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THE SUPREME COURT, JUDICIAL REVIEW, AND THE PUBLIC: LEADERSHIP VERSUS DIALOGUE*

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[T]he most interesting thing about the great flag-burning debate of the late 1980s would be how quickly that debate evaporated. . . .

. . . I can't even remember what my own opinion was on the flag issue, though I remember I had a strong one.

—P.J. O'Rourke¹

In his article, *Dialogue and Judicial Review*,² Barry Friedman poses a trenchant challenge to some received wisdom of American constitutional law. Much constitutional discourse is predicated on the assumption that the United States Supreme Court is a counter-majoritarian institution, and normative theories supporting the exercise of judicial review are seen, by some, as having to accommodate that fact. Many writers make this accommodation by showing that the other branches of government are not majoritarian.³ Friedman takes a different tack. According to Friedman, the assumption of counter-majoritarianism is wrong, for there are several indicia that the Court is a majoritarian political institution and in particular that it does respond to, and in turn influences, public opinion.

Thus, as Friedman notes, the Court sometimes makes reference to legislative enactments among the various states when

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1. P.J. O'Rourke, *Parliament of Whores: A Lone Humorist Attempts to Explain the Entire U.S. Government* 77 (Atlantic Monthly Press, 1991).

2. 91 Mich. L. Rev. 577 (1993).

3. See Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* 28-30 (Yale U. Press, 1990).

rendering a decision;⁴ “[p]ublic opinion polls establish that, contrary to common thought, judicial decisions often garner substantial public support”;⁵ and polls show that the public, in general, holds the Court in high regard.⁶ Moreover, the public can indirectly influence judicial decisions through the appointment process, since Presidents usually nominate Justices with compatible ideologies.⁷ In short, “[t]he Court facilitates and shapes the constitutional debate”⁸ since its decisions are generally consistent with, and to some extent formative of, the public’s views of the issues which reach the Court.

Friedman’s contribution to our understanding of constitutional law is important because it focuses on the supposed empirical underpinnings of the counter-majoritarian assumption. Unfortunately, we think that Friedman’s use and interpretation of social science data is partially flawed. That data is more complex and nuanced than he indicates, and this fact calls into question the breadth of some of the conclusions he reaches.⁹

First, the polling data with respect to public support of particular decisions is, at best, equivocal. As Friedman himself notes, with some cases, such as the flagburning decisions of 1989 and 1990,¹⁰ solid majorities of the public seem to be *opposed* to the results.¹¹ Many other decisions, in contrast, receive support in the polls. But on the whole, the data does not tell us much. The leading work is that of Thomas Marshall, who has associated the results of 139 decisions in fully argued Court cases to nationwide polls on those cases. Of that number, about 55% were consistent with the will of the majority as revealed by the poll.¹² This percentage is hardly awe-inspiring, and may, in fact, just as easily

4. Friedman, 91 Mich. L. Rev. at 597 (cited in note 2). The best example is the Court’s death penalty jurisprudence.

5. *Id.* at 607.

6. *Id.* at 624.

7. *Id.* at 675-76.

8. *Id.* at 654.

9. To be sure, Friedman frames his article as a response to the legal community, and not to political scientists as such. *Id.* at 586 n.41. Nonetheless, his project is explicitly a descriptive one, and he refers at several points to studies by political scientists, including a number discussed in this paper. *Id.* at 624 n.235 (citing works by Marshall and Caldeira and Gibson). Thus, we are evaluating him on his own terms.

10. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

11. Friedman, 91 Mich. L. Rev. at 605-06 (cited in note 2).

12. Thomas R. Marshall, *Public Opinion and the Supreme Court* 71-79 (Unwin Hyman, 1989) (data from 1935-1986) (“*Supreme Court*”) (if “unclear” decisions are not included, agreement rises to 63% in the years 1935-86); Thomas R. Marshall, *Public Opinion and the Rehnquist Court*, 74 *Judicature* 322 (1991) (data from 1986-1990) (“*Rehnquist Court*”).

be used to demonstrate a *lack* of public support for the Court's decisions. There are also several other problems attendant to such associations: only a tiny fraction of Court decisions have been studied, and the polling questions themselves, of necessity, often oversimplify the holding of a case.¹³ Moreover, the vast majority of Court decisions escape the scrutiny of public opinion polls entirely.

