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BUT HOW WILL THE PEOPLE KNOW?
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COURT DECISION MAKING

Tom Goldstein*
Amy Howe**


INTRODUCTION

Chief Justice John Roberts famously described the ideal Supreme Court Justice as analogous to a baseball umpire, who simply “applies” the rules, rather than making them. Roberts promised to “remember that it’s my job to call balls and strikes and not to pitch or bat.” At her own recent confirmation hearings, Elena Kagan demurred, opining that Roberts’s metaphor might erroneously suggest that “everything is clear-cut, and that there’s no judgment in the process.”

Based on his 2009 book, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution, Barry Friedman would likely reject the Chief Justice’s analogy as well, but for a different reason. Friedman might describe Supreme Court Justices as umpires who call the balls and strikes, but whose future calls in constitutional law cases might be influenced by an angry crowd—leading them, for example, to reverse the call of a strike if the fans believed strongly enough that the pitch was low and outside.

Friedman offers The Will of the People as a response to a “persistent complaint about judicial accountability”—that unelected and unaccountable judges wield tremendous power, which thwarts democratic judgments (p. 6). As Friedman relates this complaint, which has famously been described as the “countermajoritarian difficulty,” “when the justices base a ruling on the

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Constitution, the country must live with that decision unless and until the Court reverses itself or the rare constitutional amendment is adopted. There is no overriding the Court otherwise” (p. 5).

Friedman offers an account of the relationship between the Court and the public in which this complaint is unfounded. In his view, it is the public that is in fact calling the game. Rather than thwarting popular will, the Court over time largely aligns itself with public opinion: “[T]hrough the process of judicial responsiveness to public opinion . . . the meaning of the Constitution takes shape. The Court rules. The public responds. Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public” (p. 383). Friedman grounds this thesis in a detailed history of judicial review and the Supreme Court, starting with the ratification of the Constitution in 1789 and concluding with the end of the Rehnquist Court in 2005.

Our Review of The Will of the People proceeds in two Parts. The first Part recounts Friedman’s thesis in more detail. The second considers whether Friedman’s thesis accounts for the decisions of the Roberts Court, including how it might play out in the looming constitutional fights over same-sex marriage, health care reform, and state immigration law.


Friedman devotes most of his book to an extensive (and exhaustive) survey of the role of the Supreme Court and judicial review in U.S. history as he sees it. He divides that history into “four critical periods,” with each having significant implications for the relationship between the Court and public opinion (p. 12).

Friedman’s first period begins shortly after independence and lasts until the early 1800s. Initially, Friedman relates, “judicial review appeared off to a strong start”: although employed relatively rarely, and generally in cases that did not carry “grave consequence[s],” the overall public reaction was one of acceptance (p. 43). To be sure, some members of the public continued to harbor misgivings about judicial review—then, as now, because of concerns about giving power to unelected and unaccountable judges—but judicial review was widely regarded as the only “satisfactory alternative to the problem of unconstitutional legislation” (p. 41).

The honeymoon period for judicial review quickly ended, however, with the election of 1800, when Republicans captured control of both Congress and the White House, leading Federalists to respond by hijacking the judiciary for largely partisan purposes. As a result, Friedman explains, “the question of judicial review proved secondary to a much more fundamental challenge: whether the judiciary would manage to survive as an independent branch of government” (p. 44). After a series of partisan battles that culminated in the impeachment of Justice Samuel Chase in 1805, relative peace was secured by what Friedman characterizes as a “tacit deal” (p. 45) in
which "judicial independence was guaranteed so long as the judges refrained from engaging in blatant partisan politics from the bench" (p. 12).

With judicial independence secure, the country and the Court moved into Friedman's second period, which would last until the 1830s. During this time, the Court issued "what to this day are acknowledged to be its great nationalizing opinions" (p. 79)—particularly, Martin v. Hunter's Lessee, Gibbons v. Ogden, and McCulloch v. Maryland. However, those decisions—which Friedman describes as "often [running] ahead of existing sentiments for union" (p. 80)—met with resistance from the states, which had begun to chafe at federal control and "[r]epeatedly ... recurred to the argument that there could be no umpire in their disputes with the national government—and certainly not the Supreme Court" (p. 73). Resistance notably took the form of "official[] sanctioned defiance" of the Court's constitutional decisions (p. 12): for example, "Georgia actually hanged a man in the face of a Supreme Court order to the contrary" (p. 12). Disputes over the Court's authority came to a head in the 1832 Nullification Crisis, in which South Carolina enacted an ordinance that not only declared a federal tariff "null, void, and no law"—and therefore not binding on state officials—but also forbade any appeal of a challenge to the law to the Supreme Court (p. 99). Friedman largely credits federal officials, and in particular President (and states' rights advocate) Andrew Jackson, with ending the crisis by taking a firm position in support of federal authority; in so doing, Jackson reaffirmed the judiciary's role in resolving federal-state disputes (pp. 101-04).

