Defending the Majoritarian Court

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Recommended Citation
Frost, Amanda, "Defending the Majoritarian Court" (2010). Articles in Law Reviews & Other Academic Journals. 1384.
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INTRODUCTION

In his book, The Will of the People, Barry Friedman argues that the U.S. Supreme Court and the American people have reached a tacit agreement under which the Court may engage in judicial review as long as it never strays too far from mainstream public opinion. Those convinced by Friedman’s thesis—and I count myself among the many—are left with troubling questions about the role of the federal judiciary in our system of government. First and foremost, what is the purpose of establishing an appointed, life-tenured federal judiciary if its members inevitably follow the will of the people? If the Supreme Court’s primary function is to “rubber-stamp public opinion,” as Friedman’s thesis suggests, then why allow judicial review at all? We already have two branches of the federal government that are bound to serve the constituencies that elected them, so why add review by a third branch to the same effect? In short, by debunking the counter-majoritarian difficulty—that is, the claim that judicial review is undemocratic because it allows unelected judges to reverse decisions made by elected officials—Friedman leaves the reader with the opposite problem: how to justify the continued existence of the Supreme Court in light of its

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evolution from "an institution intended to check the popular will to one that frequently confirms it."  
Friedman's book is devoted to describing the Supreme Court's majoritarian tendencies, not to defending its existence, and thus his answers to these questions are necessarily undeveloped. In the book's conclusion, Friedman suggests that the Supreme Court's true worth lies in its ability to serve as a catalyst for conversations with the public about constitutional values.  

He argues that "it is through the dialogic process of 'judicial decision—popular response—judicial re-decision' that the Constitution takes on the meaning it has." Although the Court is ultimately led by the sustained, strongly felt preferences of the general public, Friedman contends that it has some leeway to reject the fleeting and ill-conceived whims of the majority and perhaps even shape emerging public preferences.  

If true, the federal judiciary serves an important role in our system of government despite its inability to deviate far, or for long, from mainstream opinion. As Friedman admits, however, legal scholars have only a minimal understanding of how the courts and public opinion affect one another, and thus his description of their interactions is nothing more than an educated guess.  

In this Essay, I seek to test Friedman's suggestions by contrasting the constitutional decisions of the appointed, life-tenured judges of the federal courts with those of elected state court judges. Elected judges perform essentially the same function as federal judges, and they act under most of the same institutional constraints, such as serving on collegial courts, issuing written opinions, and deciding cases within a limited docket. Unlike federal judges, however, elected state court judges are directly accountable to the public through periodic elections. As Friedman has shown, federal judges are kept in check by the public they serve despite their life tenure, raising the question of whether they act any differently than the other elected officials who must accede to majority preferences. Thus, variations in these two court systems' approaches to constitutional cases can shed light on the purpose of maintaining a federal judiciary that is far from the independent and apolitical institution that Americans have long believed it to be.

Part I of this Essay briefly describes the empirical evidence demonstrating that judges facing re-election decide cases differently from those

2. Id. at 4.
3. Id. at 367-68. Friedman describes this role in more detail in some of his other work; see, e.g., Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 2596 (2003).
4. Friedman, supra note 1, at 382.
5. Id. at 377-78, 382.
6. Id. at 373 ("Far too much time has been spent and ink spilled debating whether the judiciary is beholden to or independent of majority will (even among those who should know better). Surprisingly little is devoted to analyzing where, between these two poles, the answer rests and how the system of judicial review actually works.").
with job security. In other words, even accepting Friedman’s contention that appointed, life-tenured federal judges are responsive to public opinion, it is important to acknowledge that such insulated judges nonetheless have greater leeway to flout majority preferences than those subject to periodic elections. Part II contrasts the culture of constitutional decision-making at the state and federal level. Although federal courts have a long history of expounding on the meaning of the U.S. Constitution, state court judges are almost pathologically unwilling to engage in constitutional discourse, preferring instead to defer to the federal judiciary’s interpretation of the Constitution. Taken together, Parts I and II seek to show that appointed, life-tenured federal judges do matter, in that they reach different results, and create a different constitutional culture, than do elected judges.

