humans consider themselves to be fairly rational and deliberate individuals. However, "[t]here's only one problem with [an] assumption of human rationality: it's wrong."[104] Left to their own faculties, humans generally do not "analyze the alternatives and carefully weigh the pros and cons" during the decision-making process, and they are "[neither] deliberate [nor] logical creatures."[105] Thus, the literature on public reasoning—less voluminous than that on legal literacy, but illuminating nonetheless—reveals that most people routinely make "basic logical errors," "embrace illogical pseudoscience," and possess only a "limited understanding of philosophy, logic, and moral theory."[106]

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twice as many Americans can name at least two characters from *The Simpsons* (52%) than can name two or more First Amendment rights (28%). McCormick Tribune Freedom Museum, *supra* note 96.

[102] Quigley, *supra* note 100, at 1434–35.

[103] Although knowledge of the facts of an individual case has not been incorporated into Interpretive Competence, it is also relevant to the task of faithfully interpreting the Constitution in a particular case. It is therefore worth noting here the substantial time constraints learning the facts would impose upon the people, and that "[t]ime and attention are limited resources . . . [so] citizens must make deliberate choices about what to focus on and gather information about." Gewirtzman, *supra* note 4, at 917. For an example of the fact-intensive inquiry that a single question of constitutional interpretation can entail, see generally Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388 (2011) (analyzing quantitative data on the veterans benefits adjudication process in light of the Due Process Clause of the Fifth Amendment).

[104] JONAH LEHRER, HOW WE DECIDE, at xv (2009).

[105] *Id.*

[106] Somin, *supra* note 82, at 259 (citing THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 1–2 (1991) (logic); MICHAEL SHERMER, WHY PEOPLE BELIEVE WEIRD THINGS: PSEUDOSCIENCE, SUPERSTITION, AND OTHER CONFUSIONS OF OUR TIME 57 (1997) (pseudoscience)); *see generally* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES (2007); ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998).

Insofar as Constitutional Reasoning is concerned, however, the people's presumptive lack of logical reasoning skills may only be part of the problem facing popular constitutionalists. While the ability to think logically is a necessary part of Constitutional Reasoning, as discussed *supra* Part III.B, it does not constitute the whole of it. So even assuming the people were perfectly rational, they still might lack Constitutional Reasoning. A closer look at the manner in which second-order judgments depart from the practical first-order decisions of everyday life reveals why.[107]

As Frederick Schauer explains,

> When engaged in ordinary (first-order) reasoning and decision making, people tend, not surprisingly, to try to make the best decision for the problem or task at hand. Their aim is typically to reach the right result for *this* case—the present case. That this is so for ordinary people, however, is not to say that it is so for lawyers and judges, for one of the things that law schools attempt to teach their students is precisely to *avoid* thinking that the right result for *this* present case is necessarily the right result all things considered.[108]

Schauer's analysis highlights the important point that, contrary to the practical decisions of daily living, legal decisions may call for a different type of reasoning—one which accounts for long-term legal values that go beyond the particular situation at hand.[109] Indeed, it is because of the presumed material differences between first-order and second-order reasoning that law schools, vis-a-vis the Socratic Method, spend so much time cultivating students' ability to appreciate "the way in which the backward-looking, constraining, and limiting dimensions of law . . . often mandate a result other than the one that is optimally fair or maximally wise, all things considered, in the particular case . . . ."[110] This type of specialized training is believed to be necessary because the notion that the correct legal decision could be the one that produces an otherwise unjust result in the present case is "artificial."[111]

And yet, while the ability to make second-order judgments may be central to the task of faithfully interpreting the Constitution, as discussed

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[107] *See* Schauer, *supra* note 76, at 107–09.

[108] *Id.* at 107 (citation omitted).

[109] *See id.* at 109.

[110] *Id.* (citations and internal quotation marks omitted).

[111] *Id.* (internal quotation marks omitted).

supra Part III.B, it may also be the very skill that lay people lack.[112] For example, after reviewing voluminous public polling data, Stephen Gottlieb concludes that "it is definitely not very influential to tell the public that the Constitution demands a particular result . . . . The public [cares more about] fairness, and equity, as well as community, and national, and self-interest."[113] Mark Tushnet similarly notes that "[o]rdinary people tend reasonably enough to focus on the problem at hand—a specific legislative proposal, for example—that they assess in policy terms. They then try to make constitutional sense of the policy position they have taken with respect to that proposal."[114] Comments such as these, and others like them, suggest that the people may lack the training necessary to enable them to account for the type of long-term values that constitutional fidelity requires.[115] And because this accounting is essential to faithfully interpreting the Constitution, the foregoing analysis suggests that the people also lack the second dimension of Interpretive Competence, Constitutional Reasoning.

