A COASE THEOREM FOR CONSTITUTIONAL THEORY

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INTRODUCTION

There is much to admire about Barry Friedman's new book.[1] Explaining how the institution of judicial review was made safe for democracy in America, Friedman's story is extensively researched, beautifully written, scrupulously nonpartisan about the modern Court, and frequently humorous. What is more, his primary claim—that the Supreme Court of the United States is a democratic institution because judicial review has always been responsive to public opinion—is, to a significant extent, convincing. I assigned *The Will of the People* in my first-year constitutional law course last year, and it worked so well that I taught from the book again this year.[2]

Despite its many virtues, certain aspects of *The Will of the People* give me pause. For one thing, I fear that the book may fail to fully register the power and potential influence of the particular individuals who sit on the Supreme Court at a given time. If law professors and political scientists may become "so fascinated by the Court as political actor that they [forget]

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* Professor of Law and Political Science, Duke University School of Law. For illuminating discussions, I am grateful to Katherine Bartlett, Stuart Benjamin, Curtis Bradley, Guy Charles, Luis Fuentes-Rohwer, R. Craig Green, Richard Primus, Robert Post, my fellow participants in this symposium, and, especially, Barry Friedman. I thank M. Rhead Enion for able research assistance, and the editors of the *Michigan State Law Review* for hosting a marvelous symposium in honor of Barry.

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. During the past two semesters, I assigned *The Will of the People* to my constitutional law students, both as fodder for theoretical ruminations and as a painless way to inject pertinent historical background into students who often know little about America's past. I heartily recommend the book to other teachers of constitutional law.

that it is also acted upon politically,"[3] Friedman's project may be vulnerable to the opposite criticism. That is, the book may underappreciate the capacity of the justices to shape social values or otherwise to decide important matters with finality. For another thing, even if I am wrong about the Court's potential efficacy as an actor, there remains reason for skepticism that the book has tamed the countermajoritarian difficulty, at least when the problem is framed properly.

Part I of this essay summarizes Friedman's main thesis, including his implicit suggestion that the present composition of the Court matters much less than is commonly thought—and may not even matter much at all. Part II offers some reasons to doubt that the substantive visions of the justices themselves are as relatively inconsequential as Friedman seems to believe. Part III explains why the countermajoritarian difficulty endures even in the wake of Friedman's important contribution.

I. THE COURT IS ACTED UPON

Friedman's primary target is the longstanding claim in constitutional theory that has been inspired by Alexander Bickel's memorable invocation of "the essential reality that judicial review is a deviant institution in the American democracy."[4] "The root difficulty," Bickel wrote in *The Least Dangerous Branch*, "is that judicial review is a counter-majoritarian force in our system."[5] Friedman believes that Bickel was wrong,[6] and that a good deal of constitutional scholarship over the ensuing half-century has proceeded from a false assumption. "History makes clear," Friedman writes, "that the classic complaint about judicial review—that it interferes with the will of the people to govern themselves—is radically overstated."[7] This is

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3. Martin Shapiro thus wrote of the "neutral principles" debate:

> It is true that those who attack the concept of neutral principles do so by stressing the political role of the Court. But they have been so fascinated by the Court as political actor that they have forgotten that it is also acted upon politically. The almost instinctive habit of viewing the Court as a thing apart reasserts itself in concern about what the Court can do to others but not for what others can do to it. Those who favor neutral principles *have* been worrying about what others can do to it.

Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 603 (1963).

4. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962).

5. *Id.* at 16.

6. *See* FRIEDMAN, *supra* note 1, at 370 (arguing, *inter alia*, that Bickel's "underlying assumption" is "deeply problematic").

7. *Id.* at 9.

because "the Supreme Court is, and always has been, accountable to the popular will."[8]

To be clear, Friedman does not advance the (readily refutable) claim that all of the Court's decisions are always consistent with public opinion. For example, he is well aware that the Court's school prayer and flag burning decisions continue to lose popularity contests by wide margins.[9] "None of this is to say the Court will always be in line with public opinion," he writes.[10] "The justices neither need to, nor necessarily do, respond to what the public wants."[11] Framed precisely, rather, Friedman's claim is that the Court's decisions on socially salient issues tend to come into alignment "over time"[12] with popular preferences—that "over the long term on the important issues the people are going to have their way."[13]