Part III examines why this is so in light of the strong evidence that the Supreme Court is a majoritarian institution just like its elected state counterparts. First, even though federal judges are not insulated from majoritarian pressures, they are insulated from electoral pressures. Federal judges need not please powerful interest groups, raise money for the next campaign, or defend against attack by opponents. Nor do they need to be overly concerned with the public’s immediate reaction to their decisions, but instead must only avoid consistently reaching decisions at odds with sustained public preferences. Accordingly, federal courts have breathing room to issue unpopular decisions from time to time, as well as to engage in a constitutional dialogue with the citizenry. Elected state court judges do not have that luxury, and thus their decisions differ from those of appointed judges not because they are more responsive to majority preferences, but rather because they must be attentive to the much narrower subset of the population who might be able to mobilize public opinion against them as an election approaches.

Second, and more troubling, the Supreme Court’s capacity to ignore “the opinion of the moment,” and to inspire dialogue about constitutional values, may depend on the public’s mistaken belief that the Court strives to be principled rather than popular. The federal courts address sensitive subjects such as religion, abortion, and free speech (not to mention selecting the winner of the Presidential election in 2000). Yet the courts remain the most popular of the three branches of the federal government. The widespread support for the Court would likely decrease if the public understood that the Court is not the insulated, apolitical institution it purports to be, but rather follows the will of the people like any other political entity. Ironically, then, if Friedman is successful in convincing the public that the Supreme Court is in fact a majoritarian institution, the Court’s margin of decisional

7. Id. at 384.
8. Id. at 363 (describing a 2006 Gallup Poll showing Congress’s approval rating at 29 percent, the President’s at 39 percent, and the Court’s at 60 percent).
independence and its role as catalyst for constitutional discourse might subsequently suffer.  

I. ELECTED VERSUS APPOINTED JUDGES  

Thirty-eight states elect their judges. In those states, the public has an easy way of communicating with judges, and judges likewise have a strong incentive to pay attention to public preferences or risk losing their jobs.

Political scientists have confirmed that elected judges' decisions are influenced by their need to run for re-election. This phenomenon is particularly notable (and troubling) in criminal cases. Empirical studies demonstrate that elected judges issue longer sentences and are more likely to impose the death penalty as elections approach, presumably because they fear being labeled "soft on crime" by their opponent in the next election. Their concerns are reasonable; judges have lost election because they were perceived as too lenient on criminal defendants. For example, West Virginia Supreme Court Justice Warren McGraw was defeated in 2004 after being criticized for his refusal to revoke the probation of a convicted child molester, and Tennessee Supreme Court Justice Penny White lost her bid for re-election after opponents targeted her vote to reverse a death sentence.

11. Indeed, incumbent judges are slightly less likely to win re-election than are incumbent members of the House of Representatives, and thus elected judges are under as much, if not more, pressure to please constituents than members of Congress. See Melinda Gann Hall, State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform, 95 AM. POL. SCI. REV. 315, 319 (2001).
12. Gregory A. Huber & Sanford C. Gordon, Accountability and Coercion: Is Justice Blind When it Runs for Office?, 48 AM. J. POL. SCI. 247, 248, 258 (2004) (reviewing hundreds of decisions by elected Pennsylvania judges and concluding that "all judges, even the most punitive, increase their sentences as reelection nears"); Richard R. W. Brooks & Steven Raphael, Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002) (finding that "criminal defendants [convicted of murder] were approximately 15% more likely to be sentenced to death when the sentence was issued during the judge's election year").
13. See Carol Morello, W. Va. Supreme Court Justice Defeated in Rancorous Contest, WASH. POST, Nov. 4, 2004, at A15 (describing the "controversial ad" campaign that "criticized the justice for joining a 3-2 majority extending probation for Tony D. Arbaugh Jr., who had been convicted of sexually molesting a half brother"); see also Adam Liptak, Case May Alter the Elections of Judges, N.Y. TIMES, Feb. 15, 2009, at A29 (describing the same ad campaign).
Judicial decisions in civil cases also appear to be affected by electoral pressures. A study of 7,000 tort decisions found that elected judges impose higher damage awards in general, and against out-of-state defendants in particular, than do appointed judges. The study’s authors speculated that the discrepancy between the treatment of in-state and out-of-state defendants was due to the elected judge’s incentive to distribute wealth from non-voters to voters. Elected judges themselves admit that they are influenced by voter preferences. In one survey of 369 elected judges, a “very high percentage” reported that “judicial behavior is shaped” by the desire to be re-elected.