C. *Addressing Three Objections*

So where does this leave the theory of popular constitutionalism? Somewhere between a rock and a hard place. The people's presumptive lack of Interpretive Competence suggests that they would be unable to fulfill the constitutional fidelity obligation that attaches to interpretive authority, thereby leading to the conclusion that popular constitutionalist reforms ought to be rejected.

But the inquiry is not yet complete. Popular constitutionalists might object to the foregoing analysis on one of three grounds. Consider the first: even assuming the people *presently* lack Interpretive Competence,

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[112] *See id.*; *see also* EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 26 (2009) ("Law school is not merely professionalization; it is a resocialization process where students' old ways of thinking are extinguished and replaced with reference to legally appropriate arguments and considerations."). *But see* Pettys, *supra* note 2, at 345 ("[I]f the ultimate power to interpret the Constitution's indeterminate provisions were shifted from the courts to the political domain, the American People would prove themselves able and willing to distinguish between their long-term fundamental commitments and their short-term political desires in the kinds of ways that constitutionalism demands.").

[113] Stephen E. Gottlieb, *The Passing of the Cardozo Generations*, 34 AKRON L. REV. 283, 287 (2000).

[114] Tushnet, *supra* note 92, at 1387.

[115] *See, e.g.*, Richard A. Posner, *The People's Court*, NEW REPUBLIC, July 19, 2004, at 32, 36 ("To depict the people as constitutional 'interpreters" merely entangles popular constitutionalism in a legalism. . . . Americans care for results rather than for interpretations."); Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 207 (2007) (noting that the "public's judgment" in constitutional cases may "not in any sense [be] rooted in a judgment about constitutional meaning[,]" but rather a "reflection of some kind of policy-driven, constitution-blind opprobrium").

such a finding might not dictate whether the people would lack Interpretive Competence *after* the enactment of their reforms. Popular constitutionalists could argue, for example, that the people's lack of Interpretive Competence is actually a function of their current lack of authority. Thus, once the transfer of authority occurs, then perhaps the people would seek out and acquire Interpretive Competence.

Unfortunately, the political science data on public voting trends suggests the implausibility of this assumption. For example, notwithstanding their right to vote, Americans are extremely ill-informed about many of the most basic public policy issues of the day.[116] As Donald Kinder puts it: "When confronted with policy debates of great and abiding interest to political elites, many Americans can do no better than shrug."[117] Furthermore, it does not appear the people see this lack of public policy knowledge as a problem; rather, "the people's desire to avoid politics is widespread."[118] Indeed, as John Hibbing and Elizabeth Theiss-Morse report:

> The last thing people want is to be more involved in political decision making: They do not want to make political decisions themselves; they do not want to provide much input to those who are assigned to make these decisions; and they would rather not know all the details of the decision-making process.[119]

And as Doni Gewirtzman explains, voting trends over the past five decades clearly demonstrate this point: Notwithstanding "increased access to education, decreased information costs, and the elimination of barriers to voter registration," the political participation trend has been one of steady decline.[120] Thus, the people's lack of public policy knowledge, in addition

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[116] *See* Somin & Levinson, *supra* note 84, at 240 (noting that decades of public opinion research reveals low levels of public knowledge on public policy issues).

[117] *See* Donald R. Kinder, *Diversity and Complexity in American Public Opinion*, *in* POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 389, 397 (Ada W. Finifter ed., 1983).

[118] JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 3 (2002).

[119] *Id.* at 1–2.

[120] Gewirtzman, *supra* note 4, at 915; *see also* CARNEGIE CORP. OF N.Y. & CIRCLE, THE CIVIC MISSION OF SCHOOLS 19 (2003), *available at* http://carnegie.org/fileadmin/Media/Publications/PDF/CivicMissionofSchools.pdf [hereinafter CARNEGIE REPORT] ("Young people's voter participation rates have declined substantially. Today, young people are distinctly less likely to vote than older generations were at the same point in their lives. . . . Young people are less interested in public affairs than they once were."); Mark Hansen, *Flunking Civics: Why America's Kids Know So Little*, 97 ABA J., May 2011, at 32, 33 ("Those under the age of 25 are less likely to vote than were their elders or younger people in previous decades" and "students also are less interested in public or political issues than were previous generations . . . .").

to their overall aversion toward political participation, severely undercuts the assumption that the people would acquire Interpretive Competence after the implementation of popular constitutionalist reforms.

