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Gerald N. Rosenberg

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## THE WONDER OF IT ALL

Gerald N. Rosenberg\*

Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus & Giroux 2009). Pp. 624. \$35.00.

Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789-2008* (Harvard U. Press 2009). Pp. 432. \$29.95.

What wonderful books! Barry Friedman and Lucas (Scott) Powe have produced books that belong on the bookshelves of anyone interested in constitutional history and the role of the U.S. Supreme Court in the United States. The books are well written (in the case of Powe, beautifully written) and studded with fascinating, sometimes delightful, historical tidbits. I took pages of notes that will enrich my lectures for years to come. These books have clear arguments, are well organized, and are easy to follow. Both authors are extremely well read, not only in the work of legal academics, but also, and more importantly, in parts of the political-science literature on the role of the U.S. Supreme Court. And yet, for all their considerable virtues, these books break no new ground. Their theoretical arguments rehearse those made at least a half century ago, if not earlier, and they suffer from all the same methodological and analytic faults as those works. The wonder of these books is why the authors expended so much effort to reproduce such well-known arguments. In the pages that follow, I briefly summarize the arguments and the methodology, highlight some weaknesses, and then place the books in the larger literature to wonder why these books have appeared now.

### THE AIMS AND ARGUMENTS

It is not possible to do justice to works of such depth and scholarship in this essay. The shorter Powe book is merely 350 pages of substantive text (387 pages with notes), while Friedman's opus contains 385 pages of text and a whopping 203 pages of footnotes! Acknowledging this limitation, a brief summary is important to provide a basis for understanding my concerns and wonder.

The key argument of both books is that the U.S. Supreme Court does not stand apart from the rest of the government and the society in which it operates. Rather, it reflects the views of the society at large. "This book," Powe writes, "is a history of the Supreme Court, placed within the context of a broader history of the United States and

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\* Department of Political Science and Law School, University of Chicago.

its politics.”<sup>1</sup> Chronicling that history, Powe’s “dominant theme is that the Court is a majoritarian institution.”<sup>2</sup> Three hundred fifty pages later, in the last sentence of the book, he reminds the reader of that theme, confidently predicting that “the Court will continue to function as it has for most of its existence to harmonize the Constitution with the demands of majoritarian politics.”<sup>3</sup> For Powe, as his title suggests, majoritarianism is filtered through political elites. He approaches the Court as “a part of a ruling regime doing its bit to implement the regime’s policies.”<sup>4</sup> So, for example, in discussing *McCulloch v. Maryland*,<sup>5</sup> he writes: “Because each member of the Virginia dynasty - Washington, Jefferson, Madison, and Monroe believed that implied powers authorized chartering a bank, it was totally unreasonable to think that the justices would come to the opposite conclusion.”<sup>6</sup> His book is a study of the interests and demands of political elites and how the Court works with them to further their interests.

Similarly, Friedman’s aim is to provide a “chronicle of the relationship between the popular will and the Supreme Court as it unfolded over two hundred-plus years of American history.”<sup>7</sup> In that chronicle “the chief protagonists are the American people.”<sup>8</sup> In Friedman’s view, whatever power the Supreme Court has is given by the people: “To the extent that the judges have had freedom to act, it has been because the American people have given it to them. Judicial power exists at popular dispensation.”<sup>9</sup> But the “people” who dispense power can also take it back. If the Court deviates from majoritarian views, it will be disciplined. For example, writing of the current Roberts Court, Friedman states, “the long-run fate of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line.”<sup>10</sup> This is because “[w]hat history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*.”<sup>11</sup> It is the “will of the people” that both empowers and constrains the Supreme Court.

A crucial implication of both books is that the Court is not countermajoritarian. That is, because its decisions are in line with the preferences of political elites (Powe) or majority views (Friedman), the Court’s decisions reflect widely held societal views rather than constrain or impose on them. Friedman explicitly addresses this point, writing that “[h]istory makes clear that the classic complaint about judicial review that it

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1. Lucas A. Powe, Jr., *The Supreme Court and the American Elite, 1789-2008*, at viii (Harvard U. Press 2009).

2. *Id.* at ix.

3. *Id.* at 350.

4. *Id.* at ix.

5. *McCulloch v. Md.*, 17 U.S. 316 (1819).

6. Powe, *supra* n. 1, at 69.

7. Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 4 (Farrar, Straus & Giroux 2009).