Even though federal judges are also influenced by public opinion, they nonetheless have the freedom to diverge from popular preferences in a way that elected state court judges do not. As Friedman puts it, the public’s “diffuse” support of the U.S. Supreme Court as an institution allows it to issue unpopular decisions from time to time, confident that the public will continue to support the Court even if it dislikes some of its recent opinions. Friedman explains that “diffuse support is the measure of the slack the Court has to go its own way on some issues.” The observable differences between decisions by elected and appointed judges, particularly as elections near, is evidence that appointed federal judges benefit from significantly greater slack in the leash that tethers them to public opinion than do elected judges.

If nothing else, then, the appointed, life-tenured federal judiciary is better able to withstand majoritarian pressures than are elected judges. At least in the short-term, they can protect the most vilified members of society and can avoid decisions based on blatant political calculations in a way that elected judges cannot. As Friedman’s book teaches us, however, federal judges cannot hold the line for long against sustained and strongly-held majority preferences, and thus any protection they provide is short-lived.

16. Id. at 157. Former West Virginia Supreme Court Chief Justice Richard Neely admitted as much, stating:

As long as I am allowed to redistribute wealth from out-of-state companies to in-jured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone’s else[sic] money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

Id. (quoting RICHARD NEELY, THE PRODUCT LIABILITY MESS 4 (1988)).
18. FRIEDMAN, supra note 1, at 379.
19. Id.
20. See supra notes 11-19 and accompanying text; infra note 21 and accompanying text.
Moreover, in some notable decisions, such as Korematsu v. United States, the Court failed to do even that.\textsuperscript{21} A comparison of the performance of elected and appointed judges shows that appointed federal judges have at least a small additional degree of independence to go their own way in hard cases, but it seems a slim reed on which to justify the very existence of the third branch of the federal government.

II. ELECTED JUDGES, APPOINTED JUDGES, AND CONSTITUTIONAL DIALOGUE

If the federal courts follow majority preferences, then what purpose do they serve? Friedman tentatively suggests that federal judges provoke a constitutional dialogue in which the public works through the tension between democracy and constitutionalism.\textsuperscript{22}

Friedman's supposition can be tested by comparing the constitutional jurisprudence of the federal courts with that of the states. As described in The Will of the People, the Supreme Court has engaged in a vibrant discourse with the public about the meaning of the Constitution. Through the pattern of "judicial decision—popular response—judicial re-decision," the Supreme Court and the people have together fleshed out vaguely-worded constitutional principles, updating and changing the Constitution in the process.\textsuperscript{23} State courts should play a similarly important role in the development of state constitutional law. Furthermore, as a result of the conjoined federal and state court systems, under which state courts have the authority—indeed, the obligation—to hear and decide federal issues,\textsuperscript{24} state courts could play a significant part in developing federal constitutional law as well. Yet it is widely agreed that state courts have not fulfilled their promise, and that state constitutional jurisprudence is painfully thin and almost entirely derivative of federal law.\textsuperscript{25}

In fact, state courts appear to have gone to great lengths to avoid creating an independent state constitutional culture. State courts have often interpreted their own state's constitution in lockstep with the U.S. Supreme Court's interpretation of the federal Constitution, despite no requirement that they do so, and even when the history of the state's constitution would suggest that an alternative interpretation of the constitutional text would be the more reasonable one.\textsuperscript{26} Moreover, even after the U.S. Supreme Court

