

Response

The Dialogic Theory of Judicial Review: A New Social Science Research Agenda

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Introduction

For an institution designed to resolve disagreement, the United States Supreme 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 for minorities. Others point out the consequences of the Court's 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 have 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*,¹ Barry Friedman turns the debate inside out. For either side of the conventional debate to be right, the Court would need to defy the popular majority.² But as Friedman shows through a careful examination of the Supreme Court's full history, the Court hews closely to public will, rarely stray-

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¹ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

² *Id.* at 369–70.

ing from the public's side and never doing so for long.³ The Court bounds along, pulling and resisting, but generally it accepts the people's alpha status.⁴ 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 and to be able to guide the reader with such care and patience 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 is 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.⁵ 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.⁶

³ See *id.* at 370–72.

⁴ See *id.*

⁵ *Id.* at 382.

⁶ *Id.* at 381–84. Others have noted the synchronicity between public opinion and the Supreme Court. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652 (1985); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795 (1975); Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89 (2000); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357 (1968). For Friedman's own early analysis, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

Relatedly, other works trace the public support for the Supreme Court. See, e.g., Gregory

Public ambivalence grants the Court some latitude, but there are boundaries that it may not cross, where the Constitution's meaning is pushed beyond the public understanding.⁷ In these circumstances, the Court is rebuked and recants submissively.⁸ 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.⁹ 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.¹⁰

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 (which is necessary for the incentive to have force); and (3) how this behavior and knowledge shape the constitution (small "c"), i.e., the document's meaning.

None of these three parts makes for an easy argument. This Essay examines each of these components, describing what challenges each poses for social science theory.

I. The Emergence of Public Control of the Court

The metaphorical leash necessary for Friedman's thesis to hold 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.¹¹ That is, the Friedman Court is a rational and stra-

A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986); James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114 (1997); Walter F. Murphy & Joseph Tanenhaus, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24 (1981). None of these works, however, provides a theory based on incentives to account for these observations.

⁷ See FRIEDMAN, *supra* note 1, at 375–78.

⁸ See *id.* at 382–83.

⁹ See *id.* at 382 (stating that ideally the Court should ignore “popular opinion at the moment” and instead follow “permanent popular will,” but noting that this distinction is difficult for Justices to make).

¹⁰ See *id.* at 370.

¹¹ See *id.* at 371.

tegic actor;¹² 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.¹³ The Court is constrained by its concern over this consequence; it will resist the short-term satisfaction of expressing its true legal or policy preferences to avoid being disciplined.¹⁴

Note that this theory complements theories that explain the alignment between the Court and the public in terms of the appointments process, where any deviants are weeded out during the Executive's vetting and the Senate's confirmation hearings, so that only Justices sympathetic to public opinion are appointed.¹⁵ The appointments process, however, 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.¹⁶

If this induced restraint of public punishment is important to the Court's behavior, then the public must understand its role, agree to pick up the mantle, and punish the straying Court.¹⁷ The public must also make the consequences clear to the Court.¹⁸ 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.¹⁹ How does the public develop this sense of responsibility? Does it have it?

¹² See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998).

¹³ See FRIEDMAN, *supra* note 1, at 374–76.

¹⁴ See *id.* at 371. In fact, the leash metaphor perfectly illustrates the firmament of compliance theory, the subject of much of the author's prior scholarship. See, e.g., Jenna Bednar, *Is Full Compliance Possible? Conditions for Shirking with Imperfect Monitoring and Continuous Action Spaces*, 18 J. THEORETICAL POL. 347 (2006).

¹⁵ See, e.g., Dahl, *supra* note 6, at 284–85.

¹⁶ See David W. Rohde & Kenneth A. Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court*, 69 J. POL. 664, 668, 675 (2007) (showing that an individual appointment has little effect on Court decisions, further weakening a connection between appointments and Court behavior); Jeffrey A. Segal et al., *Buyer Beware? Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557, 567–69 (2000) (displaying 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 may deviate significantly).

¹⁷ Cf. FRIEDMAN, *supra* note 1, at 376.

¹⁸ See *id.*

¹⁹ Cf. *id.* (noting that the development and enforcement of constitutional meaning result from the relationship between the courts and the public).