It may be true that the polls tell us that the Court possesses relatively high levels of public prestige and support, especially as compared with other American institutions.¹⁴ One recent study found a high correlation over the past three decades between the ideological mood of the public and *all* Court decisions, when the latter are categorized as either liberal or conservative.¹⁵ But here, too, the evidence is equivocal. The Court's public support has declined during periods, such as the Warren era, when the Court rendered controversial decisions, some of which engendered significant public opposition.¹⁶ Likewise, the Court's public support is largely diffuse and, with the exception of opinion leaders, seems largely divorced from the satisfaction of particular policy preferences.¹⁷ One might say that the Court receives the most public support just when it needs it the least.

Finally, we think that Friedman's metaphor of an interactive dialogue between the Court and public is, at best, incomplete. He envisions the Court as rendering decisions, which generate reaction among attentive publics, such as Congress. Congress might then make laws which, in turn, may be subject to legal challenge and eventually reach the Court again. The Court may thus be viewed as synthesizing and focusing the debate over important public issues, and as placing issues on the policy agenda.¹⁸

This normatively appealing vision, taken at its broadest, is premised on several unrealistic assumptions. The public at large is uninformed about the Court or its decisions, and indeed large

13. Gregory A. Caldeira, *Courts and Public Opinion*, in John B. Gates and Charles A. Johnson, eds., *The American Courts: A Critical Assessment* 303, 304-13 (Congressional Quarterly Press, 1991).

14. Marshall, *Rehnquist Court* at 326 (cited in note 12).

15. William Mischler and 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).

16. Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 *Am. Pol. Sci. Rev.* 1209 (1986).

17. Gregory A. Caldeira and James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 *Am. J. Pol. Sci.* 635, 658-59 (1992).

18. Friedman, 91 *Mich. L. Rev.* at 669-70 (cited in note 2).

segments of the public possess *incorrect* knowledge about Court decisions.¹⁹ Much of the blame can probably be assigned to the news media, whose reporting on court decisions is almost invariably dominated by sound bites.²⁰ But some of the blame might also rest with members of the other branches of government who distort the Court's decisions for political gain.

Friedman's principal example²¹ of the Court as a facilitator of debate, *Roe v. Wade* and its progeny, is not a compelling one. Whatever else one thinks about the decision, the dialogue it set off seems to have, to this day, largely polarized the public over the entire abortion issue. That is, especially with regard to the legality and public funding of discretionary abortions, the pro-life and pro-choice factions appeared to have hardened their respective positions.²² The dialogue metaphor is also weakened by the lack of any apparent direct causal mechanism between the Court and the public. To be sure, there are indirect mechanisms identified by Friedman, such as the appointment of Justices by like-minded Presidents. Similarly, any judge is a product of her environment, and surely social and political mores, which change over time, are reflected in the Justice's decisions in cases.

But having said that, there is little or no explicit recognition in the Court's decisions that public opinion, or previous or anticipated public reaction, is a driving force. In some areas, substantive doctrines are informed by indicia of public sentiment.²³ But

19. Marshall, *Supreme Court at 142-46* (cited in note 12). Compare Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. Rev. 961, 1007-10 (1992) (arguing that at least some of public is competent enough to engage in dialogue with the Court); Charles H. Franklin, Liane C. Kosaki and Herbert M. Kritzer, *The Salience of U.S. Supreme Court Decisions* 25 (delivered at annual meeting of the American Political Science Association, Washington, D.C., Sept. 2-5, 1993) (on file with authors) (new polling data shows that "[t]he picture of the public as minimally aware and generally ignorant of the Court's actions is . . . simply wrong.").

20. Elliot E. Slotnick, *Media coverage of Supreme Court decision making: problems and prospects*, 75 *Judicature* 128 (1991). Elliot E. Slotnick and Jennifer A. Segal, *Television News and the Supreme Court* (delivered at annual meeting of the American Political Science Association, Chicago, Sept. 3-6, 1992) (on file with authors).

21. Friedman, 91 *Mich. L. Rev.* at 647-48, 658-68 (cited in note 2).

22. Charles H. Franklin and Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 *Am. Pol. Sci. Rev.* 751 (1989). For similar conclusions drawn about the abortion debate, see Ruth Colker, *Abortion & Dialogue: Pro-Choice, Pro-Life, and American Law* 114-25 (Ind. U. Press, 1992); Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 164-68 (The Free Press, 1991); Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 175-77 (Oxford U. Press, 1988). It was precisely her view that *Roe v. Wade* may have had this effect that has raised questions about Ruth Bader Ginsburg's commitment to abortion rights. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. Rev.* 375, 381-86 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 *N.Y.U. L. Rev.* 1185, 1199-1209 (1992).