Friedman identifies three mechanisms that tend, over the long run and in general, to produce alignment between the Court and the public. First, "the fact that Presidents select Supreme Court justices and the Senate confirms them plays some role in ensuring that the Court heeds the cry of public opinion."[14] Second, the justices tend to care about public opinion because they like to be liked.[15] Third, and most importantly, the justices tend to care about public opinion because they have no reasonable choice:

> The most telling reason why the justices might care about public opinion . . . is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics. Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction. If the preceding history shows anything, it is that when judicial de-

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8. Kevin Russell, *Ask the Author with Barry Friedman, Part I*, SCOTUSBLOG (Jan. 25, 2010), http://www.scotusblog.com/2010/01/ask-the-author-with-barry-friedman-part-i/; *see* FRIEDMAN, *supra* note 1, at 370 ("The accountability of the justices (and thus the Constitution) to the popular will has been established time and time again.").

9. FRIEDMAN, *supra* note 1, at 377; *see* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (school prayer); Engel v. Vitale, 370 U.S. 421 (1962) (school prayer); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning).

10. FRIEDMAN, *supra* note 1, at 377.

11. *Id.*

12. *Id.* at 382.

13. *Id.* at 377.

14. *Id.* at 374. Friedman notes that presidents "rarely are driven to appoint justices who capture the mainstream of popular thought," that "justices may experience 'ideological drift'" over time, and that "the nature of the issues coming to them may make their views outmoded." *Id.* Increasing longevity on the Court and strategic retirements also render it less likely that the appointments process alone will ensure general alignment between judicial decisions and public opinion.

15. *Id.* ("[T]he fact that the justices are only human may say a lot for why responsiveness to public opinion occurs. The justices are no less vain than the rest of us, and it is human nature to like to be liked or even applauded and admired.").

> cisions wander far from what the public will tolerate, bad things happen to the Court and the justices.[16]

The Court is accountable to the public because the Court's authority rests on public support, and "the public seems to insist on the Court's being relatively in line on most issues."[17]

What this implies, according to Friedman, is that the actual constitutional views and visions of the present members of the Court are of quite limited significance. "What matters most about judicial review . . . is not the Supreme Court's role in the process, but how *the public reacts* to those decisions."[18] Friedman identifies this point as "the most important lesson that history teaches," for "[a]lmost everything consequential about judicial review occurs after the judges rule, not when they do. Judges do not decide finally on the meaning of the Constitution."[19] "The magic of the dialogic system of determining constitutional meaning,"[20] Friedman writes, "is that it works whether the judges rule properly or not."[21] This is "precisely because everything important happens after they render their decision."[22]

Friedman recognizes that his thesis threatens to swallow the normative case for judicial review. After all, why give the Court the power to invalidate the acts of elected officials if the justices largely reflect public opinion? Rather than bury the institution, Friedman praises it as indispensible because 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. It forces the American people to work to reach answers to these questions, to find solutions—often compromises—that obtain broad and lasting support."[23] Only after the American public has gone through this process does the Court tend "to come into line with public opinion."[24]

Accordingly, Friedman conceives the Court's role in the constitutional system as essentially procedural in nature, not substantive. To reiterate, "the 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 consi-

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16. *Id.* at 375.

17. *Id.* at 379. Along similar lines, I have argued that the justices must take some account of the conditions of the legitimation of the law that they craft. *See* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008) [hereinafter Siegel, *The Virtue of Judicial Statesmanship*]; Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701 (2007).

18. FRIEDMAN, *supra* note 1, at 381.

19. *Id.*

20. *Id.* at 382.

21. *Id.*

22. *Id.*

23. *Id.* at 16.

24. *Id.*; *see also id.* at 383 ("It is apparent time and again that what the Supreme Court responds to most often is the sustained voice of the people as expressed through the long process of contesting constitutional decisions.").

dered views about the meaning of their Constitution."[25] It matters a lot *that* the justices decide cases. It apparently matters little *how* the justices decide cases.[26] As Friedman underscored with characteristic humor in an online interview about the book, "[y]ou know my shtick. They [the justices] moderate, or they catch a lot of heat . . . and moderate. It all comes out in the same place eventually."[27]

Friedman thus leaves the impression that the substance of the Court's decisions is largely irrelevant to ultimate outcomes.[28] Indeed, if the Court's decisions do affect ultimate outcomes, it is not clear why Friedman believes that the countermajoritarian difficulty is unworthy of much scholarly attention. What "solves" the difficulty for Friedman is the Court's responsiveness to public opinion. The Court's responsiveness to public opinion, in turn, makes it less important how the Court decides cases. If, on the other hand, it matters to ultimate outcomes how the Court decides cases, then Friedman's rationale appears to unravel; he can no longer rely on public opinion to dissolve the countermajoritarian difficulty.