The abstract analyses of game theorists probe how institutions shape behavior given particular assumptions.²⁰ One assumption is that all of the agents in the model will participate.²¹ In the dialogic theory, this 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.²² The public may also choose to let the slight go unpunished, of course, but the choice is active; there is intentionality in the public's decision.²³ The model presumes that the actor understands its role and makes a choice.²⁴

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. Surveys indicate, however, 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.²⁵ There is no reason to suspect that the early American people, fresh from a revolution, would hesitate to appraise the Court's performance.²⁶

Instead, the contrary may be true. It is possible that in the early years of the Republic, the public needed to be convinced that it should pay attention to the Court and the Court's judgments mattered broadly, beyond resolving the immediate dispute, and were therefore worthy of attention and punishment.²⁷ The Court is only worthy of

²⁰ See generally DREW FUNDENBERG & JEAN TIROLE, *GAME THEORY* (1991) (introducing the principles of noncooperative game theory); SHAUN P. HARGREAVES HEAP & YANIS VAROUFAKIS, *GAME THEORY: A CRITICAL INTRODUCTION* (1995) (discussing the basic assumptions of game theory); GRAHAM ROMP, *GAME THEORY: INTRODUCTION AND APPLICATIONS* (1997) (introducing game theory as an explanation for how interdependent individuals make rational decisions).

²¹ Cf. FUNDENBERG & TIROLE, *supra* note 20, at 541–42 (explaining that game theory assumes that all people involved are rational actors with common knowledge); HARGREAVES HEAP & VAROUFAKIS, *supra* note 20, at 23–25 (same).

²² See FRIEDMAN, *supra* note 1, at 376, 379.

²³ See *id.*

²⁴ See *id.*; cf. HARGREAVES HEAP & VAROUFAKIS, *supra* note 20, at 28 (noting that game theory assumes participants know all possible actions and their consequences and make decisions based on this knowledge).

²⁵ See, e.g., VALERIE J. HOEKSTRA, *PUBLIC REACTION TO SUPREME COURT DECISIONS* 150–51 (2003); Hoekstra, *supra* note 6, at 97–98. Both show that the public, when informed, is able to formulate an opinion about Court decisions.

²⁶ See FRIEDMAN, *supra* note 1, at 31.

²⁷ Cf. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 262, 268 (Roy P. Basler ed., 1953) (questioning the wisdom of relying on Supreme Court interpretations of constitutional questions and supporting the view that the Court's holdings bound only the parties before it, not the entire nation).

punishment if its decisions are meaningful; for the public to accept and empower the Court, it must grow to believe that the Court is useful.²⁸ If the Court is out of step with public desires, then the public will not accord it the legitimacy necessary for its decisions to have weight.²⁹

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 has at hand to catch the public's eye and prove its worth. The key to public acceptance of the Court's legitimacy in patrolling its central government, and eventually the people, is seeing that government, even when true to the democratic process, can go bad and that the Court can patrol it.³⁰ It is much easier to approve of a decision finding fault with another state's legislation than one's own (even if a citizen does not like her own government very much). During its early history, the Court concerned itself with the missteps of the state legislatures;³¹ when it turned its attention to the Congress, the Court often focused on federalism.³² 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 con-

²⁸ Contrast the usefulness of the Court to the public against Keith Whittington's 2005 explication of the Court as a tool of congressional minorities seeking to move beyond the policy status quo. See Keith E. Whittington, "Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 594 (2005).

²⁹ See FRIEDMAN, *supra* note 1, at 371.

³⁰ A fundamental project of complex systems research is to understand the conditions that cause systems to develop characteristics that none of its component parts possesses. See generally JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* (2009) (discussing the optimality of a federal constitutional design made up of complementary but imperfect institutional components); Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009) (making a similar point about the benefit to the democratic process of having nondemocratic components).

³¹ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436–37 (1819) (invalidating a state tax on all banks, including federally created ones, as contrary to the principles of federalism); FRIEDMAN, *supra* note 1, at 12–13.

³² See generally *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (limiting application of the Privileges or Immunities Clause of the Fourteenth Amendment to national citizenship); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (limiting the power to confer national citizenship to Congress); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (invalidating a state act exercising control over Cherokee Indians because the authority to interact with Native American tribes rests solely with the federal government); *McCulloch*, 17 U.S. (4 Wheat.) 316 (holding that a state tax on banks unconstitutionally impinged on Congress's powers under the Necessary and Proper Clause).

fidence in it, and fostering public acceptance of judicial review.³³ This hypothesis, which Friedman implicitly suggests, deserves further investigation.

II. *Establishing Boundaries on the Court's Independence*

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 established, Friedman's model is essentially one of threats and punishment, compliance coerced through negative reinforcement.³⁴ 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.³⁵ Friedman asks himself this difficult question: just how long is the Court's leash?³⁶ Clearly it is a tough question to answer because Friedman does not do it in the book, and the Court itself is forever getting it wrong—misestimating public reaction or displaying a propensity for really bad timing—as with the *Lochner*-era decisions,³⁷ *Engel v. Vitale*³⁸ (banning school prayer), *Miranda v. Arizona*³⁹ (coinciding with a surge in crime), most recently *Citizens United v. FEC*,⁴⁰ and, of course, most notoriously *Dred Scott v. Sandford*.⁴¹

If the length of the leash were predictable, 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 demo-

³³ If federalism were 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.