8. *Id.* at 16.

9. *Id.* at 370. *See also id.* at 9 (“We have the Court we do because the American people have willed it to be so.”); *id.* at 367 (“Ultimately, it is the people (and the people alone) who must decide what the Constitution means.”); Friedman, *supra* n. 7, at 385 (“[W]hen it comes to the Constitution, we are the highest court in the land.”).

10. *Id.* at 369.

11. *Id.* at 382.

interferes with the will of the people to govern themselves - is radically overstated.”<sup>12</sup>

#### WRITING AND RESEARCH

The scholarship reflected in these two books is extraordinary. *The Will of the People* alone has more than 3,100 footnotes! Both authors rely on primary-source materials mostly newspapers of the day, congressional debates, and, sometimes, the correspondence of political elites. In addition, both authors have an eye for the poignant anecdote and colorful phrase, which makes reading them a delight. For example, in describing some of the press reaction to congressional legislation removing Court jurisdiction to hear the *McCardle* case,<sup>13</sup> Friedman quotes from *The Independent* which described “‘that little bill which put a knife to the throat of the *McCardle Case*’ ” as a “‘splendid performance.’ ”<sup>14</sup> The Powe book in particular is beautifully written, studded with memorable phrases and colorfully told stories. For example, in describing the Southern view of the Fourteenth Amendment, Powe writes that “the ex-Confederates accepted the Fourteenth Amendment as willingly as the Germans would agree to the Treaty of Versailles fifty years later.”<sup>15</sup> Noting the claim that the Court is influenced by election returns, Powe points out that it is “easier for the Court to follow the election returns if several justices die or retire shortly after the election.”<sup>16</sup> Considering the effect of the abortion issue on party politics in the wake of *Casey*,<sup>17</sup> Powe writes that “*Roe* remained the gift that keeps on giving to Republicans.”<sup>18</sup> And most poignantly, after the Supreme Court ordered the desegregation of Central High School in Little Rock, Arkansas, in *Cooper v. Aaron*,<sup>19</sup> Powe recalls that Arkansas Governor Oral Faubus ordered the Little Rock schools shut for the year, “although Central’s reigning state championship football team was allowed to play out its schedule because, as Faubus noted, cancellation would be ‘a cruel and unnecessary blow to the children.’ ”<sup>20</sup>

#### THE PRECURSORS

As delightful as they are to read, the main arguments that these books offer are not new. They were made, albeit with substantially less detail, over half a century ago, most notably by Robert Dahl and Robert McCloskey. And their essential insight goes back at least a century. Indeed, in 1901, Finley Peter Dunne’s fictional character, Mr. Dooley, opined that “th’ supreme coort follows th’ iliction returns.”<sup>21</sup> Writing in 1937, in the wake of the Court’s capitulation to the New Deal, then Professor Felix Frankfurter wrote to Justice Harlan Stone, “I must confess I am not wholly happy in thinking that Mr.

12. *Id.* at 9.

13. *Ex parte McCardle*, 74 U.S. 506 (1868).

14. Friedman, *supra* n. 7, at 132 (quoting *The Independent* (publication data unknown) (as quoted in Charles Warren, *The Supreme Court in United States History* vol. 3, 199 (Little, Brown & Co. 1922))).

15. Powe, *supra* n. 1, at 124-125.

16. *Id.* at 194.

17. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

18. Powe, *supra* n. 1, at 311 (referencing *Roe v. Wade*, 410 U.S. 113 (1973)).

19. *Cooper v. Aaron*, 358 U.S. 1 (1958).

20. Powe, *supra* n. 1, at 246.

21. Finley Peter Dunne, *The Supreme Court’s Decisions*, in *Mr. Dooley’s Opinions* 21, 26 (R.H. Russell 1901).

Dooley should, in the course of history turn out to have been one of the most distinguished legal philosophers.”<sup>22</sup>

In 1957, Yale democratic theorist Robert Dahl examined whether the Supreme Court acts as a protector of minorities against majorities.<sup>23</sup> He concluded that it did not. “By itself,” Dahl wrote, “the Court is almost powerless to affect the course of national policy.”<sup>24</sup> Dahl provided two reasons. First, he calculated the average number of months between appointments, finding it to be twenty-two months.<sup>25</sup> Thus, on average, a one-term president historically would likely have two appointments and a two-term president would likely have four. Unless presidents chose poorly, the new Justices would likely reflect the policy views of the president and the political coalition that elected him. This meant, Dahl concluded, that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”<sup>26</sup> Further, Dahl examined how Congress responded to Court decisions invalidating congressional acts. His conclusion was that if Congress cared about the substantive issue at hand, it could pass similar legislation that, historically, the Court would uphold. Dahl’s overall conclusion was that “the Supreme Court is inevitably a part of the dominant national alliance.”<sup>27</sup>

