Response

The Will of the People? Pollsters, Elites, and Other Difficulties

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Introduction

Barry Friedman has written a wonderful book. Brilliant in its narrative detail, *The Will of the People*[1] ranks among the best one-volume histories of the Supreme Court in United States politics. It recounts two centuries of a complex saga in a way that is sprightly and learned, readable and deep. It rests on formidable primary research and distills and synthesizes a great deal of important work in several fields: American political and constitutional history, constitutional theory, and political science. *The Will of the People* also sets out its own important and provocative theses, about which this Essay offers a few critical reflections.

The overarching story is one of a happy marriage. After some stormy, troubled years, the Court and the People work out a modus vivendi, a "relatively quiet equilibrium."[2] The Court provokes the People to focus on constitutional issues; the People do so, and when their considered views clash with the Court's doctrines, the Court gets the message and alters its doctrines to reflect the People's will. Over

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1 Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009).

2 *Id.* at 376.

time, the Court became less provocative and less inclined to stray far from mainstream public opinion.[3] Thus, over the course of the nineteenth century, the Court engaged in epic battles against powerful elements in the polity and broadly supported public policies.

By comparison, the New Deal contest, for all its sound and fury, was a milder fray. But the New Deal taught the Court a lesson about holding out too long. The Court's backing and filling in respect of *Roe v. Wade*[4] illustrates how well the Court learned that New Deal lesson.[5] By now, Friedman writes, "[t]he [J]ustices . . . can sense trouble and avoid it . . . . [I]f [the People] simply raise a finger, the Court seems to get the message."[6] It tailors doctrines and adjusts outcomes to fit the outlook of median voters, or at least to avoid their ire. And rightly so, Friedman affirms, if the Justices care about their institutional power and legitimacy.[7]

Whether this is an accurate descriptive account of relations between Court and polity or Court and citizenry, and whether, as Friedman suggests, it also offers an attractive prescriptive model, are questions to which we will return. But in view of the narrative arc he has drawn, Friedman's conclusion follows: "[W]hen it comes to the Constitution, [the People] are the highest court in the land."[8] Friedman, in other words, concurs with (and draws generously from) the political scientists who have mapped the modern Court's relationship to public opinion polls; by their lights, the Court generally is attuned to the will of political majorities, and it molds constitutional law accordingly.[9] Thus, Friedman concludes, the countermajoritarian difficulty that so troubled generations of constitutional scholars is a nonissue.[10]

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3 *See id.* at 12–14.

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

5 *See* FRIEDMAN, *supra* note 1, at 380.

6 *Id.* at 376.

7 *See id.* at 375.

8 *Id.* at 385.

9 *See id.* at 375.

10 Friedman has written a number of fine articles chronicling the history of the countermajoritarian difficulty, on which *The Will of the People* draws. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *Part Five*].

Additionally, in Friedman's view, the worries of popular constitutionalists like Larry Kramer are also false.[11] Kramer frets that "We the People" have lost all sense of ownership and authority over the processes of constitutional deliberation and decisionmaking.[12] From the mid-twentieth century onward, the Court has made ever-more-imperialistic claims about its monopoly on constitutional interpretive authority, and the political branches, on Kramer's account, have yielded.[13] Liberal and conservative political and legal elites alike have abandoned the very idea that the political branches enjoy coequal interpretive authority. They also have abandoned the traditional vehicles for asserting that authority and for challenging judicial interpretations and championing rival constitutional outlooks. As a result, the People have lost the sense that constitutional deliberation and contestation should unfold in popular political and cultural arenas.[14] For Friedman, this is sheer nostalgia and willful blindness. While the forms of popular involvement may have changed, the sway that an aroused public opinion enjoys over the course of constitutional development has never been greater.[15]

Kramer's reports of the death of popular constitutionalism are exaggerated.[16] But for his part, Friedman never really inspects the changing machinery of popular constitutional participation and opinion formation; instead, he simply tends to assume it is always in good working order. So, Friedman's counterclaim against Kramer blurs some critical issues and begs some important historical and normative questions that this Essay examines.