There is yet another potential objection, however, which focuses not on the people, but on the current holders of final interpretive authority over the Constitution: the justices. This Essay has thus far argued that popular constitutionalist reforms that would transfer interpretive authority to the people ought to be rejected because the people lack Interpretive Competence. But this begs the question: do the justices themselves possess Interpretive Competence?

This question is central to my argument because popular constitutionalist reforms seek to transfer the justices' interpretive authority to the people. Therefore, a fidelity-based challenge to the theory of popular constitutionalism requires a comparative assessment of the people and the justices in light of the constitutional fidelity obligation. In other words, the people's lack of Interpretive Competence cannot be viewed in isolation but must be considered in light of whether the justices possess it. For if the justices lack Interpretive Competence, then the people's lack of the same would no longer be an appropriate ground upon which to reject popular constitutionalism.

This objection is easily overcome, however, because the justices clearly do possess Interpretive Competence. It is important to keep in mind just how low the bar is set: the constitutional fidelity obligation requires only that an authoritative interpreter possess an understanding of the traditional sources of constitutional meaning; the legal principles upon which these sources rest; and basic first and second-order reasoning skills. These are, to be sure, the very competencies that law schools instill in their students,[121] and that the justices exercise on a regular basis in their roles as public decision-makers who must base their rulings on reasoned justification.[122] The polity expects the justices to construct opinions that

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[121] *See* Sherry, *supra* note 2, at 1066 (noting that the skills of "critical thinking," "account[ing] [for] opposing evidence and arguments," "identify[ing] recurring patterns," and "look[ing] at many factors in order to reach a principle of decision rather than imposing a pre-set principle of decision on the existing factors," are the "professional skills that are taught in law school and are the hallmarks of a successful lawyer").

[122] *See* Norman R. Williams, *The People's Constitution*, 57 STAN. L. REV. 257, 288 (2004) ("Modern constitutional disputes often comprise a multitude of competing interpretations, each of which is defended by their adherents with myriad arguments. Judges, because of their educational background and specialized legal training, are better able to penetrate the argumentative cacophony and identify those claims of moral principle that lie at the heart of these debates."); ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 89 (1987) ("Judiciary is unique in that it is the only institution committed to arriving at decisions based entirely on arguments and reasoning."); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) (noting that judges must write reasoned opinions to reinforce their "oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do"); Frank I.

reflect the application of Interpretive Competence, and a review of the constitutional decisions in the United States Reports reveals that this is what the justices do.

And yet, while the justices' opinions demonstrate that they possess Interpretive Competence, the opinions cannot by themselves prove that Interpretive Competence is the driving force behind the justices' constitutional interpretations. For there is sufficient ambiguity in most constitutional questions that reach the Court to enable the justices to put together an opinion that demonstrates their possession of Interpretive Competence without its necessarily being the primary motivator underlying the opinion. This state of affairs opens the door to the law-as-politics objection, which asserts that Interpretive Competence is simply a tool the justices use to construct after-the-fact justifications for decisions based upon their political preferences.

If the law-as-politics argument is true—and the constitutional interpretations rendered by the Court are nothing more than an articulation of the justices' preferences—then the people's lack of Interpretive Competence may no longer provide a basis for rejecting popular constitutionalist reforms. For why should the American constitutional order privilege the preferences of nine judicial elites over those of the people? Indeed, under this scenario, popular constitutionalist proposals to delegate interpretive authority to the people—as an otherwise honest attempt at democratizing a tyrannical judicial charade—could have some real purchase.[123] With that in mind, the final Part of the Essay is dedicated to addressing the role Interpretive Competence plays in the Court's work.

V. INTERPRETIVE COMPETENCE AND THE JUSTICES

This Part confronts the law-as-politics objection by evaluating the role Interpretive Competence plays in the justices' constitutional interpretations. To address the issue, this Part considers a range of contemporary research in political science and cognitive psychology, with a particular emphasis on the theory of motivated reasoning. The literature reviewed suggests that the justices' Interpretive Competence is the

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Michelman, *Judicial Supremacy, the Concept of Law, and the Sanctity of Life*, in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 140, 145 (Austin Sarat & Thomas R. Kearns eds., 1996) ("[W]e do best to assume strong advantages . . . from well-honed dialectical and judgmental capabilities; from a cultivated sense of the distinction between public and personal reason; and from a live and broad working knowledge of the law, along with a studied grasp of the country's deep political-moral culture.") (footnote omitted).