\textsuperscript{21} 323 U.S. 214, 223-24 (1944).
\textsuperscript{22} FRIEDMAN, supra note 1, at 367.
\textsuperscript{23} Id. at 382.
\textsuperscript{24} See Testa v. Katt, 330 U.S. 386, 394 (1947) (holding that state courts must hear federal causes of action absent a valid excuse).
\textsuperscript{25} See infra notes 26-32.
\textsuperscript{26} James A. Gardner, The Failed Discourse of State Constitutionalism, 90 MICH. L. REV. 761, 788-93 (1992) (describing the tendency of state courts to interpret their constitu-
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declared that state courts could insulate their decisions from Supreme Court
review by clearly grounding them on state constitutional law,27 state courts
have avoided doing so. Instead, state judges have continued to decide cases
by citing either the U.S. Constitution and the federal precedent expounding
on that document, or by citing both the state and federal constitutions and
precedent, without clarifying which source they rely on for their decision.28
In short, the majority of state courts seemingly wish to avoid articulating the
meaning of their own constitutions, preferring instead to rely on the federal
courts’ pronouncements on the U.S. Constitution.

Even more surprising, state court judges appear to have voluntarily
ceded some of their power to decide cases to federal courts. As previously
mentioned, some state courts interpret provisions in their state constitutions
in lockstep with the Supreme Court’s views of similar provisions in the U.S.
Constitution.29 In addition, state courts frequently declare themselves bound
to follow federal judicial precedent even when they are under no obligation
to do so.30 Federal judges widely agree that states are not required to adhere
to the decisions of the lower federal courts on the meaning of federal law,
even on questions of constitutional interpretation,31 and yet some state
courts nonetheless claim that they are so bound, and many others have de-
clared that they will follow this precedent under most circumstances.32

28. See, e.g., Gardner, supra note 26, at 779-80 (a study of 1208 state court deci-
sions from seven states revealed that state courts repeatedly failed to specify whether the
holding rested on state or federal constitutional grounds); Felicia A. Rosenfeld, Note, Fulfilling
the Goal of Michigan v. Long: The State Court Reaction, 56 Fordham L. Rev. 1041,
1042 (1988) (a study of 500 state court decisions post-Michigan v. Long revealed that “most
state courts fail to indicate clearly the basis for their constitutional rulings”); Richard H.
Fallon, Jr., et al., Hart and Wechsler’s The Federal Courts and The Federal
fail to indicate clearly whether they rest on state or federal grounds”).
29. See supra note 26 and accompanying text.
30. See Colin E. Wrabley, Applying Federal Court of Appeals’ Precedent: Contrast-
ing Approaches to Applying Court of Appeals’ Federal Law Holdings and Erie State Law
Predictions, 3 Seton Hall Cir. Rev. 1, 17 n.77 (2006) (describing different states’ views
regarding the precedential effect of lower federal court rulings on questions of federal law).
31. See, e.g., Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concur-
ring) (stating that Arkansas court is not bound by Eighth Circuit precedent).
32. See Wrabley, supra note 30.
In sum, state courts repeatedly refuse to develop the meaning of their own state’s constitutions or to elaborate on current interpretations of the U.S. Constitution, choosing instead to parrot the federal judiciaries’ interpretation of the U.S. Constitution. Undoubtedly, there are many reasons for this dearth of state court constitutional decision-making, and thus it is not possible to identify a principal cause for the phenomenon. It is likely, however, that judicial elections play at least some role. As discussed in Part III, elected state judges are inhibited from discussing constitutional values by the need to avoid controversy and win the next election.

