

The Social Science of the Dialogic Theory of Judicial Review

Jenna Bednar
University of Michigan

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I.

For an institution designed to resolve disagreement, the Court is remarkably good at stirring the pot. Some look to the court as the rampart that makes democracy's airy construction possible: it is the essential resistance to majoritarian policy turned oppressive, the bulwark of liberty or minorities. Others point out the consequences of its countermajoritarian tendency: it will either reject progress like a dowdy schoolmarm, or the opposite, when it legislates from the bench, pushing its unpopular policies on a befuddled and increasingly resentful public.

We've grown so used to this debate about judicial review that we fail to ask the obvious question: what if both sides are wrong? In his remarkable, original book, *The Will of the People*, Barry Friedman turns the debate inside out. In order for either side of the conventional debate to be right, the court would need to defy the popular majority. But as Friedman shows through a careful examination of the Supreme Court's full history, it hews closely to public will, rarely straying from the public's side, and never for long. The Court bounds along, pulling and resisting, but generally it accepts the people's alpha status. Golly! The Court is the people's puppy, and the people hold it firmly by the leash.

Histories, when recounted by gifted writers (as this one is), can leave us breathless, but not necessarily sated. Certainly, to know, in such a familiar way, such a complex story; to be able to guide the reader with such care and patience, this is a rare talent. Friedman walks his reader through the social and political contexts of Supreme Court decisions as if along a windowed corridor, occasionally throwing back the curtains to reveal a stunning scene, exposing a landscape both familiar and fantastic. These stories make for a good read but do not amount to a satisfying theory. I am a social scientist, meaning I am by pedigree prone to be skeptical. What's behind the curtains not opened? To convince me you need an explanation for why these selected vignettes make sense when linked together, that tells us something about the way human nature interacts with the incentives created by our government's structure to produce the history we observe. That is, you need a good theory. And so, although the book was quite satisfyingly complete after Chapter 10 for virtually

all of his readers, by adding the final chapter, Friedman has turned the book into a major contribution to social science.

Friedman's contribution is what he dubs the *dialogic* system of determining constitutional meaning (382). According to his thesis, the court and the public not only speak to one another, they *listen* to each other, with the court deferring to the public when they disagree.¹ The court is given some latitude granted by the public's ambivalence, but there are boundaries that it may not cross, where the constitution's meaning is pushed beyond the public understanding. In these circumstances, the court is rebuked, and recants submissively. Friedman's court is one that might defend minorities, unless majority consensus firmly wants marginalization or discrimination; and rather than shaping legislation to match its preferences, Friedman's court might resist weakly supported legislation or advance policy that already has a significant base of support in place. But Friedman makes clear that the court is not the paladin of liberty or usurper of democracy contrarily depicted in conventional theories of judicial review.

In order for us to believe that the people have the court by a leash, a dialogic theory of judicial review must address three critical details:

1. How the public leashes the court
2. How the court knows the length of its leash (necessary for the incentive to have force)
3. How this shapes the constitution, small-c: the document's meaning.

None of these three parts makes for an easy argument.

I.

The metaphorical leash is the disciplinary relationship between the public and the court. In the dialogic theory of judicial review, the court inhabits a world where its actions shape the law, but the court is also concerned with a supplemental effect: its actions have consequences for the welfare of the court's members. That is, the Friedman court is a rational and strategic actor;² its members weigh the costs and benefits of action, and consider the likelihood that their judgment will induce punishment, in this case by a watchful public. The court is constrained by its

¹ Others have noted the synchronicity between public opinion and the Supreme Court. See, for example, Dahl 1957, Murphy and Tanenhaus 1968, Funston 1975, Barnum 1985, Marshall 1989, Mishler and Sheehan 1993, Hoekstra 2000, Kramer 2004, and Friedman's own early analysis, 1993. Relatedly, Tanenhaus and Murphy 1981, Caldiera 1986, Caldiera and Gibson 1992, Mondak and Smithey 1997, and Gibson, Caldeira, and Spence 2003 trace the public support for the Supreme Court. However, none of these works provide a theory based on incentives to account for these observations.

² See Epstein and Knight 1998.

concern over this consequence; it will resist the short-term satisfaction of expressing its true legal or policy preferences to avoid being disciplined.