With the nullification crisis largely abated, the country entered Friedman's third period, which would begin with the Court's infamous 1857 decision in Dred Scott and continue for nearly a century. As Friedman relates, Dred Scott "set off a firestorm of criticism, wounding the Court as it has not been since" (p. 112). But the response to Dred Scott, Friedman argues, ironically demonstrated the country's commitment to judicial review, as government officials now sought to evade rather than formally defy the Court's ruling.

In this period, the other branches of government sought to mitigate judicial review by seeking to control the Court "to ensure that disfavored decisions were simply not rendered in the first place or, if rendered, were quickly reversed"—including through such tactics as jurisdiction stripping and court packing (pp. 106-07). During the second half of this era, the Court regained its power by siding with constituencies that could protect it: its decisions dismantling Reconstruction-era legislation garnered "widespread

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4. 14 U.S. (1 Wheat.) 304 (1816) (establishing that the Supreme Court has jurisdiction to review state court decisions involving federal law).
5. 22 U.S. (9 Wheat.) 1 (1824) (establishing that Congress has power under the Commerce Clause to regulate all aspects of commerce between the states).
6. 17 U.S. (4 Wheat.) 316 (1819) (establishing that Congress has the power to charter a national bank).
plaudits from an American populace fatigued by the effort to guarantee African-Americans their security, political rights, and some measure of equality," while the Court also "took corporate America under its wing, offering interstate businesses a refuge from the hostile actions of state governments and state courts" (p. 138).

The 1937 battle over President Franklin D. Roosevelt's court-packing plan both ushered in the modern era and served as one of the cornerstones of Friedman's thesis. After his election in 1932, Roosevelt sought to combat the woes arising from the Great Depression by expanding the government's authority. But "[t]ime and again, Roosevelt found his program stymied by a Supreme Court refusing to interpret the Constitution to cede broad control over the economy either to the federal government or to the states" (p. 195). Moreover, Friedman recounts, the Court's decisions "also ran up against the American people's evolving judgment of what the Constitution meant" (p. 205), with the public now believing that the Constitution "should be construed . . . to keep pace with the changing times" (p. 214). Thus, in February 1937 Roosevelt introduced a plan to "reorganize" the federal judiciary by, among other things, adding new Justices to the Court. Roosevelt's plan met with opposition from the public, which Friedman characterizes as "reluctant to see [the Court's] independence tampered with by politics" (p. 236); but in any event, "the Court seemed to switch directions, handing down several dramatic decisions that upheld state and federal economic measures" (pp. 225–26). This "switch in time," combined with the retirement of Justice Willis Van Devanter, led to the demise of Roosevelt's plan. Friedman hypothesizes that "had the Court not capitulated . . ., Americans might well have approved Roosevelt's plan" (p. 236). Moreover, Friedman contends, "judicial review now was widely valued, but only so long as important judicial decisions did not wander far from the mainstream of American belief about the meaning of the Constitution" (p. 236).

Friedman focuses next on the Warren Court, beginning with its 1954 decision in Brown v. Board of Education. Here too Friedman describes a "symbiotic relationship between popular opinion and judicial review" (p. 14). He notes, for example, that the Court's first decision in Brown drew praise and encountered relatively little resistance in the South precisely because it "did not actually order anything to be done" (pp. 245–46). When the Court later turned to the question of how best to order desegregation, he explains, it purposely established the "all deliberate speed" standard "out of concern that the Court not be made to appear powerless" (p. 246). "[M]assive resistance" (p. 247) eventually ensued, requiring President Eisenhower to send in federal troops; here, Friedman emphasizes that although, "[I]n the wake of the Little Rock controversy, the Supreme Court issued what is arguably its strongest statement of judicial supremacy in all of American history" (p. 248)—its decision in Cooper v. Aaron9—it did so

only “after the President had already sent in the troops to support it” (p. 248).