[123] Of course, there may be other reasons, such as the rule-of-law values of predictability, stability, and certainty, that would nonetheless support rejecting a grant of interpretive authority to the people. *See* Alexander & Solum, *supra* note 1, at 1628–38. But this does highlight the fact that, if Interpretive Competence is not driving the Court's work, then the constitutional fidelity-based rejection of popular constitutionalism loses its purchase.

foremost influence on their constitutional interpretations; the impact of political preferences operates primarily through unconscious cognitive bias; and the impact of this bias is bounded by the justices' Interpretive Competence. Part V concludes by explaining why these findings justify the rejection of popular constitutionalist proposals to delegate interpretive authority to the people.

A. *Law as Politics?*

Within the field of political science, the law-as-politics argument is best captured by the attitudinalist model, which views judges as "naïve decision makers who always vote their unconstrained attitudes."[124] As two of the model's chief proponents, Jeffrey Segal and Harold Spaeth, phrase it: "Rehnquist vote[d] the way he [did] because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."[125] An attitudinalist model of constitutional interpretation crowns political preferences, rather than law, with the predominant role in the justices' constitutional decision-making process. If this model is an accurate depiction of how the justices resolve cases, then Interpretive Competence presumptively has very little to do with the interpretations rendered by the Court.

All things considered, however, the attitudinalist model of Supreme Court decision-making does not appear to be descriptively accurate. To understand why, let us begin by considering some recent statistics on decision-making at the U.S. Supreme Court. As Tom Goldstein writes, the Court's 2009–2010 term presented a "varied and shifting mix" of decision-making that in most cases did not reflect an alignment between the justices' assumed political preferences and their voting habits.[126] For example, in that term, less than twenty percent of cases were decided by a margin of five to four, approximately half the decisions were nine to zero, and "[o]nly slightly more than one in ten cases involved the narrow liberal-conservative divide."[127] Further, there were multiple "five-to-four decisions that intuitively might have been decided on an ideological basis during the course of the Term [that] were instead resolved by totally unpredictable alignments."[128] Most importantly, the foregoing statistics are

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[124] Lee Epstein & Jack Knight, Documenting Strategic Interaction on the U.S. Supreme Court 3 (Wash. Univ. St. Louis, Political Science Paper No. 275, 1995), *available at* http://epstein.usc.edu/research/conferencepapers.1995APSA.pdf.

[125] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 65 (1993).

[126] Tom Goldstein, *Everything You Read About the Supreme Court Is Wrong*, SCOTUSBLOG (June 30, 2010, 5:55 PM), http://www.scotusblog.com/2010/06/everything-you-read-about-the-supreme-court-is-wrong/#more-22491.

[127] *Id.*

[128] *Id.*

not an aberration: during the 2010–2011, term the liberal-conservative divide constituted only ten of the eighty-two cases decided,[129] while it constituted only five of the seventy-five cases decided during the 2011–2012 term.[130] Thus, contrary to the attitudinalist model, the justices "routinely make decisions that appear to be inconsistent with their policy preferences."[131]

Howard Gilman provides a broader historical perspective, highlighting a range of evidence uncovered over the course of the past two decades—mined from such diverse areas as pre-New Deal commerce clause and due process jurisprudence,[132] voting patterns of Warren Court liberals,[133] the impact of legal argumentation in the development of the Court's abortion and death penalty jurisprudence,[134] and the role of legal analysis in the Court's certiorari-granting process[135]—that suggests the role of legal influence in the Court's work.[136] More recently, Michael Bailey and Forrest Maltzman conducted a thorough study on the Court's First Amendment jurisprudence and concluded that the "justices are influenced

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[129] *See* SCOTUSBLOG STAT PACK, OCTOBER TERM 2010, at 11, June 28, 2011.

[130] *See* SCOTUSBLOG STAT PACK, OCTOBER TERM 2011, at 14, June 30, 2012.

[131] MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 2 (2011).

One particularly interesting recent example of apolitical coalitions can be found in the interpretive disagreements over the Sixth Amendment's Confrontation Clause, *see, e.g.*, Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), which seem to indicate the role of legal influence, and not political influence, in constitutional interpretation. *See* David G. Savage, *Criminal Defendants Find an Unlikely Friend in Justice Scalia*, L.A. TIMES (Nov. 24, 2011), http://Essays.latimes.com/2011/nov/24/nation/la-na-court-scalia-20111125. As Richard Friedman puts it, the Court's division in Confrontation Clause jurisprudence is "not a left-right split," but rather a question of "principle versus pragmatism." *Id.* (quoting Richard Friedman); *see* Jonathan H. Adler, LAT *on Justice Scalia and Criminal Defendants*, VOLOKH CONSPIRACY (Nov. 25, 2011, 7:11 PM), http://volokh.com/2011/11/25/lat-on-justice-scalia-and-criminal-defendants ("[T]he best way to understand the current Court's division on many (though not all) questions of criminal procedure is as a split between formalists and pragmatists—between those inclined to enforce a bright-line constitutional rule and those inclined to account for practical considerations.").