If I am reading Friedman correctly, his logic brings to mind a famous proposition in law and economics, which helped Ronald Coase win the Nobel Prize in Economics. The Coase Theorem asserts that individuals bargain successfully unless transaction costs impede them. The primary implication of the theorem is that it does not matter to efficiency where the law places initial legal entitlements so long as transaction costs do not get in the way.[29] At bottom, *The Will of the People* offers a kind of Coase Theorem for constitutional theory: Regardless of the way the Court interprets the Constitution and initially assigns constitutional entitlements, Americans will eventually bargain their way towards an interpretation that reflects their considered judgment as a people.

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25. *Id.* at 16.

26. *See, e.g.*, Barry Friedman, *Why the Supreme Court is Irrelevant*, THE NEW REPUBLIC, at 7, Sept. 23, 2009. Regardless of whether Friedman chose the title of this piece, it captures (even if it somewhat exaggerates) an apparent implication of his argument.

27. Russell, *supra* note 8.

28. *See, e.g.*, Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1214 (2010) ("[T]he book could be read to mean that it does not much matter what the Court does. Its latitude is narrow, and its decisions are not final: in the rare cases where the Court gets out of line, the People will eventually bring the law back to where they want it." (footnote omitted)).

29. For an illuminating discussion, see Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 14 (1982) ("The basic idea of [Coase's] theorem is that the structure of the law which assigns property rights and liability does not matter so long as transaction costs are nil; bargaining will result in an efficient outcome no matter who bears the burden of liability."). For an application of the Coase Theorem to intergovernmental relations in the federal system established by Article I, Section 8 of the U.S. Constitution, see Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010).

II. THE COURT ACTS

In law and economics, the point of the Coase Theorem is to isolate the reasons why law matters, not to deny that law matters. Whereas in the typical Coasian story law matters because of various impediments to bargaining between the parties, in Friedman's story the key question is whether it suffices to model the Court merely as assigning initial constitutional entitlements—only as motivating a conversation that will subsequently be dominated and reshaped by the American people.

In approaching this question, I will leave aside for the moment the potentially serious problems one encounters in attempting to identify public opinion and in utilizing such metaphors as "the popular will" or "the considered judgment of the American people." I will also leave aside the potentially significant distinction between public opinion and elite opinion.[30] Assuming that one can know what the considered judgment of the American people is, should we be persuaded by Friedman's conceptualization of the Court merely as reflecting this judgment, at least in general and over the long run?

I am skeptical, and my skepticism stems in part from a potential causal mechanism for producing alignment between the Court and the public that Friedman does not explore, but that is implied by some of his language and evidence. The "dialogic"[31] metaphor that Friedman repeatedly invokes suggests a conversation that goes both ways, a conversation in which the Court is shaped by popular values but also shapes popular values to a nontrivial extent, even considering the long run.[32] Specifically, the Court may shape values by eventually persuading Americans of the rightness of its rulings, not just by causing backlash.[33] More subtlely, the Court may inform popular understandings of which kinds of constitutional arguments count as

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30. For Friedman's responses to some of these problems, see FRIEDMAN, *supra* note 1, at 17-18.

31. *Id.* at 382 (referencing "the dialogic process" and "the dialogic system").

32. For an argument that "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture," see generally Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003). For example, Dean Post argues that the Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), "has advanced a powerful and passionate statement that is plainly designed to influence the ongoing national debate about the constitutional status of homosexuality." *Id.* at 104-05 (footnote omitted). At the same time, "the Court has not committed itself to the full consequences of its position. It has crafted its opinion so as to allow itself flexibility to respond to the unfolding nature of public discussion." *Id.* at 105.