First, this Essay offers a highly distilled account of what "the People" and "public opinion" have meant over the centuries Friedman chronicles. Friedman's main thesis and grand narrative sometimes lose hold of what, in his more concrete moments, he knows very well: "The People" is a fiction. The will of the People is always constructed out of the nation's changing ways and means of aggregating, representing, enlisting, educating, and molding citizens' ideas and interests, votes and political energies. As these change, so do the ways and

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11 *See* FRIEDMAN, *supra* note 1, at 349–50. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

12 *See* William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 990 (2006).

13 *See id.* at 988.

14 *See id.* at 990.

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

16 *See generally* Forbath, *supra* note 12.

means that ordinary citizens do and do not encounter and shape the making of constitutional law. Surely, profound changes in the meaning of "public opinion" and the infrastructure of popular participation and opinion formation should be probed a bit more in a history that is about the role of public opinion in constitutional development. It should also be salient for a theory of constitutional democracy that concludes by declaring that "the considered views of the American public" are the stuff of our constitutional law.[17]

Second, this Essay turns to a central ambiguity in Friedman's book, a blurring of *is* and *ought*, and a related vagueness about the different forms of power and authority that the Court has cultivated and that occupy Friedman's attention. Most simply, this Essay addresses the difference between the power to act by dint of strategic canniness versus the power to act by dint of moral authority and the deference it may produce. A good court ought to cultivate both kinds of power, and it is often impossible to disentangle them precisely. Despite the difficulty, the historian and constitutional scholar must keep this difference in view.

At the same time, an ambitious history like this one also tries to offer its own reflective judgments about how the Court has built up and used its strategic resources and moral authority, acting and refraining from actions in the service of what kinds of parties and precepts. Sometimes, Friedman seems to cast himself as the shrewd *consigliere* for whom the normative side of these matters is beside the point; what counts is maximizing institutional power and providing effective service to patrons and constituents. Other times, Friedman applies his own normative precepts—the modern liberal vision of the Court's office as guardian of vulnerable minorities.[18] He also sometimes puts in the foreground the thesis—at once descriptive and prescriptive—that the Court's key role has been to arouse and then respond to sustained public consideration of hard constitutional questions. There are tensions amongst these perspectives. They make for a rich broth, but also yield some normative uncertainty and analytic confusion.

This Essay takes up these tensions, briefly, by reflecting on the prodigious run of boldly probusiness decisions that have rolled off the Court's press over the past few decades. This, Friedman notes, is a largely invisible aspect of the Court's and the federal judiciary's hand-

17 FRIEDMAN, *supra* note 1, at 383.

18 *See, e.g.*, *id.* at 221–22 (discussing the Court's role as protector of the civil liberties of unpopular and politically weak groups and individuals).

iwork[19] and, therefore, a seeming exception to his thesis of the Court channeling the will of the People. For various reasons, however, he does not think this invisibility an especially serious problem. I demur, and this Essay suggests some historical and structural reasons why this may be a countermajoritarian difficulty worth worrying about, not least during an economic crisis many hope will bring forth a "New New Deal."

I. The Changing Infrastructure of Popular Participation and Public Opinion

Ordinary citizens' involvement in constitutional politics is shaped and mediated in varying degrees by political, economic, and intellectual elites.[20] The process flows through an array of political and social institutions. Although these institutions have changed over time, there are continuities. Political parties and party elites, for example, have been central players in this process of constitutional development for over two hundred years. For just as long, Congress has been a critical arena where foes of the Court's constitutional output exert pressure upon it. But much also has changed in what we can call the infrastructure of popular participation and public opinion. Likewise, the very notion of public opinion has a history, and what it signifies has undergone a number of transformations.[21]

A brief narrative of these changes might look something like this: In the early Republic, gentry elites and men of letters were thought to form public opinion; their essays and pamphlets thought to express rival public opinions on matters like the new Constitution.[22] The Jeffersonian and Jacksonian revolutions gave rise to party systems.[23] And local and state party organizations and the party press became key institutions of a public sphere, where constitutional conflicts were aired and opinion and will formation unfolded.[24] As Gerry Leonard

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19 *See id.* at 377–78.