[132] *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 67, 202 (1993); Howard Gillman, *More on the Origins of the Fuller Court's Jurisprudence: Reexamining the Scope of Federal Power over Commerce and Manufacturing in Nineteenth-Century Constitutional Law*, 49 POL. RES. Q. 415, 415 (1996); *see generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 177–93 (1998).

[133] *See* ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 11 (1997); Elizabeth Bussiere, *The Failure of Constitutional Welfare Rights in the Warren Court*, 109 POL. SCI. Q. 105, 122 (1994).

[134] *See* LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 7 (1992).

[135] *See* H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 41–91 (1991).

[136] *See* Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 490 (2001).

by more than just the policy preferences emphasized by the attitudinal model . . . law matters."[137]

That is not to say, of course, that law is necessarily *all that matters*. Indeed, it is important not to overstate the claims of legal influence—and in the context of constitutional interpretation, Interpretive Competence—in the Court's work. Findings such as the foregoing do not preclude the oftentimes irresistible conclusion, based upon the Court's more politically divisive decisions, that preferences may sometimes play a prominent role as well[138]—and there is a vast body of literature that appears to support this.[139]

However, insofar as the framework of Interpretive Competence is being used to evaluate the theory of popular constitutionalism, preferences need not be absent from the justices' interpretations to justify rejecting reforms that would delegate interpretive authority to the people. For when the importance of constitutional fidelity is viewed in light of the people's

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[137] BAILEY & MALTZMAN, *supra* note 131, at 143. For similar findings in lower federal courts, see J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 186 (1981) ("The predictive power of political indicators [on judicial decision-making in the federal courts of appeal studied] was negligible and indirect."); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) ("[W]e cannot find that Republican [federal trial] judges differ from Democratic [federal trial] judges in their treatment of civil rights cases."); Frank B. Cross, *Decision-making in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1515 (2003) ("The greatest constraint [on federal appellate judges] appears to be that of the law: the 'neutral principles' of the traditional legal model fare quite well as a descriptive model for judicial decision-making") (footnote omitted).

[138] *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000); SEGAL & SPAETH, *supra* note 125, at 2, 171 (noting that *Bush v. Gore* "may appear to be the most egregious example of judicial policy making" ever, and that "one may accurately say that never in its history has a majority of the Court behaved in such a blatantly politically partisan fashion"). *But see* Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1741 (2003) (noting that the *Bush v. Gore* law-as-politics claim is overblown "because seven justices—including Clinton appointee Stephen Breyer—upheld Bush's equal protection claim and consequently agreed to reverse the Florida Supreme Court's ruling that preserved Vice-President Gore's challenge to Florida Secretary of State Kathleen Harris's certification of the Florida election in Bush's favor. . . . [In other words, there was] a bipartisan coalition of justices who supported Bush's claim."); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 62–64 (2001) (noting that while the Court may sometimes give in to political pressures in particular cases, such as *Bush v. Gore*, the Court, in general, is sufficiently disinterested to act on principle); *see also* RICHARD POSNER, HOW JUDGES THINK 27 (2008) (noting that by focusing only on politically charged cases decided by the Supreme Court, we end up with "an exaggerated impression of the permeation of American judging by politics").

[139] For literature suggesting the influence of politics in legal decision-making, see generally Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998); Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts:A Meta-analysis*, 20 JUST. SYS. J. 219 (1999); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

lack of Interpretive Competence, the direness of the resulting landscape suggests that even a hybrid model of Supreme Court decision-making—wherein Interpretive Competence and political preferences each influence the justices in some capacity—is preferable to the popular constitutionalist alternative. The empirical literature discussed in this Section suggests that Interpretive Competence is indeed a central part of the justices' constitutional decision-making process, and the fact that preferences may also exert some influence should therefore not be fatal to the Essay's Interpretive Competence-based argument.

And yet, studies on the justices' outwardly observable behavior can only take us so far. While the content of the justices' opinions and their voting patterns may point toward Interpretive Competence-based interpretations, they cannot confirm them. For that, an internal perspective is necessary. The next Section therefore considers recent work in cognitive psychology to gain a better understanding of the manner in which Interpretive Competence and political preferences may actually interact in the minds of the justices.