The Court’s concern for public opinion and its desire to avoid rocking the boat played out again on the issue of interracial marriage—a question that first came to the Court in 1956. Because “mixed marriage was a sensitive issue throughout the country,” the Court sought to skirt the question, striking down laws prohibiting interracial marriage only after Congress enacted the Civil Rights Act (pp. 249–50).

Concluding with the Rehnquist Court, Friedman depicts the Court of this era as a “political foil” (p. 353) for extremists on both ends of the ideological spectrum, who were motivated by (and sought to motivate their followers with) “wedge” social issues such as abortion and affirmative action (pp. 352–53). But those extremists’ complaints, Friedman explains, “fell on deaf ears because despite all the hype, it turned out the public agreed with the justices’ decisions. Or perhaps it is more accurate to say that the justices were following social trends, and by doing so were often deciding cases consistent with public opinion” (pp. 353–54). This latest development led to “the ultimate irony”: “critics began to challenge the Court, not because it was defeating the popular will but because it was fulfilling it” (p. 364).

II. THE WILL OF THE PEOPLE AND THE ROBERTS COURT

_The Will of the People_ is an engaging and thorough history, but it does not accomplish its goal of persuasively responding to the counter-majoritarian difficulty, at least with respect to the work of the Roberts Court. Although few areas of constitutional law are sufficiently important that they produce polling on public attitudes, we accept as the best available methodology Friedman’s generally anecdotal effort to draw on press coverage of the Court’s decisions and accounts of the public’s views on various issues generally. But contrary to Friedman’s account, the Supreme Court’s modern constitutional jurisprudence overwhelmingly does not correspond to a model in which decisions generate a public debate, to which the Justices then adapt.

It does seem fair to say that, on the very few constitutional questions that generate significant public interest, the Court’s decisions remain within the mainstream of public opinion. For example, it is hard to imagine the Court having decided _Roe v. Wade_ without the feminism revolution or _Lawrence v. Texas_ absent the greater social acceptance of gay rights. But those are two isolated rulings decided decades apart, and even in that narrow subset of the Court’s much broader body of work, the impetus for jurisprudential shifts seems to be a change in its membership resulting from the ordinary political process of presidential appointment and Senate confirmation.

A. The 2009 Supreme Court Term

The October 2009 Term offers an opportune vehicle for illustrating that Friedman's theory is not persuasive. The term included a representative array of constitutional rulings. The Court issued two high-profile decisions on constitutional questions, invalidating both a limit on corporate and union spending in elections\textsuperscript{12} and a ban on handgun possession.\textsuperscript{13} It also invalidated the limits on the president's power to remove members of the Public Company Accounting Oversight Board;\textsuperscript{14} a federal statute criminalizing depictions of animal cruelty;\textsuperscript{15} and statutes permitting the imposition of life sentences without the possibility of parole for juvenile offenders.\textsuperscript{16} By contrast, the Court rejected constitutional challenges to a federal law authorizing the indefinite detention of sex offenders;\textsuperscript{17} a state court ruling upholding a statute reclaiming beachfront property;\textsuperscript{18} and a state law requiring the disclosure of petition signatories.\textsuperscript{19} Finally, in response to constitutional challenges, the Court upheld but narrowly construed the "honest services" criminal statute\textsuperscript{20} and the federal terrorist "material support" statute.\textsuperscript{21}

Only one of the eighteen constitutional rulings seems to fit the theory of The Will of the People. In McDonald v. City of Chicago,\textsuperscript{22} the Court held that the Second Amendment right to keep and bear arms is incorporated by the Fourteenth Amendment and therefore applies to state and local gun regulation. McDonald extended the Court's holding from two terms earlier in District of Columbia v. Heller\textsuperscript{23} that the Second Amendment confers a right to possess a firearm unconnected to service in an organized militia. Both McDonald and Heller narrowly read or overruled prior precedents.\textsuperscript{24} In both cases, the Court's rulings track public opinion, which in turn seems grounded in a felt sense that gun rights have a constitutional foundation rather than merely being a "good thing."\textsuperscript{25}