Note that this theory complements theories that explain the alignment between court and public in terms of the appointments process, where any deviants are weeded out during the executive office's vetting and Senate's confirmation hearings, so that only sympathetic judges are appointed.³ In either case, court/public concurrence can be explained. But the appointments process is not sufficient to explain the general agreeableness of the court when public sentiment changes much more quickly than the decades-long tenure of court personnel.⁴

If this induced restraint is important to the court's behavior, then the public must understand its role, agree to pick up the mantel and punish the straying court. And it must make the consequences clear to the court. That is, all agents subject to the mechanism, whether the actor Court or punisher Public, must understand that this is the game they are playing. In this model the public bears a great responsibility. It has an obligation to keep the court in line. How does the public develop this sense of responsibility? Does it have it?

The abstract analyses of game theorists probe how institutions shape behavior given particular assumptions. One assumption is that all of the agents in the model will participate. In the dialogic theory, that means that the public understands and accepts its role: when it sees the court step out of line, it has a choice to punish the court. It may also choose to let the slight go unpunished, of course, but the choice is active; there is intentionality in the public's decision. A model presumes that the actor understands its role and makes a choice.

How does the public, the citizens of this new nation, grow to embrace this role? One might think that the difficulty would be in getting the public to accept that it has the right to challenge the court. However, surveys indicate that while the public may know few details about what is written in the Constitution, they seem to have no trouble formulating an opinion about whether or not the court has acted appropriately in many cases,⁵ and we have no reason to suspect that the early American people, fresh from a revolution, would hesitate to appraise the court's performance.

³ See especially Dahl 1957.

⁴ Segal, Timpone, and Howard (2000) display the empirical weakness of Dahl's hypothesis; while appointees may start their tenure on the bench true to the preferences of the appointing president, over time they deviate significantly. Rohde and Shepsle (2007) show that an individual appointment has little effect on court decisions, further weakening a connection between appointments and court behavior.

⁵ See, eg, Hoekstra 2000, 2003, showing that the public, when informed, is able to formulate an opinion about court decisions.

Instead, the contrary may be true: it was possible that in the early years of the republic the public needed to be convinced that it should pay attention to the court: that the court's judgments mattered, and were therefore worthy of attention and punishment. It is only worthy of punishment if its decisions are meaningful; in order for the public to accept, and empower the court, they must grow to believe that the court is useful.⁶ If it is out of step with public desires then the public won't accord it the legitimacy necessary for its decisions to have weight.

If the court's power depends on its ability to convince the public to pay attention to it, and that attention depends on the public finding the court useful, consider what tools the court had at hand to catch the public's eye and prove its worth. Key to the public coming to accept the court's legitimacy in patrolling their central government, and eventually, themselves, is seeing that government, even when true to the democratic process, can go bad and the court can patrol it.⁷ It is much easier to approve of a decision finding fault with another state's legislation than one's own (even if a citizen doesn't like her own government very much). During its early history, the court concerned itself with the missteps of the state legislatures; when it turned its attention to the Congress, it often focused on federalism.⁸ In a federal system, the majority of the national public can witness the court striking legislation without feeling personally burned. Perhaps federalism can be credited as a catalyst establishing the court's legitimacy, attracting public attention, seeding public confidence in it, and fostering the public acceptance of judicial review.⁹ This hypothesis, implicitly suggested by Friedman, deserves further investigation.

II.

The second requirement of a complete theory is to account for the leash length, or, less metaphorically, to describe how the court might know just how far it can push its members' own preferences without punishment. As we've established,

⁶ Contrast the usefulness of the court to the public against Whittington's 2005 explication of the court as a tool of congressional minorities seeking to move beyond the policy status quo.

⁷ The emergence of systems with characteristics when the system's subcomponents that do not share those characteristics is a fundamental insight of complex systems research. See Vermeule 2009, making a similar point about the benefit to the democratic process of having nondemocratic components, and Bednar 2009, about the optimality of a federal constitutional design made up of complementary but imperfect institutional components.

⁸ Think of *McCulloch*, *Worcester*, *Dred Scott*, *Ex Parte McCordle*, and the *Slaughterhouse* cases.

⁹ If federalism was the instrument fostering the legitimacy of judicial review then we may see broader implications of Friedman's history---beyond the United States---as it can become a lesson for emerging democracies and the establishment of the rule of law, requiring an active and independent court.