B. *Motivated Reasoning and Judicial Decision-Making*

At the turn of the twenty-first century, cognitive psychologists discovered the biasing effect "motivations"—that is, wishes, desires, or preferences—exert on human decision-making.[140] Based on this observation, psychologists developed the theory of motivated reasoning, which posits that decision-makers have an "unconscious tendency . . . to fit their processing of information to conclusions that suit some end or goal."[141]

In its practical application, the theory of motivated reasoning suggests that motivations lead decision-makers to find evidence or arguments that support their preferred outcome more persuasive than those that do not.[142] In other words, decision-makers are "more likely to arrive at those conclusions that they want to arrive at."[143] The theory of motivated reasoning calls into question the very possibility of neutral decision-

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[140] *See generally, e.g.*, ZIVA KUNDA, SOCIAL COGNITION (1999); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

[141] *See* Dan Kahan, *What is Motivated Reasoning and How Does it Work?* SCI. & RELIGION TODAY (May 4, 2011), http://www.scienceandreligiontoday.com/2011/05/04/what-is-motivated-reasoning-and-how-does-it-work).

[142] *See id.* at 480–81; Kahan, *supra* note 141. Further, once a decision is made, motivations may help entrench it by leading decision-makers to "ignore new contradictory information, actively argue against it or discount its source, all in an effort to maintain existing evaluations." David P. Redlawsk, *A Matter of Motivated 'Reasoning,'* N.Y. Times (April 22, 2011, 3:55 PM), http://www.nytimes.com/roomfordebate/2011/04/21/barack-obama-and-the-psychology-of-the-birther-myth/a-matter-of-motivated-reasoning.

[143] KUNDA, *supra* note 140, at 485.

making because it suggests that, even where decision-makers want to be fair-minded and objective, unconscious bias may nonetheless get in their way.[144]

Importantly, however, cognitive psychologists have discovered that the biasing effect of motivations is limited by the type of motivation at work.[145] There are two general categories of motivations: (1) directional goals, "in which the motive is to arrive at a particular, directional conclusion," and (2) accuracy goals, "in which the motive is to arrive at an accurate conclusion, whatever it may be."[146] When it comes to the manner in which a particular decision is made, the difference between the two types of motivations is significant. Whereas directional goals "lead to the use of those beliefs and strategies that are considered most likely to yield the desired conclusion," accuracy goals lead to the use of "those beliefs and strategies that are considered most appropriate."[147] Put another way, directional goals lead a decision-maker to engage in outcome-oriented decision-making, while accuracy goals lead a decision-maker to engage in process-oriented decision-making. Lastly, these two categories of motivations are not mutually exclusive: both can co-exist in the mind of a decision-maker with respect to an individual decision.[148]

The theory of motivated reasoning may offer important insights into the Essay's Interpretive Competence-based evaluation of constitutional interpretation at the Supreme Court. Because judging is a quintessential decision-making activity, the justices (as well as all other judges for that matter) are likely impacted by the process of motivated reasoning.[149] This further suggests that the justices are likely subject to both the biasing effect of directional goals—what are, in the context of constitutional decision-making, politically-based motivations—and the moderating effect of accuracy goals—what are, in the context of constitutional decision-making, fidelity-based motivations.[150]

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[144] *See* Dan M. Kahan, Foreword, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011) ("When subject to [motivated reasoning], individuals can be unwittingly disabled from making dispassionate, open-minded, and fair judgments.").

[145] *See* Kunda, *supra* note 140, at 481.

[146] *Id.* at 480–81.

[147] *Id.* at 481.

[148] BRAMAN, *supra* note 112, at 20.

[149] For application of the theory of motivated reasoning to judicial decision-making, see for example BRAMAN, *supra* note 112; Kahan, *supra* note 141; Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307 (2001); Donald P. Judges, *Who Do They Think They Are?*, 64 ARK. L. REV. 119, 158 (2011).

[150] Put another way, a judge's motivation to "arrive at an accurate conclusion" in a constitutional case can be described as that judge's motivation to demonstrate constitutional fidelity, whereas a judge's motivation to "arrive at a particular, directional conclusion" can be described as that judge's motivation to achieve a politically salient result. *See* BRAMAN, *supra* note 112, at 19–20 (discussing the role of accuracy and directional goals in judicial decision-making).

This application raises the following question in response to the law-as-politics objection: are fidelity-based motivations or politically-based motivations foremost in the minds of the justices when they interpret the Constitution? For if fidelity-based motivations predominate in the justices' minds when they interpret the Constitution, then their interpretations are likely to be based upon their Interpretive Competence, as that decision-making strategy "considered most appropriate"[151] to interpreting the Constitution. If, on the other hand, politically-based motivations predominate, then politics may be the driving force in the Court's work: for even if the justices think they are faithfully interpreting the Constitution, their motivation as to a particular outcome may lead them to unconsciously skew their analysis to reach the politically-salient result. So, then, which is it?