III. DEFENDING THE MAJORITARIAN FEDERAL JUDICIARY

Part I reviewed the empirical data demonstrating that elections influence judicial decisions, and Part II described how state judges have failed to engage in the constitutional discourse that is commonplace among their federal counterparts. These systemic differences between appointed and elected judges should perhaps surprise us in light of the evidence marshaled by Friedman that federal judges are not insulated from public opinion, and thus would be expected to decide cases similarly to elected judges. As Friedman’s book amply demonstrates, time and again federal judges accede to majority preferences, often reversing course to do so.3 If federal judges are beholden to the public just like elected state judges, why do we see such variation in their performance on the bench? The answer to this question can also shed light on the value of maintaining a (supposedly) politically-insulated federal judiciary that rarely deviates far, at least for long, from mainstream public opinion.

A. Electoral Versus Majoritarian Pressure

One possible answer is that even though federal judges are influenced by broadly held and sustained public sentiment, they are insulated from electoral politics and all the distortions of majority preferences that accompany elections. We tend to view elections as the method by which the majority expresses its views, but the truth is that the majority rarely speaks through elections themselves. Due to low voter turnout, very few elected officials are voted into office by a majority of their constituents, a problem that is particularly pronounced in low salience judicial elections. On average, less than thirty percent of registered voters vote in judicial elections.34

33. See, e.g., FRIEDMAN, supra note 1, at 3-4 (describing how the Supreme Court stopped striking down New Deal legislation as unconstitutional shortly after President Roosevelt proposed legislation to “pack” the Court by adding new justices).
Moreover, any elected judge knows that his or her most important supporters are a small cadre of interest groups, media elites, and campaign donors who can prevent her from being displaced by an opponent in the next election, or alternatively can fund and support that opponent.35 Thus, elected judges, like all elected officials, will strive to please a few particularly powerful groups—or at least avoid angering them—rather than engage in a dialogue with the general public about constitutional values.

Friedman comments on this phenomenon in chapter ten of *The Will of the People*, in which he describes the public’s reaction to the Rehnquist Court’s decisions. Elected officials and interest groups on both the right and the left decried that Court’s “activist” decisions and even occasionally threatened impeachment, jurisdiction-stripping, and other forms of reprisal.36 The average American, however, reacted to the Court’s decisions with equanimity.37 As Friedman observed, this gap between the people and their elected representatives is likely due to the distortions of the electoral process. Each party’s primaries produce elected officials on the extremes of the political spectrum, a polarization that has worsened with computer-aided partisan gerrymandering.38 In other words, judges seeking to win re-election have to please a very particular subset of influence-peddlers who can make or break their bid to retain office, and must do so within a very specific temporal window.39 In comparison, federal judges need only remain sufficiently popular to ensure that their decisions are enforced and complied with, and to avoid impeachment and jurisdiction-stripping. To do so, federal judges must be careful not to deviate too far from mainstream values over the long term, but they need not cater to the whim of a fleeting majority, or seek to curry favor with powerful special interests, as is required of elected officials.

The fact that federal judges are insulated from electoral pressures while remaining attentive to mainstream public opinion enables them to listen to and be influenced by the majority in a way that elected officials are not. Elected officials cannot afford to test the breadth and depth of the public’s opinion on sensitive issues—such as abortion, crime, and religious freedom—as the appointed, life-tenured federal judiciary can. Rather, elected officials must either avoid these questions altogether or else answer...
them as activists and interest groups prefer—even though these organized
groups may not represent the majority view. Ironically, it seems that ap-
pointed, life-tenured federal judges are sometimes better at satisfying main-
stream preferences than Congress, the President, or the elected judges.
Friedman acknowledges this possibility when he takes note of “the very odd
fact that the Court of late seems to be doing a better job than the Congress
in meeting public expectations.”

An example is useful here. The Supreme Court’s death penalty juri-
sprudence, and specifically its recent decision in *Kennedy v. Louisiana*
abolishing the death penalty for child rape, illustrates the way in which the
federal courts can inspire dialogue on an issue that oftentimes paralyzes
elected officials, including elected judges.

The Eighth Amendment is one of the few areas of the Court’s juri-
sprudence that is explicitly guided by the will of the people. The Court
frequently polls state practices in an effort to determine whether a penalty
transgresses the nation’s “evolving standards of decency.” The Court’s
conclusions do not rest entirely on contemporary public opinion, however,
the Justices also bring their “own independent judgment” to bear on the
question whether a punishment transgresses the limits of the Eighth
Amendment.