20 *See id.* at 17–18.

21 The classic works remain WALTER LIPPMANN, PUBLIC OPINION (The Free Press 1965) (1922), and JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Burger & Frederick Lawrence trans., The MIT Press 1989) (1962).

22 *See generally* ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (1984); JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC (2001); RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA 1740–1790 (1982); DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (1980); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (First Vintage Books 1993) (1992).

23 *See* FRIEDMAN, *supra* note 1, at 12–13.

24 *See generally* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM (1993);

has shown, it was President Martin Van Buren who perfected—and theorized—the mass party as a bearer of public opinion on constitutional issues.[25]

This was the context in which the remarkable constitutional debates regarding the big issues of the day in mid-nineteenth-century America—e.g., the Webster-Hayne debates and the Lincoln-Douglas debates—actively engaged ordinary citizens with constitutional politics.[26] As Friedman notes, the party presses circulated hundreds of thousands of pamphlets and newspaper reprints of the debates.[27] Meanwhile, social movements, like abolitionism in the Antebellum era and Populism in the Gilded Age, created alternate publics with rival constitutional outlooks and interpretations, mimicking the party presses and party organizations. They pressed their rival constitutional interpretations and opinions about slavery and free labor, political economy and currency reform, and the constitutional legitimacy of the new giant business corporations on the major parties, legislatures, and courts.[28]

As Friedman observes, the Progressive Era saw attacks on this nineteenth-century mode of popular political participation.[29] Jacksonians had championed the local party organization as an ideal vehicle of public opinion- and will-formation. Half a century later, Progressives attacked it as a patronage tool of party bosses with new immigrant constituencies. So Progressives, famously, set out to supplant the old "state of courts and parties."[30] Friedman highlights the

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Richard Hofstadter, The Idea of a Party System (1969); Sean Wilentz, The Rise of American Democracy: Jefferson to Lincoln (2005); Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815 (2009).

25 *See* Gerald Leonard, The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois 98 (2002).

26 *See* Friedman, *supra* note 1, at 51, 96–104, 113–18.

27 *See id.* at 51. *See generally* Trish Loughran, The Republic in Print: Print Culture in the Age of U.S. Nation Building, 1770–1870 (2007); Jeffrey L. Pasley, The Tyranny of Printers: Newspaper Politics in the Early American Republic (2001); Harry L. Watson, Liberty and Power: The Politics of Jacksonian America (1990).

28 *See generally, e.g.*, 1 John Ashworth, Slavery, Capitalism, and Politics in the Antebellum Republic (1995); Daniel Walker Howe, What Hath God Wrought: The Transformation of America, 1815–1848 (2007); Loughran, *supra* note 27; Michael McGerr, A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870–1920 (2003); Robert C. McMath, Jr., American Populism: A Social History 1877–1898 (1993); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999).

29 *See* Friedman, *supra* note 1, at 167–73; *see also* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 117–71 (2000).

30 *See* Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920, at 285–92 (1982).

Progressives' attacks on judicial review and their calls for popular recall of judges and judicial rulings.[31]

Friedman, however, does not catch hold of the whole shape and push of the Progressive reforms. Progressives set out to remake the constitutional order, root and branch, and to reinvent the institutions of public, citizenly involvement in constitutional politics and decisionmaking.[32] Thus, Progressives set out not only to legitimate the modern administrative, regulatory, and redistributive state;[33] they also set out to make law- and policymakers more accountable by reconstructing the relations among the branches and the role of the political party. Progressives wanted to make the Constitution itself more changeable by amending the amendment clauses. They hoped to create a modern democracy that was more deeply rooted in popular participation and decisionmaking, more open to initiative and change from below, and a democracy that was not plebiscitary but deliberative, in a more popular and plebeian fashion than liberal constitutionalists today generally dream of.