³⁴ See *supra* text accompanying notes 6–8.

³⁵ See FRIEDMAN, *supra* note 1, at 373–74.

³⁶ See *id.* at 373. Friedman actually writes “bungee cord,” *id.*, but I prefer not to think of Justice Kennedy hanging upside down under a bridge.

³⁷ See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 561–62 (1923) (striking down legislation that provided minimum wages for women); *Bailey v. Drexel Furniture Co. (Child Labor Tax Case)*, 259 U.S. 20, 43–44 (1922) (invalidating a federal tax imposed on entities that employ children); *Lochner v. New York*, 198 U.S. 45, 65 (1905) (striking down a law that limited the hours bakers could work).

³⁸ *Engel v. Vitale*, 370 U.S. 421 (1962).

³⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁰ *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

⁴¹ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

cratic process.⁴² A controversial decision is one that incites disagreement within the public about the appropriateness of the Court's ruling.⁴³ Such decisions can come as the logical extension of a doctrinal trend developed while the public was not watching. For example, the Roberts Court has consistently ruled in favor of business interests,⁴⁴ an inclination noted by close Court-watchers,⁴⁵ but missed by the mainstream public.⁴⁶ The majority decision in *Citizens United*⁴⁷ is unsurprising given this expressed preference. In complex areas of the law, like business regulation, the public may be more ambivalent. Public equivocation grants the Court a longer leash.⁴⁸ When the majority of the Court has probusiness 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.⁴⁹ The public will get involved in issues that affect it directly, such as abortion and eminent domain.⁵⁰ With these issues, the public has an impression of what is right and wrong and judges the Court according to these impressions.

Citizens United underscores the importance of calculating the leash length for both the public, who would like to avoid such unpopular judgments, and the Court, which prefers not to disappoint its public. Reining in the Court requires coordinated action, and that coordination can be tricky to devise with a diverse public.⁵¹ Sometimes the people are united, sometimes sharply divided (40/20/40), sometimes closely divided (50/50), and often ambivalent (20/60/20). It

⁴² See FRIEDMAN, *supra* note 1, at 5–7.

⁴³ See *id.* at 8–9.

⁴⁴ E.g., Adam H. Charnes & James J. Hefferan, Jr., *Mostly Pro-Corporation*, NAT'L L.J., Aug. 6, 2008, at 9; see, e.g., Jenéa M. Reed, Note, *In the Shadows of Lohr: The Disconnect Within the Supreme Court's Preemption Jurisprudence in Medical Device Liability Cases*, 64 U. MIAMI L. REV. 305, 329–30 (2009).

⁴⁵ See, e.g., Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38; David G. Savage, *High Court Is Good for Business*, L.A. TIMES, June 21, 2007, at A1.

⁴⁶ But see Robert Barnes & Carrie Johnson, *Pro-Business Decision Hews to Pattern of Roberts Court*, WASH. POST, June 22, 2007, at D1; Rosen, *supra* note 45.

⁴⁷ *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010) (holding that limitations on corporate funding of independent political broadcasts in candidate elections violate the First Amendment rights of corporations).

⁴⁸ See FRIEDMAN, *supra* note 1, at 377–78.

⁴⁹ See *id.*

⁵⁰ See *id.* at 378.

⁵¹ See generally ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS OF COLLECTIVE ACTION* (1990) (analyzing models of collective action); Douglas D. Heckathorn, *Collective Action and Group Heterogeneity: Voluntary Provision Versus Selective Incentives*, 58 AM. SOC. REV. 329 (1993) (discussing the role of heterogeneity in collective action).

is unlikely that the Court listens to the people in each of these circumstances in the same manner. Intuitively, it might seem that the leash is longest when the public is ambivalent, but under what conditions is the leash shortest? It appears 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 complete 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.⁵² 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 willing to forgive the Court even for controversial and significant decisions, as with *Bush v. Gore*.⁵³ 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 as countermajoritarian as the myth recounts. Suppose that this has not happened. (It is so hard to tell, really!) If it has not, then there is 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 the Court and expect their government to be bound by the Court's rulings.⁵⁴ The Court has legitimacy, its only sustenance.⁵⁵ If, on the other hand, the Court's decisions are not in accordance with public understanding, the public will pay the Court little attention. Legitimacy, in short, depends upon the Court subscribing to popular

⁵² See FRIEDMAN, *supra* note 1, at 254–58, 285–99.

⁵³ *Bush v. Gore*, 531 U.S. 98 (2000); see FRIEDMAN, *supra* note 1, at 358. The public accepted the Court's decision despite direction from one of the Justices that the public had a right to object to it. See *Bush v. Gore*, 531 U.S. at 542 (Stevens, J., dissenting) (“Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.”).

⁵⁴ See FRIEDMAN, *supra* note 1, at 374–77.