\textsuperscript{12}Citizens United v. FEC, 130 S. Ct. 876 (2010).
\textsuperscript{13}McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).
\textsuperscript{14}Free Enterprise Fund v. PCAOB, 130 S. Ct. 3138 (2010).
\textsuperscript{15}United States v. Stevens, 130 S. Ct. 1577 (2010).
\textsuperscript{17}United States v. Comstock, 130 S. Ct. 1949 (2010).
\textsuperscript{18}Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010).
\textsuperscript{19}Doe v. Reed, 130 S. Ct. 2811 (2010).
\textsuperscript{20}Skilling v. United States, 130 S. Ct. 2896 (2010).
\textsuperscript{21}Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).
\textsuperscript{22}130 S. Ct. 3020 (2010).
\textsuperscript{23}128 S. Ct. 2783 (2008).
\textsuperscript{24}See United States v. Miller, 307 U.S. 174 (1939) (holding that the Second Amendment does not prohibit firearms conviction); United States v. Cruikshank, 92 U.S. 542 (1876) (establishing that the Second Amendment applies only to the federal government).
\textsuperscript{25}See, e.g., Jeffrey M. Jones, Americans in Agreement with Supreme Court on Gun Rights, \textit{Gallup} (June 26, 2008), http://www.gallup.com/poll/108394/Americans-Agreement-Supreme-
But public opinion does not represent a material influence with respect to the other seventeen constitutional rulings. One decision in fact provides a clear counterexample to Friedman’s theory. In *Citizens United v. FEC*, the Court overruled a recent precedent, *Austin v. Michigan Chamber of Commerce*, to hold that corporations and unions have a First Amendment right to participate in political campaigns. There was no public movement calling for that jurisprudential shift, which may have significant consequences for elections. To the contrary, the repeated enactment of campaign finance legislation suggests its popularity. The Court’s prior ruling upholding the same statutory scheme only a few terms before had sparked no protest. But looking forward, there is no genuine prospect that the negative public response to *Citizens United*—stoked by the Obama Administration—will trigger a reversal of course. *Citizens United* instead represents a committed view of a majority of the Court that the Constitution broadly guarantees a right to participate in political campaigns.

Most of the remaining constitutional rulings from the October 2009 Term simply do not register in the public consciousness. But that is not because they are trivial and therefore immune from concerns about decision making by unelected judges. For example, the civil commitment ruling, *Comstock v. United States*, had the potential to narrow federal legislative power materially, if the constitutional claim in that case had been accepted. In fact, *Comstock* will inevitably be one of the principal precedents cited in the high-profile litigation over the constitutionality of health care reform. The honest services decision, *Skilling v. United States*, is significant as well, as it significantly limits a commonly invoked prosecutorial tool. The ruling on presidential control over removal of officials, *Free Enterprise Fund v. PCAOB*, calls into question the constitutionality of hundreds of other governmental positions.

But with respect to those rulings and almost all of the others, there is no public conversation that could lead to a reshaping of the Court’s decision making. On our website—SCOTUSblog—we attempt to track all of the coverage of the Court’s decisions in the mainstream media and in the blogosphere. With the exception of the guns and campaign finance rulings, none of the Court’s constitutional jurisprudence produced more than a whisper in the popular press.

Obviously, a single term provides only a snapshot. But nothing about the October 2009 Term makes it anomalous. The Court’s constitutional rulings were not uniquely low-profile. If anything, *Citizens United* and *McDonald* were unusually prominent decisions.

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B. Shifts in the Supreme Court's Personnel

The theory of the *The Will of the People* does not seem descriptively accurate even when applied across decades rather than a single year, and even when narrowly limited to the Court's most prominent decisions, as opposed to all of the constitutional rulings that implicate the countermajoritarian difficulty. In four significant areas of the law, the Court has recently shifted jurisprudentially in a fashion that more closely tracks public opinion. These are the decisions most likely to support Friedman's view. The expansion of gun rights in *Heller* and *McDonald* were discussed above. The Court has narrowed the abortion right in the line of decisions from *Roe v. Wade* to *Planned Parenthood of Southeastern Pennsylvania v. Casey* to *Gonzales v. Carhart*. It has expanded gay rights, overruling *Bowers v. Hardwick* in *Lawrence v. Texas*. And it has narrowed the circumstances in which race-based decision making—including affirmative action programs—will be upheld under the Fourteenth Amendment.

Those examples, however, are better explained by a shift in the Court's membership: the replacement of Justice O'Connor with the substantially more conservative Justice Alito, which also gave rise to the ascendancy of Justice Kennedy as the median vote on a deeply divided Court. As Justice Breyer stated after the appointments of Chief Justice Roberts and Justice Alito, in a line he included in a dissent from the bench but not his written opinion, "It is not often in the law that so few have so quickly changed so much." And with respect to each of these issues, the Court is narrowly divided. The fact that the shift of a single vote—the successful appointment of Harriet Miers, for example—could have produced the opposite outcome undercuts a claimed causal relationship to broader trends in public opinion.