Today's constitutional scholars have a standard account of the Progressives' goals[34]: supplanting the state of courts and parties with a modern regulatory and administrative state dominated by the executive branch; securing political and constitutional legitimacy for the new administrative state's managerial and bureaucratic forms of governance; forging direct-democracy measures like the direct primary and the initiative, referendum, and recall; creating powerful national interest group associations as vehicles of political representation; and relying on the newly emergent national media to define and publicize social problems and shape public opinion. With the exception of the direct-democracy reforms, these efforts have seemed aimed at empowering experts and elite professionals rather more than the citizenry.[35]

And the direct-democracy reforms have seemed a distinctly hollow achievement, helping to erode political parties as vehicles of

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31 *See* FRIEDMAN, *supra* note 1, at 182–87.

32 *See, e.g.*, JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS 222–24 (Anne Firor Scott ed., 1964) (1907); HERBERT CROLY, PROGRESSIVE DEMOCRACY 123–24 (1915); KEVIN MATTSON, CREATING A DEMOCRATIC PUBLIC: THE STRUGGLE FOR URBAN PARTICIPATORY DEMOCRACY DURING THE PROGRESSIVE ERA 8–9 (1998); Forbath, *supra* note 12, at 974–75; Jerome M. Mileur, *The Legacy of Reform: Progressive Government, Regressive Politics*, *in* PROGRESSIVISM AND THE NEW DEMOCRACY 259, 271–74 (Sidney M. Milkis & Jerome M. Mileur eds., 1999).

33 The following discussion draws substantially from Forbath, *supra* note 12.

34 *Id.* at 976.

35 *See* MATTSON, *supra* note 32, at 84.

popular participation in democratic politics in favor of a politics of advertising and mass manipulation.[36] Indeed, lawmaking by initiative and referendum has been assailed by many leading liberal constitutional law scholars as irrational (and, usually, rightwing) populism, driven by money and the manipulation of popular fears—the antithesis of the kind of deliberative democracy the Constitution prescribes.[37] Likewise, liberals today condemn the Progressives for their complicity in the disenfranchisement of the blacks of the South; but we take this as being of a piece with a reform agenda that meant to supplant popular patronage politics with expert administration and elite policymaking, and we have no brief against the thinning of democracy that such an agenda implies. Modern society is too complex, mass politics too irrational and dangerous, to take thicker conceptions of democracy seriously. That is our contemporary liberal view; but in important respects, it was not the Progressives'.

Progressive reformers as diverse as Jane Addams, the great settlement-house pioneer, and Herbert Croly, founder of *The New Republic* and the leading public intellectual of the Progressive movement, shared President Theodore Roosevelt's outlook on the links between constitutional and political, social, and economic reform.[38] All three thought that a European path to social democracy was a nonstarter in the United States. Class-based socialist politics rubbed too abrasively against the American grain, as did strongly centralized and disciplined party organizations. Both clashed with democratic individualism. If commitments to substantial redistribution, central state regulation, and the like were to be forthcoming, they would come from a more middle-class movement that appealed to individual voters, one by one (rather than as members of an oppressed class), to embrace the higher calling of national community and a national social ethic.[39] Figures like Addams and Croly genuinely expected to see these commitments emerge from the direct democratic constitutional reforms they and Roosevelt championed and the active, popular democratic deliberation they fostered. They also understood that the citizenry might mas-

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36 Forbath, *supra* note 12, at 976.

37 *See, e.g.*, Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 297–99; Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 436 (1998); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1513–14 (1990).

38 Forbath, *supra* note 12, at 980. *See generally* ADDAMS, *supra* note 32; CROLY, *supra* note 32.

39 Forbath, *supra* note 12, at 980; *see also* Sidney M. Milkis, *Introduction: Progressivism, Then and Now*, *in* PROGRESSIVISM AND THE NEW DEMOCRACY, *supra* note 32, at 1, 4–6.

sively reject their social ethics and their hope for an administrative state-building. However, they thought this was the only path compatible with respect for the dignity of the individual citizen. In this sense, theirs was not a plebiscitary brand of democracy at all, although that is how constitutional scholars today tend to view it.