In 1960, Robert McCloskey published *The American Supreme Court*.<sup>28</sup> In this book, which Friedman describes as “justly famous”<sup>29</sup> and Powe views as “[t]he best single volume on the Court and American history,”<sup>30</sup> McCloskey presents a historical overview of the role of the Court. He argues that the “Court learned to be a political institution and to behave accordingly.”<sup>31</sup> What he means by this is that the Court learned to be politically sensitive, changing as political understandings changed. As McCloskey put it, “the Court’s whole history can be viewed as a constant, or at least repeated, readjustment of role to suit the circumstances of each succeeding judicial era.”<sup>32</sup> McCloskey saw this occurring in two ways. First, the Court pretty much follows public opinion. The Court, McCloskey wrote, has “seldom lagged far behind or forged far ahead of America” and has “seldom strayed very far from the mainstreams of American life.”<sup>33</sup> Indeed, he writes that “it is hard to find a single historical instance when the

22. David M. O’Brien, “*The Imperial Judiciary*”: *Of Paper Tigers and Socio-Legal Indicators*, 2 J.L. & Pol. 1, 22 (1985) (quoting Ltr. from Felix Frankfurter, Prof., Harv. L. Sch., to Harlan Stone, J., U.S. S. Ct. (Oct. 15, 1937) (available in Lib. Cong., Manuscript Div., Stone Papers, Frankfurter File)).

23. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*, 6 J. Pub. L. 279, 293 (1957).

24. *Id.* at 293.

25. *Id.* at 284. As of the end of 2010, the number of months between appointments has increased since 1957 to approximately thirty-one months for the twenty-one Justices appointed since then. This means that a one-term president is likely to have at least one appointment and a two-term president is likely to have two or three appointments, typically enough to sway the ideological direction of the Court.

26. *Id.* at 285.

27. *Id.* at 293.

28. Robert G. McCloskey, *The American Supreme Court* (5th rev. ed., U. Chi. Press 2010).

29. Friedman, *supra* n. 7, at 11.

30. Powe, *supra* n. 1, at viii.

31. McCloskey, *supra* n. 28, at 261.

32. *Id.* at 70.

33. *Id.* at 261.

Court has stood firm for very long against a really clear wave of public demand.”<sup>34</sup> The public gets what it wants because “[a]t no time in its history had the Court been able to maintain a position squarely opposed to a strong popular majority.”<sup>35</sup> Second, the Court has a developed sense of its own limitations. The “Court’s own strength rest[s] on a tradition of judicious self-restraint,”<sup>36</sup> or “a lively sense of its own limitations.”<sup>37</sup> At bottom, the Court has realized the truth of what Alexander Hamilton in *Federalist 78*<sup>38</sup> wrote long ago, that it lacks power: “the Court’s decrees are backed only by its own prestige and ultimately by the willingness of the president to help enforce them.”<sup>39</sup> In the end, then, McCloskey concludes that “the facts of the Court’s history impellingly suggest a flexible and nondogmatic institution fully alive to such realities as the drift of public opinion and the distribution of power in the American republic.”<sup>40</sup> And, in practice, this means that “[t]he great fundamental decisions that determine the course of society must ultimately be made by society itself.”<sup>41</sup>

Finally, Martin Shapiro, in a seminal work published in 1981, pointed out that “[n]o regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints.”<sup>42</sup> Pointing to “many” of the Court’s controversial “race and religion decisions,” for example, he wrote that one of the main roles of appellate courts, including the U.S. Supreme Court, is as the “imposer of national uniformity over local diversity.”<sup>43</sup> Thus, Shapiro argues, courts that appear countermajoritarian are more likely bringing policy outliers up to national standards.