⁵⁵ See *id.*

constitutional interpretation, and so the Court minds the public, even if the public would never actively correct it.⁵⁶

If this latter theory of positive reinforcement is more appropriate, it is worth asking whether this is a general developmental path, one that might be viewed elsewhere. As with the hypothesis of federalism contributing to the establishment of judicial review,⁵⁷ 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 Implications for How Law’s Meaning Evolves

The final aspect to be constructed in fully building the model of dialogic judicial review is to describe how the Court’s relationship with the people shapes the law. This important component is addressed in two parts: first, the source of limitations on the law, and second, the Court’s ability to influence public interpretation. Friedman’s book sets 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.⁵⁸ On the more conventional constitutional theories, there are debates among 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, by reading the black letter of the text, or by deviating only to enhance the democratic process, and so forth. In Friedman’s thesis, it is the public that determines the Constitution’s meaning.⁵⁹ Is the people’s interpretation limited by the Constitution itself? The noninterpretivists 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 them? If so, who enforces it? If it is the Court, is there a contradiction in the theory?

The dialogic theory is framed as if the people were in control in order to highlight its difference from countermajoritarian theories, but the descriptive word “dialogic” invokes mutual listening, or a partner-

⁵⁶ *Id.* at 376.

⁵⁷ *See supra* notes 31–33 and accompanying text.

⁵⁸ *See* FRIEDMAN, *supra* note 1, at 14–15.

⁵⁹ *See id.*

ship.⁶⁰ If this image is taken 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 between 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 form an opinion, or it selects between plausible alternatives, weathering criticism until the losing section of the public acquiesces.⁶¹ 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 will shape the law.

Several empirical studies give us a sense of the possibility for and limitation on the Court's ability to shape public constitutional understanding. Charles Franklin and Liane Kosaki studied public opinion regarding the constitutional validity of abortion (equated to public acceptance) before and after the *Roe v. Wade*⁶² decision.⁶³ 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.⁶⁴ Rather than inform and unify public opinion, the Court's decision transformed the public's prior ambivalence into sharp division.⁶⁵ Valerie Hoekstra and Jeffrey Segal challenged these findings with an innovative study focusing on the impact of local decisions.⁶⁶ 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.⁶⁷ In Hoekstra's subsequent research on the effect of "ordinary" decisions—those which do not attract the media's attention—she finds little support for the Court's ability to change public opinion—only that it builds or expends support for the Court as an institution with a public informed of its judgments.⁶⁸ 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

⁶⁰ See *id.* at 384.

⁶¹ See *id.* at 382–84.

⁶² *Roe v. Wade*, 410 U.S. 113 (1973).

⁶³ Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989).

⁶⁴ See *id.* at 761–62.

⁶⁵ See *id.* at 768.

⁶⁶ Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The Supreme Court and Lamb's Chapel*, 58 J. POL. 1079 (1996).

⁶⁷ See *id.* at 1089, 1092.

⁶⁸ HOEKSTRA, *supra* note 25, at 154–55; Hoekstra, *supra* note 6, at 98.

about the latter. Phoebe Ellsworth and Lee Ross, in a survey of Californian respondents' attitudes and information about capital punishment, found little correlation between the reasoning of the respondents and the reasoning of the Supreme Court.⁶⁹ The study indicated that even if the public agrees with the Court, it is influenced not by the Court's reasoning about the law, but instead by the policy implications of the Court's decisions.⁷⁰

Evidence suggests that the public cares little about the shape of the law as long as it can get its preferred policy.⁷¹ 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.⁷² 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.⁷³ 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.⁷⁴ 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, however, 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.⁷⁵ It would seem that the dialogue is about policy, not the Constitution's meaning.⁷⁶

Conclusion

This Essay closes 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 does not close doors without

⁶⁹ Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 *CRIME & DELINQ.* 116, 135 (1983).

⁷⁰ *See id.* at 148–49, 165.

⁷¹ *See, e.g., id.*

⁷² James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 *BYU L. REV.* 1037, 1043–47.

⁷³ *See, e.g., id.* at 1044.

⁷⁴ Sometimes the deviation lies outside of the public's immediate policy concerns, such as in *United States v. Morrison*, 529 U.S. 598 (2000), where the Court struck down provisions of legislation designed to punish assaults of women due to its emerging and much-updated federalism doctrine, *see id.* at 626–27.

⁷⁵ *See* FRIEDMAN, *supra* note 1, at 377–78.

⁷⁶ *See, e.g.,* HOEKSTRA, *supra* note 25, at 154–55.

opening others. Friedman has not topped off a research agenda; he has laid the foundations for a new one. By freeing us from the old conflict-based model of the Court versus the public, he has 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 making 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 this Essay raises.

Of the three components of the dialogic system, Friedman gives us the greatest insight into the first part: 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 also about a transformation of the people of the United States.