Nor was theirs as foolish a hope as we now think.[40] Legions of city- and state-level Progressive reformers were succeeding in melding new managerial forms of administrative governance (for which the Progressives are remembered) with vibrant democratic associations and polities (which tend to be forgotten). They worked hard with unions, academics, and all kinds of reform organizations to create a myriad of forums and arenas for public political deliberation in cities like Portland, Cleveland, and Rochester, fashioning a circuitry of democratic publics, direct democracy, and strong executives.[41] We think of direct and deliberative democracy as foes; for Progressive reformers, they were bound up with one another. And together they seemed a better vehicle for popular opinion formation, as well as radical social reform, than the inherited party machinery, which seemed unaccountable, boss-ridden, and dominated by corporate elites.

In its emphasis on the reasoned deliberation of the People, deciding one by one on the desirability of new constitutional social rights and governmental duties and structures, Progressives' brand of constitutional reform could be labeled "conservative," as Roosevelt frequently insisted. It marked a distinctive vision of bringing an informed public opinion to bear on constitutional change and a distinctive moment in Americans' understandings of the interplay of public opinion and constitutional development.

As World War I brought the Progressive Era to an end, it destroyed the cultural climate that sustained the Progressive experiments in creating democratic publics and public opinion.[42] The war saw the creation of massive propaganda machinery by the federal government in collaboration with the emerging advertising industry.[43] In the twenties, both experiences—wartime propaganda and burgeoning modern advertising—inspired thinkers like Walter Lippmann to forge a new conception of modern, urban publics as manipulable, irrational, emotional vessels for opinions manufactured for them by media and

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40 Forbath, *supra* note 12, at 980–81.

41 *See* MATTSON, *supra* note 32, at 40, 60.

42 Forbath, *supra* note 12, at 982.

43 *See* LIPPMAN, *supra* note 21, at 30–31.

political technicians.[44] Thus, the idea of public opinion underwent another sea change. From meaning the widely mooted views of the citizenry, which must guide and constrain state policy and constitutional development, and from being a project of reformers, intellectuals, and activists, public opinion became the product of new professionals and new techniques: advertising, polling, mass media. And the prewar Progressive ideas about democratic citizenship and popular rule came to seem hopelessly old-fashioned and naïve.

The New Dealers succeeded in building up the national administrative state, but they put aside the project of structural constitutional reform. As Friedman underscores, they turned to arguing that the Constitution was capacious enough for the kind of national government they sought; they were not much interested in rekindling the Progressive experiments in novel forms of popular constitutional decisionmaking.[45]

Meanwhile, as Friedman brilliantly describes, the New Deal saw an efflorescence of popular debate about the constitutional issues of the day.[46] Friedman suggests that the machinery of popular opinion- and will-formation was basically the same as it ever was. Unlike Progressives of an earlier generation, however, New Dealers were not interested in self-consciously renovating that machinery via constitutional change. They did not concern themselves with the question of constituting democratic publics capable of the task of constitutional self-reflection in mass urban America. But, Friedman might argue, they did so just the same. Social movements produced new constitutional outlooks, rhetorics, and narratives.[47] These embodied the aspirations of broad swathes of Americans and found their way into the speeches of lawmakers and the President. The People voted, and the popular constitutional views prevailed.

At the same time, however, the new understandings and machinery of public opinion fashioned in the 1910s and ’20s were also in operation. Public opinion was ceasing to be understood as a product of public, political deliberation and expression; it was increasingly identified with polling.[48] But while the New Deal polls sometimes surveyed citizens’ views on expressly constitutional questions like the court-packing plan, by the 1950s pollsters had ceased to pose questions fo-

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44 Forbath, *supra* note 12, at 982–83.

45 *See* FRIEDMAN, *supra* note 1, at 212–16.

46 *See id.* at 205–12.

47 *See id.* at 168–70.

48 *See* Forbath, *supra* note 12, at 983.

cused on the Constitution. According to Friedman, from the New Deal onward polls, "social trends," and "social indicators"—the handiwork of mass-market and political technicians and social scientists—occupy much of the space of public opinion.[49] These register spectrums of approval and disapproval on whether lawmakers should, say, outlaw the death penalty for rape, or allow abortion in cases of rape or incest, not whether doing so comports with the Constitution.