As noted, both Powe and Friedman acknowledge and admire McCloskey’s work. Clearly, their books are richer, more detailed, and more colorful than McCloskey’s.<sup>44</sup> And each author differentiates his work from McCloskey’s. Powe points out that “McCloskey’s masterpiece was written when the New Deal dominated thinking about the functions of the judiciary.”<sup>45</sup> Thus, McCloskey viewed the Court primarily as “an enemy or competitor of the other two branches of government”<sup>46</sup> rather than as part of the ruling regime. Friedman faults McCloskey for failing to “grapple with just how judicial power ha[s] been sculpted by those very instances in which the justices did in fact overestimate their own power.”<sup>47</sup> As my brief summary of McCloskey’s argument shows, neither claim is fully persuasive.

34. *Id.* at 260. *See also id.* at 14 (“[T]he Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment.”).

35. McCloskey, *supra* n. 28, at 131.

36. *Id.* at 112.

37. *Id.* at 60.

38. Alexander Hamilton, *Federalist No. 78*, in Alexander Hamilton, James Madison & John Jay, *The Federalist Papers* 463 (Clinton Rossiter ed., Signet Classic ed., New Am. Lib. 1999).

39. McCloskey, *supra* n. 28, at 37.

40. *Id.* at 260.

41. *Id.* at 60.

42. Martin A. Shapiro, *Courts: A Comparative and Political Analysis* 34 (U. Chi. Press 1981).

43. *Id.* at 28.

44. In fairness to McCloskey, the Powe book is 131 pages longer and the Friedman book is 256 pages longer, not including the 203 pages of footnotes.

45. Powe, *supra* n. 1, at ix.

46. *Id.*

47. Friedman, *supra* n. 7, at 11.

## THE SINS OF THE FATHERS

The methodological approach of both books, like that of McCloskey, is flawed in at least four distinct ways. First, both authors reify the Court, projecting onto it an intelligence and a farsightedness that treat nine Justices, or at least five, as one person. But Court decisions are the aggregation of individual decisions. The Court does not react to elites or public opinion, anticipate the future actions of other branches, or act to protect itself from reprisals. It does not plan or act strategically. Individual Justices might do all of these things and, combining together, act in concert, but that is a far cry from treating the Court as a unitary actor with a mind and intelligence of its own. Reifying the Court overemphasizes its predictability and understates the contingencies of individual decision making.

The analytic categories on which both Powe and Friedman rely are imprecise. For most of American history there has been no way to measure the views of the American majority with any degree of certainty. Even with the advent of sophisticated public opinion survey research in the mid-twentieth century, it is difficult if not impossible to state with confidence the views of the American public to which the Court adheres. Problems with doing so are legion, ranging from ill-informed and changing views to differences in the intensity of preferences to methodological tricks with question wording and order. Often, there are overlapping majorities, or multiple publics. Does a minority with intensely held preferences better represent the views of Americans than a majority with weakly held or no views? Friedman realizes these problems, writing that “there is no single American voice,”<sup>48</sup> but his analysis depends on identifying one.

Similarly, Powe’s analysis requires him to identify both the existence and policy interests of something called the “ruling regime.”<sup>49</sup> What is such a beast? How does the Court know when a ruling regime has come into existence or has disintegrated? Does its political strength matter and, if so, how can the Court determine it? To whom does the Court look to identify its interests? What if its members disagree, as they undoubtedly will, over important issues? To which elites will the Court look? There are no simple or easy answers to these questions, and Powe doesn’t grapple with them.

Related to this concern with analytic categories is the question of evidence. What counts as good evidence for elite or popular views? Both authors make use of newspaper editorials, but they are particularly poor measures of broad views. Similarly, as noted above, confidently knowing which elites speak for the regime, or which poll results are meaningful and representative, is very difficult. Powe, in particular, makes many unsupported claims. For example, comparing the reaction to *Brown v. Board of Education*<sup>50</sup> and the 1964 Civil Rights Act,<sup>51</sup> Powe writes, “on fundamental issues, losers accept a democratic defeat more readily than a judicial one.”<sup>52</sup> No evidence is provided for this claim. An alternative explanation, of course, is that the 1964 Act was passed a decade after the 1954 *Brown* decision and views may have changed. Similarly,

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48. *Id.* at 17.

49. Powe, *supra* n. 1, at 1x.

50. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

51. Pub. L. No. 88-352, 78 Stat. 241 (1964).

52. Powe, *supra* n. 1, at 250-251.

in describing Justice William Brennan's plurality opinion for the Court in *Frontiero v. Richardson*,<sup>53</sup> Powe writes, "[t]he four Democrats, by their actions [supporting strict scrutiny], demonstrated a belief that the [Equal Rights] amendment process was a waste of time."<sup>54</sup> How does he know? Perhaps the four Justices thought they were helping it along, supporting the ruling regime?