23. Friedman, 91 *Mich. L. Rev.* at 597 (cited in note 2).

the vast majority of opinions make no allusion to this factor.²⁴ Indeed, the Court will often take pains to point out that the law demands a result, irrespective of popular will.²⁵ And, as in a *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁶ sometimes the Court seems to be explicitly *leading*, rather than following, the public.²⁷ It is difficult to demonstrate, in any sort of systematic way, that public opinion influences Court decision-making.²⁸

Despite our reservations, we agree with Friedman's broad conclusions. But we think the overall data about public opinion leads to a restatement of the problem. Majoritarianism is not a dichotomous variable, but is instead continuous. It is dangerous for any branch, elected or not, to be too majoritarian. In our political culture, references are often made to the "tyranny of the majority."²⁹ Over time, over generations,³⁰ the Court is as majoritarian as any other branch of government is, or ought to be. One of the functions of leadership is to create new majorities, and the Court has a leadership role as important as that of any other branch of government, as measured by public support and acceptance (or acquiescence) in its decisions.

Shifting majorities of the public do disagree with many decisions, to the extent they perceive them, or are simply ignorant of

24. See Marshall, *Supreme Court* at 31-55 (cited in note 12); Marshall, *Rehnquist Court* at 327-28 (cited in note 12).

25. Examples are legion. One relevant one is *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.").

26. 112 S.Ct. 2791 (1992).

27. *Id.* at 2816 (Opinion of O'Connor, Kennedy, and Souter, JJ.) (Court will "speak before all others for [the American people's] constitutional ideals."). Cf. *id.* at 2882 (Scalia, J., concurring in the judgment in part and dissenting in part) (characterizing this language as a "Nietzschean vision of us unelected, life-tenured judges—leading a Volk. . .").

28. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 240 (Cambridge U. Press, 1993).

29. The term tyranny of the majority is often associated with the 19th century de Tocqueville, but it actually dates as far back, at least, as the debates over ratification of the Constitution. ("A bill of rights . . . serves to secure the minority against the usurpation and tyranny of the majority. . . . [E]xperience . . . has proved the prevalence of a disposition to use power wantonly. It is therefore as necessary to defend an individual against the majority in a republic as against the king in a monarchy.") Winthrop, the Letters of Agrippa, XVIII (1788), in *Essays on The Constitution of the United States* 115, 117 (P. Ford ed. 1892 & photo. reprint 1970), quoted in *Introduction*, in *The Antifederalists* xciii (Cecelia M. Kenyon ed., Bobbs-Merrill, 1966).

30. See Frank H. Easterbrook, *Bills of Rights and Regression to the Mean*, 15 Harv. J. Law & Pub. Pol'y 71, 72-73 (1992).

the great mass of the Court's jurisprudence.³¹ But this is also true of many decisions of the House of Representatives, arguably (at least by design) the most majoritarian of the branches. As just one example, it has been widely reported that a high percentage of the public favors some sort of federal law controlling handguns. Such legislation never gets out of committee.³²

Recent developments, such as the continued salience of the abortion issue, and the nominations of Robert Bork and Clarence Thomas,³³ may well raise public consciousness of the activities of the Court as many interest groups appear to seek to capture it for their own purposes. Ironically, while we think the data available is inconclusive, it might well be that the public in the future will demand an even more majoritarian Court, perhaps to our deep regret.³⁴

31. As Friedman points out, some of his discussion is akin to a dialogic vision of the Court's statutory interpretation jurisprudence and the response of Congress. Friedman, 91 Mich. L. Rev. at 581 n.16 (cited in note 2). In that regard, it is worth noting that many congressional overrulings of statutory cases are driven by interest groups. Michael E. Solimine and James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 Temp. L. Rev. 425, 449 (1992).

32. See Felicity Barringer, *Majority in Poll Back Ban on Handguns*, N.Y. Times, June 4, 1993, at A14. See generally Benjamin I. Page and Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 Am. Pol. Sci. Rev. 175 (1983).

33. See L. Marvin Overby, et al., *Courting Constituents? An Analysis of the Senate Confirmation Vote on Justice Clarence Thomas*, 86 Am. Pol. Sci. Rev. 997 (1992); Kathleen Frankovic and Joyce Gelb, *Public Opinion and the Thomas Nomination*, 25 PS 481 (1992).

34. Cf. Caldeira & Gibson, 36 Am. J. Pol. Sci. at 659 (cited in note 17) ("To the extent that the Court becomes politicized or perceived as such, it risks cutting itself off from its natural reservoir of goodwill and may become reliant for basic institutional support on those who profit from its policies").