Using this formula, the Supreme Court flirted with holding the death
penalty unconstitutional in its 1972 opinion in *Furman v. Georgia,* decided
at a time when the public seemed ready to abolish capital punishment.
Rather than put an end to the practice, however, *Furman* generated a public
backlash in favor of the death penalty. *Furman* had left open the possibility
that states could restructure their use of capital punishment to satisfy consti-
tutional standards, and state after state enacted legislation attempting to
meet the Court’s new requirements. Within a year, close to half of the
states had put into place new death penalty regimes, and opinion polls
showed that the public was strongly in favor of maintaining capital punish-
ment. Only four years later, in 1976, the Court revisited the issue and con-
cluded that capital punishment did not transgress the Eighth Amendment’s
prohibition against “cruel” and “unusual punishment.”

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40. *Id.* at 372.
42. See, e.g., *id.* at 419-20.
43. See, e.g., *id.* at 419-21.
44. See, e.g., *id.* at 421.
45. 408 U.S. 238, 240 (1972).
46. FRIEDMAN, supra note 1, at 286 (“If there ever was a moment in American histo-
ry when social indicators suggested that abolition of the death penalty was possible, this was
it.”).
47. *Id.* at 287.
The Court’s retreat supports Friedman’s thesis: ultimately, the “will of the people” prevailed, forcing the Court to backtrack from its suggestion that the death penalty was inconsistent with America’s constitutional values. But the relevant fact for the purpose of this Essay is the Court’s willingness and ability to raise the possibility of abolishing the death penalty at all. By suggesting that the death penalty was constitutionally suspect, at least in part because of its arbitrary and racist application, the Court focused the country’s attention on capital punishment and influenced debate over the death penalty for years to come. As a practical matter, the Court’s holding in Furman v. Georgia required the states to rewrite their death penalty statutes to ensure a more fair and systematic use of that penalty. Although the subsequent shift of public sentiment in favor of the death penalty probably took the Court by surprise, the Court nonetheless had succeeded in fostering discussion about capital punishment and cabining its use. An elected judge might have shied away from the entire morass, fearing that the backlash that might follow (indeed, that did follow) could end that judge’s career. The Court’s insulation from electoral politics allowed it to raise the issue, even though its vulnerability to popular opinion ultimately required it to abandon its view that the death penalty was inconsistent with the Eighth Amendment.

More recent history regarding the death penalty reinforces the point. Over the last decade, the Court has revisited the death penalty for three classes of defendants: the mentally retarded, juveniles, and child rapists who do not kill their victims. In each case, the Court held that the Eighth Amendment did not tolerate capital punishment. In each case, the Court supported that conclusion both by noting that a majority of states did not provide the death penalty for these categories of defendants, and by reasoning that the norms of civilized society dictated against execution of these types of defendants. The view that the death penalty should be off-limits for these categories of offenders appears to fit within mainstream American views regarding use of the death penalty.

And yet, at least some elected judges in some states would be reluctant to abolish capital punishment for these categories of offenders, even when the majority of the public does not support it, because that decision might be used by opponents to paint them generally as “soft on crime,” or to mobilize the minority who strongly support the death penalty for these types of crimes and defendants. Politically, there is little to gain from taking on this issue. One observer of judicial elections commented on this phenomenon:

52. See Atkins, 536 U.S. at 313-16; Roper, 543 U.S. at 564-67; Kennedy, 544 U.S. at 422-26.
Sitting judges facing an imminent election, whether a contested election or a retention election, know that every decision is potentially fodder for the opposition. When well-heeled or well-organized interest groups can seize on isolated opinions—even well-reasoned decisions that have been joined by a majority of other judges on the court—as the basis for attack ads in the next campaign, it takes extraordinary integrity and real courage for a judge facing reelection to support a ruling that plainly will be unpopular.\textsuperscript{53}