Eileen Braman's work on the psychology of judicial decision-making suggests there is good reason to believe that the former, rather than the latter, is the dominant force in the Court's work.[152] As Braman explains, the "[s]trong socialization inherent in the education and professional development of attorneys" likely generates robust accuracy goals within the minds of judges.[153] From the moment a judge-to-be arrives at law school until the time she takes the bench, she is continuously socialized in accordance with what Braman labels "the traditional norms of legal decision-making."[154] These norms are twofold: first, that judges are supposed to decide cases impartially, and second, that judges' limited authority requires them to resolve cases based solely on their legal expertise.[155] Braman suggests this socialization causes judges to internalize these norms, which results in a "sincere[] belie[f] that to the extent they stray from accepted sources of legal decision-making, they exceed their authority in our democratic system."[156] As such, judges may possess a strong motivation to faithfully apply the law.[157]

Braman also explains why certain institutional features of the judiciary

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[151] Kunda, *supra* note 140, at 481.

[152] *See* BRAMAN, *supra* note 112; Eileen Braman, *Searching for Constraint in Legal Decision Making*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 203 (David Klein & Gregory Mitchell eds., 2010.).

[153] *Id.* at 10.

[154] *Id.* at 15.

[155] *Id.*

[156] *Id.* at 24.

[157] *Id.* at 20; *see* Schroeder, *supra* note 149, at 357–58 (noting that judges are "constrained by the bounds of professional acceptability"). For related role-based arguments, *see, e.g.*, Gillman, *supra* note 136, at 493 (noting that "the institutional setting within which judges operate shape their behavior in ways that require attention to the 'relative autonomy' of legal norms, categories, or rhetorics of justification"); POSNER, *supra* note 138, at 91, 117 (noting the constraint that "rules of articulation, awareness of boundaries and role, process values, a professional culture," and the desire to demonstrate "good judgment" has on judges).

may reinforce a judge's motivation toward fidelity, while mitigating the impact of political motivations.[158] Work in cognitive psychology reveals that accountability, specifically operationalized as reasoned justification to others, can bolster a decision-maker's motivation toward accuracy, thereby leading to enhanced cognitive processing and diminishing the effect of unconscious bias.[159] These are, to be sure, the very conditions under which the justices operate.[160]

First, the justices know their published opinions will be scrutinized by an external audience, which includes the lawyers, judges, and government officials who must respond to, interpret, and apply the Court's decisions, in addition to the journalists who cover them and the legal academics who comment on them.[161] As a result, "accountability concerns should heighten . . . [the justices'] motivation to comply with norms of appropriate decision-making."[162]

Second, the collective decision-making process that inheres in a multi-member body may be another source of accuracy goals for the justices. Because all decisions made by the Supreme Court require a certain level of consensus, the justices must attempt to convince one another of their views by marshaling legal norms and appropriate sources of legal authority.[163] Moreover, even when a majority is achieved, the opinion is still written under the threat of dissent by which one or more other justices "may explicitly make accusations of improper attitudinal motivations."[164] The

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[158] *See* BRAMAN, *supra* note 112, at 23.

[159] *See id.* (discussing Jennifer S. Lerner and Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCOL. BULL. 255 (1999)); Braman, *supra* note 152, at 215; *see also* Kunda, *supra* note 140, at 481; Philip E. Tetlock, *Accountability and Complexity of Thought*, 45 J. PERSONALITY & SOC. PSYCHOL. 74, 81 (1983) [hereinafter Tetlock, *Complexity of Thought*]; Philip E. Tetlock, *Accountability: A Social Check on the Fundamental Attribution Error* 48 J. PERSONALITY & SOC. PSYCHOL. 227, 229 (1985).

[160] Braman, *supra* note 152, at 215.

[161] *See* Schroeder, *supra* note 149, at 354 ("[J]udges expect their opinions to be evaluated. In the case of the Supreme Court, that review process occurs mostly outside the judiciary, at the hands of elected officials, the public, and the scholarly community. Public scrutiny generally is thought to affect judicial behavior . . . ."); *see also* George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 ARK. L. REV. 197, 200–01 (1967) ("Above all else [the purpose of a judicial opinion is] to expose the court's decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether . . . the court is doing its job, whether a particular judge is competent.").

[162] Braman, *supra* note 152, at 215.

[163] BRAMAN, *supra* note 112, at 23.