Take abortion. No member of the majority that decided *Roe v. Wade* responded to a shift in public opinion by later deciding to narrow the abortion right in *Casey*. Instead, the controlling plurality in *Casey* was composed of three subsequent Republican appointees who were simply more conservative: Justices O'Connor and Kennedy (by President Reagan), and Souter (by President George H.W. Bush). The effect of new appointments on abortion jurisprudence is best illustrated by the example of statutes banning so-called partial-birth abortion: a five-Justice majority invalidated a state prohibition because it did not include an exception for the health of the mother; but just a few years later, when Justice O'Connor retired and was replaced by Justice Alito, the Court reversed course and upheld an indistinguishable fed-

33. 33. Linda Greenhouse, Justices, Voting 5-4, Limit the Use of Race In Integration Plans, N.Y. TIMES, June 29, 2007, at A1 (noting that Breyer's "most pointed words . . . appeared nowhere in his 77-page opinion").
eral statute. Similarly, although the Court had given its tentative approval to race-based admissions programs with Justice O'Connor on the Court, it took a significantly more restrictive approach after her retirement in Parents Involved. Public opinion did not change in the interim; the Justices did.

If anything, there are even more counterexamples to Friedman's theory of prominent constitutional rulings in which the Court has committed itself to a position with which the public seems likely to disagree. A theory that is right only half the time or less (in the very best case) is not a useful tool for explaining the Court's behavior. The First Amendment limitations on campaign finance reform in cases such as Citizens United were discussed above. The Court adopted a broad reading of the government's eminent domain power in Kelo v. City of New London that was deeply unpopular, and which has shown no interest in revisiting. It has recently limited the ability to impose the death penalty, which remains popular—for example, by categorically prohibiting execution for all non-homicide crimes in Kennedy v. Louisiana. It has recognized a right to produce and distribute pornography, including virtual child pornography. It also notably has never retreated from extremely unpopular decisions banning school prayer and recognizing a constitutional right to burn the American flag.

Nor can other recent significant jurisprudential shifts be explained by a developing public consensus. The most radical and sweeping lines of decisions have involved the Sixth Amendment. Beginning in Apprendi v. New

37. In recent decades, the only arguable instance of a member of the Court changing her view in a manner that tracks a broad trend in public opinion is the conclusion of Justice O'Connor, who was a member of the Bowers majority, that the sodomy statute in Lawrence was unconstitutional.
39. See, e.g., Adam Karlin, Property seizure backlash: State and federal lawmakers consider new limits on takings in the wake of court decision, CHRISTIAN SCI. MONITOR, July 6, 2005, at 1 (describing the decision as "fueling a nationwide backlash—rippling into homeowner outrage and legislative action").
43. See, e.g., Joseph Carroll, Public Support for Constitutional Amendment on Flag Burning, GALLUP (June 29, 2006), http://www.gallup.com/poll/23524/public-support-constitutional-amendment-flag-burning.aspx (citing poll indicating that "a majority of Americans support a constitutional amendment that would allow Congress and state governments to make it illegal to burn the American flag"); Linda Lyons, The Gallup Brain: Prayer in Public Schools, GALLUP (Dec. 10, 2002), http://www.gallup.com/poll/7393/gallup-brain-prayer-public-schools.aspx (describing issue of school prayer as "one of the most divisive constitutional issues of our time" and summarizing polling on Court's school-prayer decisions).
Jersey, the Court has dramatically expanded a criminal defendant’s right to have facts relevant to his sentence found by a jury. On that basis, it subsequently held that the federal sentencing guidelines are advisory, not binding.47

The Court has also expanded criminal defendants’ rights by overturning its framework for applying the Confrontation Clause, conferring an expansive right to require direct testimony in an array of contexts.48 For example, Melendez-Diaz v. Massachusetts49 significantly reshaped the presentation of evidence in a huge volume of criminal cases by holding that the reports of laboratory tests cannot be introduced without affording the defendant the opportunity to examine the laboratory technician.

Those decisions under the Sixth Amendment cannot fairly be traced to any development in public opinion. Instead, they reflect an unusual alignment between the Court’s idealistic ideological wings. In both lines of decisions, the most liberal Justices (Stevens, Ginsburg, and Souter) joined with the most conservative Justices (Scalia and Thomas), all of whom concluded that the outcomes were compelled by a principled reading of the Constitution.