Friedman's model is essentially one of threats and punishment, compliance coerced through negative reinforcement. In order for the court to be restrained, there must be some boundary that when crossed, triggers a punishing response. A basic requirement for this model is knowledge of the boundary's location, that is, the length of the leash, indicating the breadth of tolerance before the court is tugged back in line. On page 373 Friedman asks himself that difficult question: just how long is the court's leash? (Friedman actually writes "bungee cord", but I prefer not to think of Justice Kennedy hanging upside down under a bridge.) And it clearly is a tough question to answer, because Friedman doesn't do it in the book, and the court itself is forever getting it wrong, by misestimating public reaction or displaying a propensity for really bad timing, as with the *Lochner* era decisions, *Engel* (banning school prayer), *Miranda*---coinciding with a surge in crime---most recently *Citizens United*, and of course most notoriously, *Dred Scott*.

If we might come to be able to predict the length of the leash, it would be based upon the fracturing of the public. A controversial decision is not when the court bucks public opinion. When it does, the controversy is not over the decision, but instead over the court's role in the democratic process. A controversial decision is one that incites disagreement within the public about the appropriateness of the court's ruling. Such decisions can come as the logical extension of a doctrinal trend developed while the public wasn't watching. For example, the Roberts court has consistently ruled in favor of business interests, an inclination noted by close court watchers, but missed by the mainstream public. The majority decision in *Citizens United* is unsurprising given the court's expressed preferences. In complex areas of the law, like business regulation, the public may be more ambivalent, and the court has a longer leash. When the majority of the court has pro-business preferences, it meets little resistance as it builds a positive environment for business, unnoticed until it intersects with an issue that affects the public directly: campaign finance. The public will get involved in issues that affect them directly, such as abortion and eminent domain. With these issues they have an impression of what is right and wrong, and judge the court.

The *Citizens United* case underscores the importance of calculating the leash length. Reining in the court requires coordinated action, and that coordination can be tricky to devise with a diverse public. Sometimes the people are united, sometimes sharply divided (40-20-40), sometimes closely divided (50-50), and often ambivalent (20-60-20). It is unlikely that the court listens to them all the same. Intuitively, we might think that the leash is longest when the public is ambivalent, but under what conditions is it shortest? We are lead to believe that the threshold for public reprimand is set by public consensus, but can a well-organized, vocal minority steer the Court and shape constitutional meaning? A completed theory will evaluate these different conditions and offer predictions about the court's relative freedom from both public majorities and well-organized minorities.

Friedman describes how the court learned the length of its leash the hard way during the Warren and Burger courts, when the court was deterred in several

instances by the force of public opinion. Whatever the public did, or threatened to do, to the court during the years of the Warren and Burger Courts, Friedman notes that at present the people seem mighty willing to accept the court, even tolerating its most blasphemous mistakes, as with *Bush v Gore*. It seems the people have dropped the leash, but apart from a few larks, the puppy stays close. Why?

In theory, there are two possibilities: first, perhaps for some reason the people's punishment capacity has withered. If so, the beliefs of the credibility of punishment that sustain the equilibrium---the court's submission---will soon decay, causing the court to behave, well, as countermajoritarian as the myth recounts. Suppose that this has not happened. (It is so hard to tell, really!) If so, then there's a second possibility: the people have switched to positive reinforcement.

A model of positive reinforcement would work as follows: as long as the court's decisions sit well with the people, the people will respect it and expect their governments to be bound by the court's rulings. The court has legitimacy, its only sustenance. If on the other hand the court's decisions are not in accordance with public understanding, then the public will pay the court no more attention than if it were a wallflower at a junior high dance. (Yes, the court can stomp its feet and demand some sort of respect, but as every parent knows, this is not a winning strategy in the long run.) Legitimacy, in short, depends upon the court subscribing to popular constitutional interpretation, and so the court minds the public, even if the public would never actively correct it.

If this latter theory of positive reinforcement is more appropriate, it is worth asking whether this is a general developmental path, one that we might view elsewhere. As with the hypothesis of federalism contributing to the establishment of judicial review, this trend---the rise and then withering of popular punishment, replaced by reinforcement---may be part of Friedman's broader contribution to comparative social science.

III.

The final argument to be constructed in fully building the model of dialogic judicial review is to describe how the people/court relationship shapes the law. I will take this important component in two parts: the source of limitations on the law and the court's ability to influence public interpretation. Friedman's book set out to make one big point: the court sticks close to the people's notion of the Constitution's meaning; when the court channels the people the Constitution acquires meaning. On the more conventional constitutional theories we hear debates between legal scholars over the limits to the court's ability to stretch the words of the constitution, whether by deriving an original (and by implication fixed) meaning, or by reading the black letter of the text, or by deviating only to enhance the democratic process, and so forth. In the Friedman thesis, it is the public that determines the Constitution's meaning. Is the people's interpretation limited by the Constitution

itself? The non-interpretivists are chastised for their liberated approach to the Constitution, implying that there are some bounds on interpretation that are sacred, at least for law professors. Are the people similarly bound? That is, are there meanings that the people would like to ascribe to their Constitution, but the Constitution does not permit it? If so, who enforces it? And if it is the court, have we come to a contradiction in the theory?