The final way in which both analyses are flawed concerns the lack of causal mechanisms. One of the most important lessons of social science is that correlation is not causation. Merely because two variables are often found together doesn't mean that the existence and behavior of one leads to or causes the behavior of the other. In order to make a plausible causal claim, causal mechanisms must be identified that connect the variables. Both Powe and Friedman make causal claims that Court decisions are the product of elite or majoritarian views, but neither identifies the mechanisms by which this might occur. Changing times, elite opinions, majoritarian views, etc., are not causal mechanisms. From time to time each author hints at some possible mechanisms but does no more. For example, Powe suggests that the "composition of the Court"<sup>55</sup> can lead to different decisions, suggesting that the appointment process is a mechanism by which Court decisions are brought into line with elite views. Friedman suggests that public reaction to decisions,<sup>56</sup> the ability of the public to "save a Court in trouble with political leaders and . . . motivate political leaders against it,"<sup>57</sup> and "attacks from the Court's most important observers, the legal community,"<sup>58</sup> could all be ways in which the Court is induced to follow majoritarian views. But how any of these factors might work to influence the Court is left to the reader's imagination.

The problem with unspecified mechanisms is that they do not let us understand the conditions under which the Court will follow elite or majoritarian opinions and the conditions under which it will ignore them. The argument of both books is that the Court reflects popular and elite opinion except, of course, when it does not! Friedman suggests one of my favorite analogies: the Court's relationship to the public is like that of a person at the end of a bungee cord - ultimately tethered but with a lot of room to bounce.<sup>59</sup> Alas, the analogy fails because the mechanisms by which a bungee cord works are very well understood whereas the mechanisms by which the Court might be tethered to elite or popular views are unspecified and poorly understood.

#### JUDICIAL IMPORTANCE AND THE "DIALOGIC COURT"

What purpose, then, does judicial review serve? For Powe, as noted above, the practice of judicial review empowers the Court to further the interests of the political regime. However, perceptively, Powe understands that the Court may not have a role to play in dealing with many of the most important issues facing the country. He understands that while the Justices may be

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53. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

54. Powe, *supra* n. 1, at 277.

55. *Id.* at 254.

56. Friedman, *supra* n. 7, at 381.

57. *Id.* at 375.

58. *Id.* at 256.

59. *Id.* at 373.



confident in [their] ability to mold the Constitution in order to solve some of America's contentious issues . . . it must be noted (contra Tocqueville), not the hard ones like dealing with the Wall Street financial crisis, health care, Social Security, trade policy, immigration, the alternative minimum tax, and the deficit, as well as Iraq, Iran, Pakistan, Russia, and North Korea.<sup>60</sup>

In contrast, for Friedman, the Court is more important, and his argument is more complex. On the penultimate page of the book, he suggests that “perhaps the central function of judicial review today is to serve as the catalyst for the people to take their Constitution seriously, to develop their constitutional sensibilities, in the hope that they will adhere to those sensibilities when the chips are down.”<sup>61</sup> In other words, the “value of judicial review” is that it “serves as a catalyst for the American people to debate as a polity some of the most difficult and fundamental issues that confront them.”<sup>62</sup> And as the people debate, they give meaning to the Constitution: “it is through the dialogic process of ‘judicial decision popular response judicial re-decision’ that the Constitution takes on the meaning it has.”<sup>63</sup>

Friedman is far from the first scholar to propose a dialogic relationship between the Court and the broader society. In 1975, in his posthumously published book, *The Morality of Consent*, Alexander Bickel wrote that the “Court thus interacts with other institutions, with whom it is engaged in an endlessly renewed educational conversation. It is a conversation that takes place when . . . large ‘constitutional issues’ are decided. And it is a conversation, not a monologue.”<sup>64</sup> The problem with both Friedman’s and Bickel’s argument about constitutional dialogue is that it assumes the American public has a sufficient level of knowledge about the Constitution and the Court to participate in the dialogue. Decades of public opinion survey data provide no support for this assumption.<sup>65</sup>

Public opinion data shows that Americans have little idea what rights the Constitution enshrines or what the Court has decided. When Americans do know what decisions the Court has reached they are not persuaded by them. “For example, large percentages of Americans believe that the Constitution guarantees a job (29 percent), health care (42 percent), and a high school education (75 percent); [and] that all state court cases can be appealed to the Supreme Court (85 percent) . . .”<sup>66</sup> Apparently, Americans view the Constitution as containing their preferred policy preferences regardless of the constitutional text.<sup>67</sup>

60. Powe, *supra* n. 1, at 350.

61. Friedman, *supra* n. 7, at 384.

62. *Id.* at 16.