This is not to say that the ordinary citizen in the latter half of the twentieth century or early twenty-first century has lacked her own considered views on the constitutional questions of the day. Nor that the ordinary citizen of the nineteenth or early twentieth century had more considered views, or thought and talked about them more often in actual, plainspoken constitutional terms. I suspect that may have been so, but I do not pretend to know. But it is Friedman who is making large claims about the Court channeling the considered views of the citizenry, as opposed to channeling, say, the views of congeries of legal and political elites, whose interests sometimes lie in arousing and shaping mass opinion and sometimes in bypassing it. Friedman simply does not inspect the machinery of popular constitutional participation and opinion formation and instead assumes it is always in good working order.

What difference, if any, has it made for the relationship of Court and citizenry that the very notion of public opinion, which on Friedman's account sways the Court and shapes the meaning of the Constitution,[50] has changed in this fashion? What difference does it make that popular opinion formation is no longer centered in engagement with local public political institutions so much as it is in being apprised, appraised, and polled by national media? What difference does it make that one side in Friedman's constitutional dialogue does not put forward a constitutional view of the matter, but instead mutely offers a loose limit-setting spectrum of approval or disapproval in respect of something like the death penalty or affirmative action?[51] Does Friedman really think that his various other nonpollster proxies for public opinion—the views of Anthony Lewis, the liberal journalist who covered the Court for *The New York Times* in the 1960s and

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49 *See, e.g.*, FRIEDMAN, *supra* note 1, at 286, 382 (discussing the interplay between Court decisions and social trends on the issues of capital punishment and abortion); *id.* at 353–55 (noting that the Rehnquist Court tended to follow social trends in its decisionmaking).

50 *Id.* at 383.

51 *See id.* at 286, 361 (discussing the public opinion's influence in affirmative action and death penalty cases).

'70s,[52] or those of law professors writing in leading law reviews, or even those of social movement spokespeople on the right or the left—are reliable voices of "We the People"?

I am genuinely uncertain how important these changes in the meaning of public opinion and the infrastructure of participation and opinion formation really are, or what difference they have made, for our constitutional politics. But they seem noteworthy for a history of public opinion and constitutional development, and a positive theory of constitutional democracy that concludes by declaring that "the considered views of the American public" are the stuff of our constitutional law.[53]

II. A Real Countermajoritarian Difficulty

There is an 800-pound gorilla in Friedman's engine room. He is producing the constant run of "probusiness" decisions that roll off the Court's press. Friedman acknowledges that these decisions may not easily be made to match "the considered views of the American public."[54] To be sure, no one could have mistaken the probusiness outlook of our recent Republican Presidents. But, nothing in the public discourse and debate around their campaigns really raised for public consideration the relentlessly probusiness tenor of the work product of their judicial appointees. This, Friedman notes, is a largely "unnoticed" aspect of the Court's and the federal judiciary's handiwork.[55]

Consider, for example, the extraordinary constitutional landscape of preemption. This landscape has witnessed the undoing of hundreds of state common law claims as well as scores of duly enacted regulatory schemes that were aimed at protecting consumers and workers against corporate misconduct.[56] Consider, too, the more profound indirect impact on policymaking of this body of judge-made law, which, over the past three decades, has put off the table a great deal of what would have been welcome reforms in the eyes of many broad but dif-

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52 *See id.* at 237 (implausibly suggesting that Anthony Lewis "understood that the Court did what it did because the public supported these outcomes [in cases on school desegregation and the rights of criminal suspects] and no other organ of government would provide them").

53 *Id.* at 383.

54 *Id.*

55 *See id.* at 377–78 (discussing the Roberts Court's probusiness cases).

56 *See* Cindy Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1569–79 (2002); Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. REV. 869, 871–81 (2008). *See generally* THOMAS O. MCGARITY, THE PREEMPTION WAR (2008); Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION 249 (Richard A. Epstein & Michael S. Greve eds., 2007).

fuse constituencies. No point in spending political capital on that kind of state legislation to safeguard workplace organizing or to improve labor standards, and no point in bringing that kind of common law claim against a local polluter; the federal courts have deemed it preempted.