33. Friedman recognizes the phenomenon of backlash. *See* FRIEDMAN, *supra* note 1, at 383 ("One of the most valuable things that occurs in response to a Supreme Court decision is backlash. People who disagree with the decision tend to react more strongly than those who agree, and they dissent in any variety of ways.").

normal, plausible, or objectionable. This is what Bickel meant when he wrote that "[t]he Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed."[34] If Bickel may have exaggerated the Court's ability to lead, Friedman may exaggerate the Court's tendency to follow.

The capacity of the Court partially to shape public opinion helps to explain (better than Friedman can) why almost everyone who possesses a constitutional stake in the system cares one way or the other about, say, Justice Alito's replacement of Justice O'Connor. We may all be irrational, ignorant, or shortsighted, but that seems unlikely. The potential power of the Court to shape social values also helps to explain why those who make claims on the Constitution would much rather have the Court decide cases their way than the other way.

There are important occasions when the Court appears affirmatively to influence public values. For example, some scholars may dispute whether or how *Brown v. Board of Education*[35] made a difference.[36] And yet, I suspect most commentators remain persuaded that *Brown* helped to transform race relations in America. Most, including Friedman, likely believe that Americans eventually became more supportive of racial integration because the Court decided the case 9-0 in the way that it did, and not the opposite way.[37]

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34. BICKEL, *supra* note 4, at 239; *see also, e.g.*, *id.* at 26 ("Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. . . . Hence it is that the courts, although they may somewhat dampen the people's and the legislatures' efforts to educate themselves, are also a great and highly effective educational institution."); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1978) ("Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.").

35. 347 U.S. 483 (1954).

36. *See generally, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (doubting the capacity of the Court to effect social change through decisions such as *Brown*); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (arguing that the chain of causation tying *Brown* to transformative racial change is very different from what has commonly been supposed); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) (questioning conventional accounts of *Brown*'s importance and providing an alternative thesis stressing *Brown*'s indirect contribution to racial change).

37. *See, e.g.*, David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of* Brown v. Board of Education, 80 VA. L. REV. 151, 152 (1994) (describing "how much easily available evidence there is that testifies to the *direct* influence of *Brown* on the instigation of the 1955 Montgomery boycott"). According to Professor Garrow, "[a]lmost every significant black Montgomery activist of that time has without prompting spoken of *Brown*'s importance for the bus protesters." *Id.* at 152-53. Martin Luther King, Jr. wrote in 1958 that "the law itself is a form of education," and "[t]he words of the Supreme Court, of Congress,

Consider another consequential act of leadership—of judicial statesmanship.[38] Justice Powell's "diversity" rationale for affirmative action in higher education in *Regents of the University of California v. Bakke*[39] has shaped constitutional discourse and constitutional meaning for the past three decades.[40] Powell emphasized the value of diversity at a time when universities were defending affirmative action on remedial grounds.[41] After *Bakke*, universities publicly defended their programs as securing the educational benefits of a diverse student body.[42] Twenty-five years later, the Rehnquist Court endorsed that interest as compelling.[43]

Similarly, there seems little doubt that *Miranda v. Arizona*[44] helped to change popular culture; even the long-hostile Chief Justice Rehnquist voted

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and of the Constitution are eloquent instructors." MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 199 (1958).

38. *See generally* Siegel, *The Virtue of Judicial Statesmanship*, *supra* note 17 (offering an account of judicial statesmanship).

39. 438 U.S. 265 (1978).

40. For a brilliant and prophetic analysis, see generally Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907 (1983).

41. The first sentence of Paul Mishkin's brief for the University of California in *Bakke* framed the question presented remedially: "The outcome of this controversy will decide for future decades whether blacks, Chicanos and other insular minorities are to have meaningful access to higher education and real opportunities to enter the learned professions, or are to be penalized indefinitely by the disadvantages flowing from previous pervasive discrimination." Brief for Petitioner, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 189474, at *13. In its Summary of Argument, the University of California described the historical development of this remedial rationale:

> One of the things in which the nation may take great pride since the end of World War II has been its willingness to address in actions, rather than simply words, the racial injustices that are the unhappier parts of our legacy. . . . The commitment to relegate the lingering burdens of the past to the past has run deeply and widely throughout the country, among a great many of its institutions.
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> . . . .
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> . . . [T]oward the end of the last decade, many governmental and private institutions, including this Court, came concurrently to the realization that a real effort to deal with many of the facets of the legacy of past racial discrimination unavoidably requires remedies that are attentive to race, that color is relevant today if it is to be irrelevant tomorrow. This discovery and response was found in many sectors of society; the school desegregation area was a major arena, but the same phenomenon was found in employment, housing, and many other areas, including professional education.