The dialogic theory is framed as if the people were in control in order to highlight its difference from counter-majoritarian theories, but the descriptive word “dialogic” invokes mutual listening: a partnership. If we take this image seriously, then the court is not passive; it pulls the public toward its own vision of the law. What is the role of the court in guiding the public to resolve its ambivalence? When it steps in as umpire in a sharply divided public, does it shape the constitutional understanding of the losing side? When the public is ambivalent or divided, in theory the court’s ruling can be informative, helping the uninformed public to form an opinion, or it selects between plausible alternatives, weathering criticism until the losing section of the public acquiesces. In either case, it is the court that leads, and while in theory it might be corrected, in a world of limited information or insurmountable coordination difficulties, the court’s decision will stand, and shape the law.

Several empirical studies give us a sense of the possibility and limitation for the court to shape public constitutional understanding. Franklin and Kosaki (1989) study public opinion regarding the constitutional validity of abortion (equated to public acceptance) before and after the *Roe v Wade* decision. While public tolerance increased for abortions to protect maternal health, the public grew *more* divided over “discretionary” abortions than it was prior to the court’s ruling. Rather than educate and unify public opinion, the public’s prior ambivalence was transformed into sharp division. Hoekstra and Segal (1996) challenge these findings with an innovative study focusing on the impact of local decisions. They find that when the public is informed about the court’s decision, support for the court increases among those for whom the decision is relatively less salient. In Hoekstra’s subsequent research on the effect of “ordinary” decisions (2000, 2003), she finds little support for the court’s ability change public opinion, only that it builds or expends support for it as an institution with a public informed of its judgments. Finally, it is useful to note the distinction between law and policy, and how little the public thinks about the former even as it cares deeply about the latter. Ellsworth and Ross (1983), in a survey of Californian respondents’ attitude and information about capital punishment, found little correlation between the reasoning of the respondents and the reasoning of the Supreme Court, indicating that even if the public agrees with the court, it is not influenced by the court’s reasoning about the law, but instead with the policy implications of its decisions.

Evidence suggests that the public cares little about the shape of the law as long as they can get their preferred policy. The court scrambles to devise reasons---some plausible doctrine---to match constitutional interpretation to public opinion when that opinion is coherent enough to constrain the court. At a meta level,

constitutional consistency is necessary for the legitimacy of the union, and the court's job is to make our constitution appear consistent. At times the public asks for something that goes a bit too far, creating an inconsistency within the current trend in constitutional meaning as promulgated by the court.¹⁰ It is possible that the court pulls public constitutional understanding toward it and social scientists have not yet discovered a methodology to reveal unambiguous evidence of the court's power. It is more likely that the court shapes the law in areas where its leash is long, and the public never bothers to hear what the court is saying. It would seem that the dialogue is about policy, not the constitution's meaning.

I'll close with a pitch. *The Will of the People* is an impressive book, and I know that based on weight alone it must seem as if Barry Friedman has pretty much said all that there is to say on the subject. But really good social science doesn't close doors without opening others. Friedman hasn't topped off a research agenda: he's laid the foundations for a new one. By freeing us from the old conflict-based model of the court versus the public, he's invited us to think about how the court and the public might engage in a sort of conversation. They may even complement one another, by standing in where the other is vulnerable, and make one another more effective. We can use this new perspective to think freshly about the evolution of judicial review, and even about the holy grail, the sinuous path of law's development. The right tack is to approach the problem in pieces, perhaps by following up on some of the questions I've raised.

Of the three questions, Friedman gives us the greatest insight into the first question, about how the public leashes the court. My instinct is that federalism facilitated this transformation, although that perception could just be my glasses. But no matter what the proximate cause, somehow the people wrested power from the elites, and caused the court to listen to them. The story of the evolution of judicial review is not just about a change to the court's authority: it is about a transformation of us, the people of the United States.

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¹⁰ Sometimes the deviation lies outside of the public's immediate policy concern, such the US v Morrison case, where the court struck provisions of legislation designed to punish assaults of women due to its emerging, and much updated federalism doctrine.

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