63. *Id.* at 382. See also *id.* at 16 (“[T]he function of judicial review in the modern era [is] to serve as a catalyst, to force public debate, and ultimately to ratify the American people’s considered views about the meaning of their Constitution.”).

64. Alexander M. Bickel, *The Morality of Consent* 111 (Yale U. Press 1975).

65. See Gerald N. Rosenberg, *The Irrelevant Court: The Supreme Court’s Inability to Influence Popular Beliefs about Equality (or Anything Else)*, in *Redefining Equality* 172, 187 (Neal Devins & Davison M. Douglas eds., Oxford U. Press 1998); see generally *Public Opinion and Constitutional Controversy* (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., Oxford U. Press 2008).

66. Michael X. Delli Carpini & Scott Keeter, *What Americans Know about Politics and Why It Matters* 98 (Yale U. Press 1996).

67. For an in-depth examination of data supporting this claim, see Gerald N. Rosenberg, *Much Ado about*

In terms of the persuasive ability of the Court, reviewing the data in a 2008 compilation of the influence of Supreme Court decisions on the views of Americans in fourteen substantive areas including desegregation, rights of the accused, school prayer, abortion, gay rights, and the war on terror and civil liberties, Persily, Citrin, and Egan found few effects.<sup>68</sup> Writing in the introduction, Persily summarizes the findings: “[I]n the vast majority of the cases reviewed here, Supreme Court decisions had no effect on the overall distribution of public opinion.”<sup>69</sup>

Part of the reason why Americans are not persuaded by Court decisions is that most are unaware that the Court has acted, even on important issues. For example, consider a supposedly very well known decision, the Court’s 1973 abortion decision, *Roe v. Wade*.<sup>70</sup> In March 1982, a CBS News/*New York Times* poll asked respondents in a national survey, “Does the U.S. Supreme Court permit or does it forbid a woman to have an abortion during the first three months of pregnancy, or haven’t you been following this closely enough to say?”<sup>71</sup> Although this question was asked nearly a decade after *Roe v. Wade*, and two years into the Reagan administration with its public and vociferous commitment to overturning *Roe v. Wade*, nearly half of respondents (forty-nine percent) had no idea. Others had it wrong, with ten percent of respondents saying that the Court had issued a decision forbidding abortion.<sup>72</sup>

The problem with Friedman’s argument is that it confuses constitutional dialogue with policy debate. Americans care about policy outcomes, not constitutional meaning about which they know next to nothing. So, for example, Friedman is incorrect when he writes that the Court’s conservative decisions during the New Deal “ran up against the American people’s evolving judgment of what the Constitution meant.”<sup>73</sup> Rather, the decisions clashed with Americans’ preferred policy outcomes. More generally, Friedman argues that Court decisions “hew rather closely to the mainstream of popular judgment about the meaning of the Constitution.”<sup>74</sup> No they do not. At best, they follow Americans’ policy preferences. It is disappointing that Friedman neglects this decades-old literature.

#### THE WONDER OF IT ALL

Towards the end of his book, Friedman writes that “[s]ometime around the end of the first Rehnquist Court, a small band of political scientists and law professors questioned the common assumption that judicial review ran contrary to the popular will.”<sup>75</sup> This may be true but, as I have noted, it was hardly a new question. It was, however, pretty much new to legal academics. The question I conclude with is why they

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*Nothing? The Emptiness of Rights’ Claims in the Twenty-First Century United States*, 48 *Stud. L., Pol., & Socy.* 1 (2009).

68. See generally *Public Opinion and Constitutional Controversy*, *supra* n. 65.

69. Nathaniel Persily, *Introduction*, in *Public Opinion and Constitutional Controversy*, *supra* n. 65, at 8.

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

71. Roper Ctr. for Pub. Op. Research, *iPoll Databank, CBS News/New York Times Poll*, <http://www.ropercenter.uconn.edu/ipoll.html> (Mar. 1982) (access limited to member institutions).