Id. at *8-10.

42. *See generally, e.g.*, Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473 (2007); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006).

43. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

44. 384 U.S. 436 (1966).

to reaffirm the decision in *Dickerson v. United States*.[45] In announcing the Court's opinion in *Dickerson*, Rehnquist began by reciting the *Miranda* warnings,[46] as if they were a part of the American creed that he took pleasure in publicly avowing.[47] Political scientists who attempt to study rigo-

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45. 530 U.S. 428 (2000); *see id.* at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."); Brief of Petitioner at 12, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 142076, at *12 ("*Miranda*'s specific holdings have been widely popularized through the media and accepted in the legal culture. Departing from them would erode public confidence in the legitimacy of the criminal justice system and the legitimacy of the Court's exercise of its authority."); Brief for the United States at 38, *Dickerson*, 530 U.S. 428 (No. 99-5525), 2000 WL 141075, at *38 ("[U]psetting settled public expectations by overruling a constitutional precedent as well-known and widely applied as *Miranda* would tend to have a destabilizing effect on public confidence in the fairness of the criminal justice system and public trust in this Court's legitimacy.").

46. *Dickerson* was handed down on June 26, 2000. At the beginning of his bench statement, Chief Justice Rehnquist made clear (more so than he did in the Court's opinion) just how great a role television and national culture had played in the path from *Miranda* to *Dickerson*:

> **Mr. Rehnquist**: I have the opinion of the Court to announce in No. 99-5525, *Dickerson against United States*.
>
> You have the right to remain silent; anything you say can be used against you in the court of law. You have the right to the presence of an attorney. If you cannot afford an attorney, one will be provided for you prior to any questioning if you so desire.
>
> These four warnings have echoed through police stations and on television screens. In the 34 years since we decided the case of *Miranda versus Arizona*. In that opinion we held that any statement a suspect makes while in police custody is not admissible in the prosecution's case in chief, unless the statement was preceded by these warnings.
>
> The present case *Dickerson* addresses whether *Miranda* has been superseded by an Act of Congress passed in 1968. We hold that *Miranda* is a constitutional decision that may not be overruled by Congress and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny continue to govern the admissibility of statements made during custodial interrogation.

Transcript of Opinion Announcement, *Dickerson*, 530 U.S. 428, *available at* http://www.oyez.org/cases/1990-1999/1999/1999_99_5525/opinion. An audio recording is available at http://www.oyez.org/cases/1990-1999/1999/1999_99_5525/opinion. I thank Richard Primus for alerting me to it.

47. While the public has moved substantially over time on *Miranda*, the meaning of the Court's relationship to *Miranda* in *Dickerson* may be complex in light of subsequent decisions that seem to be narrowing *Miranda*. *See, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (holding that a suspect must unambiguously invoke the right to remain silent, and that an incriminating one-word answer, even after several hours of questioning, suffices for a waiver); United States v. Patane, 542 U.S. 630 (2004) (deeming inadmissible an un-Mirandized confession but deeming admissible evidence derived from the un-Mirandized confession). It may be that *Miranda* has come to occupy the societal status of a sacred cow, one that few justices are interested in publicly slaying. At the same time, several justices reject the policy rationale for the exclusionary rule, and they are employing ways to narrow its applicability without overruling *Miranda*. In any case, the key point for my purposes is

rously the impact of Supreme Court decisions on public opinion have identified instances in which the Court seemed eventually to move the public closer to the Court's point of view—although the evidence is mixed and the subject is perilous to study empirically, particularly as one extends the time horizon beyond short-term effects.[48]

Given the diffuse public support that the Court enjoys and that Friedman documents,[49] it would be surprising if public opinion were unaffected by which side of a constitutional dispute the Court elected to place its legal, political, and moral authority. This is especially true in light of the limited time, attention, and knowledge of constitutional issues that many Americans possess. Further suggesting that the Court possesses persuasive power is the long-observed phenomenon known as "'the normative power of the actual'"—that is, the tendency of what the law is to influence people's views about what the law should be.[50] Participants in constitutional debates often invoke (and exaggerate) the Court's agreement with their position, probably

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that American society is not where it would have been without *Miranda*; the Court's decision in 1966 continues to make a difference now.