This same cumulative probusiness impact of judge-made law on social and economic policymaking was afoot during the *Lochner* era. But unlike today, it was widely noted and decried at the time;[57] that contrast will occupy us in a moment. What bears noting is that now there are few formal constitutional barriers preventing Congress from reversing the Court (or the Executive) when either judicial rulings or administrative decrees deem state legislation or state common law preempted.[58] But practically speaking, the aggressively pro-preemption decisions of conservative and liberal Justices alike have tilted the playing field in important ways, and have done so despite strong statutory arguments on the state law side. Careful observers suggest that the Court has made practical nonsense of its theoretical "presumption against preemption" and thus made matters far worse for state-based, proworker, or proconsumer initiatives.[59] Getting Congress to act against corporate interests is always difficult, and in some areas, like workplace organizing, it has proved impossible for decades.[60] Therefore, how the Court wields its vast interpretive authority—how far it allows and how far it forecloses state-based reform—is crucial and dispiriting.

Friedman has two responses to this "unnoticed" probusiness domain of judge-made law. First, it is easily understood and analyzed in public choice terms.[61] The groups helped by this body of law tend to be concentrated, well organized, and well heeled. The groups injured by it are not. The well-heeled constituencies fund the foundations that have cultivated the intellectual groundwork of doctrines like preemption and reward the Republican and Democratic Parties alike for

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57 *See* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 153–54 (1991) (highlighting frustration with and objection to some of the Court's probusiness decisions during the *Lochner* era).

58 *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946) ("Congress may exercise [this power] alone . . . or in conjunction with coordinated action by the states.").

59 MCGARITY, *supra* note 56, at 46–47; *see also* Estlund, *supra* note 56, at 1592 (noting that courts had "at least secondary responsibility for the ossified state of labor law").

60 Jonathan R. Macey, *State and Federal Regulation of Corporate Takeovers: A View from the Demand Side*, 69 WASH. U. L.Q. 383, 400 (1991) (explaining that Congress acts under probusiness interest-group pressure for political survival).

61 *See* FRIEDMAN, *supra* note 1, at 378.

appointing probusiness judges who deploy them. The diffuse constituencies injured by the doctrines are not well positioned to oppose them and focus public attention on them.[62]

This may be plausible, but it puts some pressure on Friedman's claim that the Court's doctrines reflect the considered views of the People. On that score, he responds: when and if the broad but diffuse elements of the People are really aroused, when "enough toes" are trod on, the Court will be yanked back into line.[63] Friedman's own analysis underscores why a great deal of time may go by before the public reaches the end of this particular tether. Friedman's chronicle also suggests some deeper reasons why the constitutional domain today is structured in ways that make the probusiness tilt of the federal courts hard to assail.

The present economic crisis and the politics surrounding it are often compared to the Great Depression and the New Deal.[64] Today, as previously noted, no really serious judicial obstacles stand in the way of national economic reform measures that Congress can enact.[65] The New Deal constitutional revolution assured that. Ironically, though, the New Deal constitutional settlement also deprived today's reform advocates of constitutional and political resources the New Dealers enjoyed. The New Deal settlement eclipsed the century-old, reform-minded constitutional vision of government's duty to govern the economic order to secure ordinary citizens' material conditions, livelihoods, and opportunities.[66] This is serious because constitutionalism is one of our central resources for making moral claims on the polity. Furthermore, it is serious because, as we have noted, the end of the *Lochner* era hardly ended the antiredistributive, antilabor, reactionary work of the federal courts. That work has enjoyed a stupen-

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62 *See id.* at 379–81.

63 *Id.* at 378.

64 *See, e.g.*, Mitchell H. Rubinstein, *Obama's Big Deal; The 2009 Federal Stimulus; Labor and Employment Law at the Crossroads*, 33 RUTGERS L. REC. 1, 1–2 (2009), http://www.lawrecord.com/files/rubinstein-1.pdf (noting the similarities between Presidenet Obama's response to the current economic situation and President Roosevelt's response to the Great Depression).