Friedman’s theory also fails to explain the other recent major development in constitutional law: the Court’s halting imposition of limits on Congress’s ability to subject states to suits by private parties for money damages, and its related flirtation with a broader limitation on federal legislative power. In a line of decisions beginning with Seminole Tribe of Florida v. Florida,50 the Court restricted Congress’s authority to abrogate states’ sovereign immunity from damages suits.51 Those decisions had limited practical impact because they left unaffected the power to sue for injunctive relief under Ex parte Young.52 But even more important for present purposes, after several years, the Court seemingly reversed course and recognized a broader congressional authority to impose monetary liability.53 The Court also took a step towards imposing significant limits for the first time on Congress’s power under the Commerce Clause, but declined to go materially beyond requiring Congress to make “findings” identifying the relationship between

46. 530 U.S. 466 (2000).
49. 129 S. Ct. 2527 (2009).
52. 209 U.S. 123 (1908).
its legislative goals and interstate commerce. None of those decisions—neither the Court's initial foray into shifting towards a greater regard for federalism nor its subsequent retreat from that initiative—are traceable to either an initial public consensus favoring states' rights or a subsequent reaction against the trajectory of the Court's rulings. And with the subsequent departure of the two Justices who had been most inclined to states' rights—Chief Justice Rehnquist and Justice O'Connor—there is no realistic prospect that the "federalism revolution" will be reinvigorated, no matter what turn public opinion might take in the coming years.

On a very broad level, changes in the Court's composition such as the replacement of O'Connor with Alito are themselves traceable to shifts in public opinion. A more conservative public elected and reelected George W. Bush. A more liberally minded public elected and reelected Barack Obama, who appointed Sonia Sotomayor and Elena Kagan. But that extremely indirect relationship does not resemble the constitutional conversation between the public and the Court that Friedman envisions. Instead, it is the ordinary process of appointment and confirmation contemplated by the Constitution.

The fact that the Justices achieve their positions through such a political process, which requires the nominee to conform to certain accepted norms of legal thinking in order to secure the support of the president and a majority of the Senate, also means that the Court is surpassingly unlikely to be composed of a majority of members who hold views that are significantly outside the mainstream. That is all the more true given the modern tendency to appoint Justices who have already served for many years as judges or who otherwise have significant public profiles. Although, in an era of stealth confirmations, nominees frequently will not have stated views on hot-button questions such as abortion that could give rise to significant political fights, they are at least well-known enough that there is little prospect they will later support revolutionary theories that would take the Court outside the mainstream of public opinion. To pick two stark but illustrative examples, the president is very unlikely to pick a nominee who believes in a radically narrower vision of presidential power, and the Senate will be hesitant to confirm a nominee who believes in a dramatically constrained view of Congress's authority under the Commerce Clause, which could threaten the legacy of both the New Deal and the civil rights revolution.

The lonely position of Justice Thomas is illustrative. Thomas was appointed at a very young age, when his jurisprudential views were undeveloped or at least poorly known. He now regularly dissents, urging the Court to overrule prior lines of settled precedent. But those dissents are generally solo opinions, with no other member of the Court willing to chart


such significant new directions in the law. Even when his other colleagues agree with Justice Thomas that a prior case was wrongly decided, stare decisis presents a significant constraint on its overruling. A Court that included five members who are as willing as Justice Thomas to reconsider long-established constitutional law on prominent questions could come into direct conflict with public opinion, to which it might need to adapt, but that does not resemble the Court we actually have.

C. The Court and Public Opinion

It should be no surprise that the Court’s decisions do not track developments in public opinion. American law—including constitutional law—is like an iceberg: most of it (including the most dangerous parts) lies below the surface. As the above discussion of the October 2009 Term illustrates, the public is completely unaware of the overwhelming majority of the Supreme Court’s constitutional law jurisprudence. Ordinary Americans keep abreast of only a trivial proportion of the laws that Congress enacts, the executive orders that the president issues, and the regulations that administrative agencies promulgate. The fact that a particular ruling is issued by the Supreme Court and involves the Constitution does not make it so different in kind that it uniquely generates significant public debate. After all, only a small percentage of Americans can even name one of the Justices.56

To be sure, Supreme Court decisions do generate immediate commentary in the blogosphere on sites like SCOTUSblog and longer-term academic analysis in law journals like this one. But there is no reason to believe that the opinions of those authors reflect broader public opinion in a fashion that would give comfort to those concerned with the power of unelected judges. Nor is that sort of elite commentary likely to lead the Court to change its course in any event.