48. *See, e.g.*, Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 8-14 (Nathaniel Persily et al. eds., 2008) (explaining some of the difficulties that scholars encounter in trying to discern the impact of Court decisions on public opinion, and distinguishing evidence of irrelevance, legitimation, backlash, and polarization). Regarding the "legitimation hypothesis," which conceives the Court as a "Republican schoolmaster," Professor Persily writes:

> We were surprised to find very few instances of a short-term legitimating effect of court decisions. Rarely do we see a noticeable conversion of the public to the Court's position immediately following a particular case. More often what we see is legitimation over the longer term, sometimes produced by a "slingshot" effect—with opinion shifting immediately away from the Court's decision but eventually moving in the Court's direction. Such was the case with many of the most controversial Warren Court precedents. For example, *Brown v. Board of Education* appears to have been followed by a small and temporary backlash in opinion on desegregation of schools, particularly in the South, which soon reversed course. The same appears true of the Court's decisions on school prayer and flag burning, although, unlike desegregation, strong majorities continue to support a position contrary to that of the Court. Although we do not have enough continuous data on the rights of the accused, it is clear that the public is now much more supportive of the Court's decision in *Miranda v. Arizona* than it was in the immediate aftermath of the decision.

Id. at 11-12. For an excellent, albeit dated, review of earlier literature on whether the Court shapes public opinion, see Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303-313 (John B. Gates & Charles A. Johnson eds., 1991).

49. FRIEDMAN, *supra* note 1, at 379-80.

50. Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 71 (1965) ("[T]hat which is law tends by its very existence to generate a sense of being also that which ought to be the law."). Mishkin attributed this insight to Felix Cohen. *Id.*

because they view the Court's imprimatur as a potent form of persuasive authority.[51]

Moreover, relaxing the assumption that the American people possess a discernible, collective judgment threatens the very coherence of the distinction between a Court that reflects public values and a Court that shapes them. Given the cultural divisions that persist in contemporary American society,[52] the act of expressing social values unavoidably entails an effort to shape social values. This is because the authoritative expresser of values—here, the Court—must elect to enforce one set of values to a greater extent than another.[53]

When the American people are divided for long periods of time, Friedman's thesis becomes less persuasive. Not only is the Court more likely to be shaping values than reflecting them (because it is incapable of simply reflecting them), but there will seldom be enough popular pushback to discipline the justices. However the Court decides controversial issues involving abortion, affirmative action, church/state separation, gun rights, gay rights, capital punishment, campaign finance, criminal procedure, or the treatment of alleged terrorists, many Americans will agree with the Court's resolutions and many will disagree (and many will have no view). The result is a broad range of reasonable, irreconcilable disagreement within which the justices will be relatively free to operate.

Indeed, under circumstances of enduring disagreement, the Court will have substantial room to roam regardless of whether it succeeds in shaping values to any significant extent. This consideration also helps to explain why those who make claims on the Constitution would much rather have the Court decide cases their way than have to rely on the "dialogic" system of judicial review. The justices may prove persuasive only to Americans who already agree with them, but the Court still can decide—and decide effectively with finality—many important matters about which people care. It may not be most accurate to characterize judicial review as "countermajoritarian" when the culture is divided, but neither is it accurate to conceive the Court merely as mirroring public opinion.

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51. *Cf., e.g.*, Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for disfavorable treatment, the Court . . . places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias.").

52. *Cf., e.g.*, Adam Liptak, *To Nudge, Shift or Shove the Court Left*, N.Y. TIMES, Feb. 1, 2009, at WK4 (discussing the discrete voting blocs on the U.S. Supreme Court and quoting Christopher Eisgruber as noting the "surprising amount of ideological coherence on the court over the last 30 years").

53. *See, e.g.*, Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 492 (2003) ("When law is invoked to enforce 'cultural values,' therefore, it is often being used to advance one or another side of an ongoing cultural disagreement.").