65 Campaign finance is, of course, an important, but indirect, exception. Not a domain of economic reform, it arguably affects corporate power to shape or stymie such reform. *See generally* Citizens United v. FEC, 130 S. Ct. 876 (2010) (holding portions of campaign finance law unconstitutional as to corporations).

66 *See* Forbath, *supra* note 28, at 3–4; William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 166 (2001) [hereinafter Forbath, *The New Deal*]; William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, *in* THE CONSTITUTION IN 2020, at 55, 55–56 (Jack M. Balkin & Reva B. Siegel eds., 2009) [hereinafter Forbath, *Social and Economic Rights*].

dous revival. But the New Deal settlement has deprived this work of a high-visibility constitutional capstone in the form of decisions striking down key economic reforms,[67] and these made the much larger edifice of probusiness common law and statutory decisions far more vulnerable to progressive assault.

Compared to the New Dealers, today's liberals and progressives are having great difficulty articulating a constitutional vision that addresses the nation's political economy and sets out the constitutional stakes as clearly as the conservatives' probusiness, antistatist, laissez-faire *Lochner* revivalism.[68]

As Friedman observes, the "counter-majoritarian difficulty" was the invention of New Deal–bred liberal constitutional theorists disturbed by the rise of Warren Court activism.[69] Their liberal and progressive offspring have gotten over that.[70] But they have forgotten how to think and talk about the majoritarian-minded constitutional claims that liberals and progressives once wielded against the *Lochner* Constitution and its restrictions and limitations on national and state governmental authority. The idea was not simply that Congress had the power but that it had the duty to bring to earth through legislation what FDR called "new rights and duties" to ensure decent work, livelihoods, and social provision against the hazards of illness, old age, and unemployment.[71] Today, however, liberals and progressives have become so countermajoritarian and single-minded,[72] as Friedman himself is, in their focus on minority rights as the proper sphere of constitutional solicitude, that they have lost sight of the notion that the Constitution might contain certain kinds of affirmative governmental

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67 The defenders of Lochnerism on and off the bench were clear and articulate about the links between liberty of contract and constitutional property rights on the one hand and, on the other, the broad (and often more consequential) body of doctrines that safeguarded employers against union organizing and labor strikes, narrowed the reach of statutory reforms in derogation of the common law, authorized injunctions against state regulatory agencies, and so on. *See* FORBATH, *supra* note 57, at 150–52. The foes of Lochnerism mobilized against all these interlocking elements of judge-made law. *See id.* at 153–56.

68 *See generally* David Cole, *"Strategies of the Weak": Thinking Globally and Acting Locally Toward a Progressive Constitutional Vision*, *in* THE CONSTITUTION IN 2020, *supra* note 66, at 297 (discussing the future progressive constitutional vision); Forbath, *Social and Economic Rights*, *supra* note 66 (discussing the travails of liberals and progressives in offering an account of constitutional political economy to rival the conservatives' and suggesting such an account).

69 *See* Friedman, *Part Five*, *supra* note 10, at 201.

70 *See id.*

71 *See* Forbath, *The New Deal*, *supra* note 66, at 177–78, 181–82.

72 *See* Friedman, *Part Five*, *supra* note 10, at 259.

responsibilities not captured by the duty to undo the caste-like subordination of discrete and insular minorities.[73]

Conclusion

This is not only a history lesson for lawmakers. A new generation of liberal jurists also should not be so blinkered that they overlook that decent work and livelihoods, education, and healthcare are what federal courts briefly dubbed—and other state and national courts around the globe have recognized in a wide assortment of ways as—fundamental interests worthy of some measure of judicial solicitude, simply by dint of common membership in the political community and shared vulnerabilities to the callous disregard of government or corporate power. If we do not seize the present crisis as an opportunity to rebuild some of these old constitutional pathways and explore new ones, that would be a difficulty worth worrying about.

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73 *See* Forbath, *supra* note 28, at 1–2.