To the extent the public is in fact paying attention to a particular constitutional issue—or to the ideology of the Court more broadly—the Justices employ several tools that minimize the prospect that public opinion will coalesce against their decisions. Unlike the other branches of government, the Supreme Court does not have a public relations operation that engages in “spin.” But we know from personal experience that most of the Justices do have relationships with national reporters. The left and the right of the Court also have committed constituencies that work hard to validate high-profile ideological decisions with which they agree. Obviously, those decisions are equally subject to attack from ideological opponents. But the result is a he-said, she-said fight that is unlikely to drive around a public consensus that could give the Court such significant concern that it would reverse course.

56. E.g., Jimm Phillips, Elena Who? Only 19 Percent of Poll Respondents Can Name SCOTUS Nominee, WASH. INDEP. (June 24, 2010), http://washingtonindependent.com/88198/elena-who-only-19-percent-of-poll-respondents-can-name-scotus-nominee (citing Findlaw.com poll indicating that only 35 percent of respondents could name even one of the current Justices).
Equally important, the Court frequently shapes its decisions as taking interim steps that tend not to generate significant controversy. For example, rather than overruling Roe v. Wade, the Court continues to decide individual cases that significantly narrow the abortion right;57 rather than outlawing affirmative action, the Court has made it significantly more difficult to sustain;58 rather than jettisoning Miranda altogether,59 the Court has limited its application, including in the three cases from the most recent term;60 rather than abandoning the exclusionary rule, the Court has adopted a cost-benefit calculus that limits its application significantly;61 and rather than holding unconstitutional section 5 of the Voting Rights Act, the Court expressed significant doubts about the statute’s validity absent further revision by Congress.62 Each of those lines of decisions represents an important development in constitutional law but is sufficiently incremental that it tends not to generate significant public controversy.

The Court can also quietly shape substantive outcomes by limiting access to the courthouse in the first instance. The recent rulings in Ashcroft v. Iqbal63 and Bell Atlantic Corp. v. Twombly64 may create significant obstacles to filing complaints, particularly in civil rights matters alleging discrimination without direct proof of animus, but both involve pleading standards that are not easily understood except by lawyers. The doctrines of standing and ripeness also have the effect of substantially, but unobtrusively, restricting litigation in hot-button areas that otherwise might draw public attention. For example, Hein v. Freedom from Religion Foundation65 significantly narrowed the pool of potential plaintiffs who may challenge governmental funding of religious organization by forbidding such suits when based on “taxpayer standing.” Another example is the Court’s significant trend in the direction of precluding preenforcement constitutional challenges to legislation—a common tool in civil rights litigation.66

But in the rare instances in which the Court’s decisions directly conflict with a broad swath of public opinion, the institution has sufficient built-up capital that it emerges essentially unscathed and undaunted. Bush v. Gore is an excellent example. The decision triggered a wave of popular and expert

64. 550 U.S. 554 (2007).
disapproval. But opinion polls in the wake of the ruling showed no material diminution in the Court’s standing.67

The heightened standing of the modern Court in the public’s eye is in fact a significant factor for which *The Will of the People* fails to account in extrapolating from historical examples. Friedman places significant weight on the “switch in time that saved nine” (p. 225), in which the Court blinked in its objection to New Deal legislation in order to stave off the prospect of the court-packing plan (pp. 225–34). He also emphasizes the concerns over the enforceability of the Court’s desegregation jurisprudence in cases such as *Cooper v. Aaron* (p. 248).68 At those moments in American history, the prospect that the Court would lose its independence or have its rulings flouted represented substantial and realistic threats, and Friedman provides substantial opinion to believe that the Court in those instances was particularly attentive to the public’s views.

Put simply, times have changed. There is no prospect in the current era that the Court would suffer such significant blows. The very structure of the Constitution provides the Justices tremendous independence from public opinion by guaranteeing life tenure during good service. There has not been a material movement to rein in the Court by changing its composition, or a realistic threat to disobey its rulings, in many decades. Even relatively meager proposals to require the Court to televise its proceedings consistently fall flat in the face of invocations of judicial independence.69 The Court’s role in American life is now entirely entrenched and broadly accepted.