72. *Id.*

73. Friedman, *supra* n. 7, at 205.

74. *Id.* at 14.

75. *Id.* at 364.

discovered it now.<sup>76</sup>

Starting in the last several decades of the twentieth century, there was a revival in political-science scholarship on the Supreme Court. Influential work was published on the role of the Court as an agent of social change,<sup>77</sup> the influence of political ideology on judicial decision making,<sup>78</sup> and justices as strategic actors,<sup>79</sup> to name but a very few prominent works in a burgeoning field. For the most part, this work was ignored in the legal academy.<sup>80</sup> The work suggested, of course, that the legal academy's understanding of Justices as principled, objective, impartial, and independent was a chimera.

At the same time that political scientists were investigating the political role of the Court, the Supreme Court was changing from the politically liberal Warren Court to the moderate Burger Court to the conservative Rehnquist and Robert Courts. The progressive gains of the Warren Court in civil rights, environmental protection, and the rights of criminal defendants, and the progressive gains of the Burger Court in abortion rights and affirmative action, were seen by liberals to be under threat. The liberal belief that courts were not only open to the relatively disadvantaged, but also their best hope, was fading. As early as 1979, Yale Law Professor Owen Fiss, in the foreword to the *Harvard Law Review*, articulated the dismay that many liberals felt:

We have lost our confidence in the existence of the values that underlie the litigation of the 1960's, or, for that matter, in the existence of any public values. All is preference . . . Only once we reassert our belief in the existence of public values, that values such as equality, liberty, due process, no cruel and unusual punishment, security of the person, or free speech can have a true and important meaning, that must be articulated and implemented - yes, discovered - will the role of the courts in our political system become meaningful, or for that matter even intelligible.<sup>81</sup>

For some liberals, then, the role of courts hostile to their substantive vision was unintelligible.

How, then, could liberals understand what had happened to the Supreme Court? They could adopt the attitudinal or strategic models of Supreme Court decision making, putting the blame on conservative Justices. The problem with this approach, however, is that it might be equally applicable to any future liberal Justices or to past liberal decisions, suggesting that Court decisions furthering the rights of the relatively disadvantaged were political, not constitutional. Thus, it may be no surprise that, for the most part, the legal academy has not come to terms with the attitudinal model.<sup>82</sup> Similarly, they might turn to the public-opinion literature findings that Americans neither

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76. I thank Mark Graber for raising this question.

77. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2d ed., U. Chi. Press 2008) (originally published 1991).

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

79. Lee Epstein & Jack Knight, *The Choices Justices Make* (Cong. Q., Inc. 1998).

80. Gerald N. Rosenberg, *Across the Great Divide (between Law and Political Science)*, 3 Green Bag 267 (Spring 2000).

81. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 16-17 (1979).

82. Exceptions to this statement most prominently include the work of Cass Sunstein. See Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301 (2004).

understand the rights contained in the Constitution nor have much awareness of Court decisions interpreting them. But this, too, is problematic for the liberal project of creating a more just and equal society because it suggests that the Supreme Court and the Constitution are somewhat peripheral to social change. Here, too, it is little surprise that this literature has been mostly ignored in legal scholarship.

A more promising approach might be to turn to the older historical literature that understands Court decisions as a product of majoritarian views and elite interests. If this were the case, then right-wing courts were the fault not of the Court and the Constitution, but of the people and their government. Changing electoral outcomes and popular views, then, could lead to a liberal reinvigoration of constitutional law which would be legitimate. In Fiss's words, it would make the role of the courts intelligible again. As Friedman puts it in the last sentence of his book, "In the final analysis, when it comes to the Constitution, we are the highest court in the land."<sup>83</sup>

I do not know of course, if this is what motivated Powe or Friedman. I do know, however, that they both reached out to certain parts of the political-science literature and not others. Powe writes that he has written a "law professor's book enlightened by political science and history."<sup>84</sup> And Friedman is deeply engaged with much political-science writing. Yet it remains curious that they invested so much time, at this historical moment, in producing monumental books that add detail and color but no new theoretical insight.

In the end, both books remind readers that constitutional interpretation is not set in stone. Their message is that democratic citizens have an important role to play in influencing the society in which we live. This is a message that can never be repeated too often, especially when it is done so well.

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83. Friedman, *supra* n. 7, at 385.

84. Powe, *supra* n. 1, at viii.

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