III. THE DIFFICULTY ENDURES

Regardless of whether Friedman or I am right about the extent to which the Court succeeds in shaping popular values or otherwise deciding questions with finality, it does not follow that the countermajoritarian difficulty is much ado about little. Even when the Court affects public opinion by producing backlash or by increasing political polarization,[54] and even when the eventual result is that the Court and the public align because the Court moves, it seems incorrect to model the Court merely as reflecting the judgment of the American people. The fundamental question of authority animating the countermajoritarian difficulty is not whether the Court and the public align, but whether the Court may appropriately play a role in determining where they align. If the Court's intervention affects the public's ultimate judgment—so that the public ends up in a different place than it would have been in the absence of judicial intervention—then the countermajoritarian difficulty still requires a response to this question: with what warrant, and on what grounds, may five or more unelected judges produce such consequences in a presumptively democratic society?[55]

To see the persistence of the countermajoritarian difficulty, consider all the qualifications that Friedman builds into the most careful (and most defensible) version of his central claim: "[T]he Court's decisions on *salient* issues have tended to *come into line over time* with popular preferences."[56] It is not all of the Court's decisions that he has in mind, but only those on salient issues. The Court decides many issues that are consequential but not especially salient. Moreover, Friedman argues that the Court's decisions on salient issues *tend* to be accountable to the popular will, not that they always align with popular preferences. Still further, he maintains that this alignment, to the extent that it occurs, happens over time—which is to say, in the long run, in the end. The problem, of course, is that we will all be dead in

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54. A judicial decision may change the structure of public opinion on an issue. *See, e.g.*, Persily, *supra* note 48, at 13 ("Many people might change their minds on an issue following court intervention even though the aggregate shift in opinion might appear slight or nonexistent. In addition, a decision could solidify people's prior beliefs, causing them to feel more strongly about the issue."). An example of polarization is public opinion concerning abortion in the wake of *Roe v. Wade*, 410 U.S. 113 (1973). *See* Persily, *supra* note 48, at 13-14; Samantha Luks & Michael Salamone, *Abortion*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 48, at 80, 80-107.

55. As Richard Primus observes, "[t]he Court that is described in *The Will of the People* responds to public opinion, but its members do not grapple with constitutional text, judicial precedent, historical materials, or the other sources of authority that are standardly regarded as appropriately shaping constitutional analysis." Primus, *supra* note 28 at 1209. According to Primus, the countermajoritarian difficulty is a useful heuristic because it requires us to identify "the appropriate sources of authority for constitutional decisionmaking by courts." *Id.* at 1213.

56. Russell, *supra* note 8.

the end, and in the meantime we may have to live with some judicial decisions that possess substantial staying power. All of Friedman's qualifications are well conceived, but each pays tribute to the very difficulty he means to deny.

Significantly, Bickel worried about the countermajoritarian difficulty even as he plainly recognized that the Supreme Court was not truly final:

> The southern leaders [who opposed *Brown*] understood and acted upon an essential truth, which we do not often have occasion to observe and which dawned on the southerners themselves somewhat late; hence the contrast between initial reactions and what followed. The Supreme Court's law, the southern leaders realized, could not in our system prevail—not merely in the very long run, but within the decade—if it ran counter to deeply felt popular needs or convictions, or even if it was opposed by a determined and substantial minority and received with indifference by the rest of the country. This, in the end, is how and why judicial review is consistent with the theory and practice of political democracy. This is why the Supreme Court is a court of last resort presumptively only.[57]

Bickel agreed with Friedman's basic point that ultimate authority lies with those whom the Court purports to govern in the name of the Constitution. Bickel nonetheless perceived the need to justify the Court's countermajoritarianism because he understood that there are numerous occasions when the Court is effectively final—when Americans, for various reasons, are not well situated to exercise their ultimate authority. Friedman may believe that concerns about the countermajoritarian difficulty are vastly overstated because he overstates the concerns of scholars who take their lead from Bickel.

In reading *The Will of the People*, one sometimes has the vague sense that Barry Friedman believes he has cracked the countermajoritarian difficulty. The book's greatest contribution, however, may lie in its demonstration that it cannot be done while preserving the institution of judicial review as it presently exists in America.[58] No matter how illuminating the historical inquiry, and no matter how insightful the theorizing, the countermajoritarian difficulty is not a puzzle that can be solved. It is a problem that must be negotiated by all who engage in the business of constitutional interpretation. As long as the Court affects final outcomes one way or another, the question of authority that the countermajoritarian difficulty raises will continue to require an answer.

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57. BICKEL, *supra* note 4, at 258.

58. Like Friedman, I leave aside various methods used by other political systems to render constitutional courts more responsive to public opinion, such as term limits and legislative overrides of unpopular decisions.