Relatedly, only a handful of the constitutional questions that the current Court decides are so foundationally contested as the power of Congress to respond to the Great Depression and the Court’s authority to enforce an end to governmentally sanctioned racial discrimination. Even the criminal procedure revolution of the Warren and Burger Courts, which was the subject of sustained efforts by both Richard Nixon and Ronald Reagan to drive public opposition, now seems widely accepted.70 As discussed above, only core cases related to gun rights, abortion, religion, race, and gay rights currently strike anything approaching such a chord in the public’s mind. Those make up perhaps one case per term. And at least with respect to three of those issues—firearms, abortion, and gay rights—the Court’s rulings do not create the kinds of insurmountable obstacles to assertions of rights that might gen-

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67. See, e.g., Jeffrey M. Jones, *Rating of Supreme Court Improves as Partisans Switch Sides*, Gallup (June 22, 2009), http://www.gallup.com/poll/121196/rating-supreme-court-improves-partisans-switch-sides.aspx (citing Gallup poll in June 2001 indicating that 62 percent of Americans approved of job Court was doing).

68. 358 U.S. 1 (1958).


70. Rasmussen Reports, *33% Say Legal System Worries Too Much About Individual Rights*, June 4, 2010 ("[T]he vast majority of adults (87%) believe police officers when making an arrest should be required to read people their Miranda rights, while only nine percent (9%) disagree.").
erate significant public opposition, because advocates can and do seek alternative relief from legislatures and state courts.

Looking forward, there seem to be few questions that will correspond to Friedman’s model of a Court that responds to an evolved consensus in public opinion. Three major constitutional fights are headed towards the Supreme Court. Several states have challenged provisions of the sweeping health care reform legislation of 2010; the most significant argument is that Congress lacks the power under the Commerce Clause to require the purchase of health insurance. Those arguments seem tenuous in light of the Court’s decisions upholding the federal power to regulate medical marijuana and the power to detain sexually dangerous individuals. Similarly, significant provisions of Arizona’s immigration legislation seem preempted under the Court’s jurisprudence assigning principal responsibility for immigration questions to the federal government. But although the issue has generated enormous public attention, there is no prospect of the development of a political consensus to which the Court could conform, thus obviating concerns over the power of an unelected judiciary.

The one exception that may prove the rule that the Supreme Court’s constitutional law rulings correspond to the views of a majority of the appointees rather than to the views of the general public is gay marriage. Even within the gay rights community, there has been significant controversy over whether the Court is prepared to accept the claim that laws defining marriage as exclusively the union of a man and a woman—with corresponding rights and recognition limited to heterosexual couples—are unconstitutional. That profound question may in fact be so significant that several of the Justices—including Justice Kennedy—may give public opposition significant weight. On the other hand, the Court’s more liberal members and Justice Kennedy may agree with the assertion that homosexuals have an equivalent right to marry and may view the claim as on par with seminal desegregation precedents, in which the Court led public opinion rather than followed it (p. 242). But in whatever term that question reaches the Justices, few if any of the other constitutional cases will be written in an effort to reflect in the first instance, or later be modified to correspond to, public opinion.

72. Gonzales v. Raich, 545 U.S. 1 (2005).
75. See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); see also, e.g., Michael C. Dorf, A Federal Judge Strikes Down California’s Proposition 8: Will The Ruling Ultimately Advance Or Retard Civil Rights for LGBT Americans?, FINDLAW (Aug. 9, 2010), http://writ.news.findlaw.com/dorf/20100809.html ("[T]he Perry litigation poses serious risks for LGBT activists and for progressive politicians more broadly. One such risk is that the case will arrive at the Supreme Court too early.")
CONCLUSION

Professor Friedman has written a thorough, well-researched, and engaging history of the development of the Supreme Court’s public standing and its constitutional law jurisprudence. But because his theory that the Court adapts to developments in public opinion addresses, at most, only a tiny proportion of the Court’s modern constitutional rulings, *The Will of the People* does not articulate a persuasive response to critics who complain that the Justices’ decisions thwart democratic governance.\(^{76}\)

\(^{76}\) This Review has been limited to the question whether the Court’s decisions do in fact ultimately reflect popular will. There is a further question whether the theory of *The Will of the People*, even if descriptively accurate, would persuasively respond to the countermajoritarian difficulty. The Constitution did not adopt a system of referenda, and because Congress sometimes mediates popular will, responding to public opinion is not the same as respecting democratic governance. For the same reason, the act of bowing to negative public reaction to a particular interpretation of the Constitution is not the same as respecting democratic institutions.