[164] *Id.*; *see* Mike Rappaport, *Motivated Reasoning and Originalism*, THE ORIGINALISM BLOG, April 30, 2012 ("[T]here are methods for checking motivated reasoning. One of the best, I believe, is forcing the judges in the majority to articulate their reasons in an opinion and then allowing the judges in the minority to criticize that reasoning in a dissent. This can expose weak arguments to the public for all to see and works to check conclusions reached by motivated reasoning in the first place."); Michael Serota, *Intelligible Justice*, 66 U. MIAMI L. REV. 649, 654 (2012) ("By issuing a stinging dissent or pointed concurrence, judges are able to illuminate the flaws in a majority opinion's reasoning and to offer a public rebuke with the potential to deter an abuse of judicial power.").

accountability inherent in this process may "reinforce[] accuracy goals," and "increases the chance that . . . [the justices] will become aware of the potential role that policy preferences play in their decisional behavior."[165]

In sum, Braman's analysis suggests that fidelity-based motivations *qua* accuracy goals are foremost in the minds of the justices when they interpret the Constitution.[166] Still, though, it is important to acknowledge the limitations of such a conclusion: motivational goals are not mutually exclusive, which means even if fidelity-based motivations are the predominant feature of the justices' decision-making process, the cognitive bias caused by political motivations may still mitigate the justices' neutrality. Indeed, as Braman explains, the indeterminacy of legal authority and the latitude in interpretation both leave plenty of room for directional goals to influence judges' "subjective evaluation of evidence and authority."[167] At the very least, though, the predominance of accuracy goals does suggest there is an "outer limit" to the influence of political preferences, constraining the justices from making choices that the relevant sources of authority and appropriate modes of reasoning cannot reasonably support.[168]

The foregoing application of the theory of motivated reasoning to the Court's decision-making process provides a powerful rebuttal to the law-as-politics objection. First, it suggests the justices are motivated to demonstrate constitutional fidelity, and moreover, that this motivation leads them to rely upon their Interpretive Competence when they interpret the Constitution. Second, it tends to support what the political science data discussed in the last Section suggests: while the impact of political preferences on the Court's work may be inevitable, it is far from absolute.

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[165] BRAMAN, *supra* note 112, at 23.

[166] Braman, *supra* note 152, at 19–20 (arguing that accuracy goals are foremost in the minds of judges when deciding cases). For work suggesting that judges may be able to overcome different types of cognitive bias, see Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 28 (2007); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223–25 (2009); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1259 (2005).

[167] BRAMAN, *supra* note 112, at 21; *see also* Schroeder, *supra* note 149, at 354–55 (2001) (explaining that judges have a wide variety of inferential rules of constitutional reasoning they can apply to justify their preferred opinions: "Judges can invoke arguments based on originalist understandings of the Founding, including the early Congresses, analogical reasoning, sources incorporated by reference, historical tradition, the implicit premises underlying the Constitution, and claims of special status for suspect classes or fundamental interests, among others") (internal citations omitted).

[168] *Id.*; *see* Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 575 (2010) (noting that motivated reasoning places boundaries on the effects of ideology through legal influence); Judges, *supra* note 149, at 169 ("While judicial decisions are plainly not immune to influence from policy preferences, judges' commitment to the norms of their role very well may constrain the extent of that influence.").

When viewed collectively, these findings suggest that the justices' reliance on their Interpretive Competence facilitates a meaningful, albeit imperfect, level of objectivity and neutrality in the constitutional decision-making process. While this conclusion surely does not constitute a pristine picture of constitutional fidelity at the Court, it does suggest that the justices' possession of Interpretive Competence, when viewed in light of the people's deficiency, supports rejecting popular constitutionalist proposals to delegate interpretive authority to the people. Lacking in Interpretive Competence, the people simply are not prepared to assume the role that popular constitutionalists would afford them.

VI. CONCLUSION

This Essay has argued that constitutional fidelity's central role within the American constitutional order illuminates the substantial problems with the theory of popular constitutionalism. Because an obligation of constitutional fidelity inheres in the exercise of interpretive authority, the viability of reforms that would delegate interpretive authority to the people depends upon whether the people know enough about the Constitution and its interpretation to enable them to faithfully interpret it. The inquiry conducted suggests that the people presently do not possess Interpretive Competence, and furthermore, are unlikely to acquire it.

Having established a prima facie case against the theory of popular constitutionalism, the Essay next considered how the justices measure up to the obligation of constitutional fidelity. The political science and cognitive psychology literature reviewed suggests that although the justices' political preferences do impact their constitutional decision-making process, Interpretive Competence is still the primary driver of the constitutional interpretations they render. While this finding does not offer unqualified support for the practice of judicial review, it does validate a rejection of reforms that would delegate interpretive authority over the Constitution to the people. The importance of constitutional fidelity to the American polity surely demands that much.