The decision in \textit{Kennedy v. Louisiana}, in which the Court struck down the death penalty for child rapists, is an example of how appointed judges can address issues that are too sensitive for elected officials. The elected justices of the Louisiana Supreme Court upheld the Louisiana statute making child rape a death-eligible crime as consistent with the Eighth Amendment, perhaps mindful of how a decision the other way could be used against them in upcoming elections. Likewise, Senators Barack Obama and John McCain—respectively, the presumptive Democratic and Republican Presidential nominees at the time the case was decided—both immediately condemned the decision.\textsuperscript{54} In such a high salience case, elected officials were understandably reluctant to energize the opposition by taking on the question of the appropriate punishment for child rapists, leaving the appointed federal judiciary in the best position to do so.

In sum, the federal courts add value to our system of government, despite their inability to define constitutional values independently of public opinion, because they can prod the public to consider questions that the political branches would prefer to avoid. Even though the federal courts appear incapable of standing up against the groundswell of majority preference for long, they can push the envelope in a way that elected officials, including elected judges, cannot. Perhaps most important, federal judges' insulation from electoral politics allows them to bypass special interests, party activists, and campaign donors, and listen instead to what the majority of the general public prefers. Perhaps the Court's value lies in the purity of its majoritarianism. In other words, the courts have the luxury of listening to the general public without the din of elections that so distracts the political branches of government.

B. A Political Institution in Disguise

Unfortunately, however, there is also a less benign explanation for the Supreme Court's ability to raise issues that elected judges shy away from. As Friedman explains, the Court enjoys broad public support that allows it


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the necessary "slack . . . to go its own way on some issues." Perhaps the Court is popular not just because it follows the will of the people, but because it does so in the guise of being the neutral, impartial interpreter of law. As Friedman's book explains, the Supreme Court has carefully given the public most of what it wants while at the same time claiming that public preferences are irrelevant to its decision-making. If the truth ever came out that the Court is more interested in being popular than being principled, it might lose some of its public support, shortening the "slack" allowed between its decisions and public preferences.

In The Will of the People, Friedman argues that the Supreme Court is not the staunchly independent institution it appears to be on paper, but rather is vulnerable to political and public pressure. Friedman explains that the American people "support the exercise of judicial review . . . only so long as the Court's decisions d[o] not stray far, and for long, from the heart of what the public understood the Constitution to mean." To most people, however, the Supreme Court gives a good imitation of a non-political, independent institution that stands aloof from the partisan bickering that paralyzes the elected branches and taints so much of their decision-making. Its members have life-tenure and salary protection, they are at negligible risk of impeachment even for unpopular decisions, and they more or less control their docket. At confirmation hearings, the nominees are supposed to deny any role in policymaking, claiming that their job is to be nothing more than the neutral interpreter of others' policy choices. Chief Justice John Roberts went so far as to claim that "judges are like umpires," whose primary role is to "call balls and strikes." Friedman's view that the Court follows the will of the people, while now widely accepted among academics, would likely come as a surprise to the average American.

In his book, Friedman cites opinion polls revealing that the Court is generally far more popular and trusted than the political branches, and even that the public preferred the Supreme Court to decide the 2000 election

55. FRIEDMAN, supra note 1, at 379.
56. See, e.g., FRIEDMAN, supra note 1, at 14 (explaining that "[t]he justices recognize the fragility of their position," which pushes them to issue "decisions hew[ing] rather closely to the mainstream of popular judgment about the meaning of the Constitution.").
57. See, e.g., Kim McLane Wardlaw, Umpires, Empathy, and Activism: Lessons from Judge Cardozo, 85 NOTRE DAME L. REV. 1629, 1630 (2010).
59. FRIEDMAN, supra note 1, at 363 (describing a 2006 Gallup Poll showing Congress's approval rating at 29 percent, the President's at 39 percent, and the Court's at 60 percent).
over other political actors.\textsuperscript{60} One assumes, however, that these polls reflect the public's sense that the Court is somehow "pure" in a way that the political branches are not—a conclusion supported by recent studies of public perceptions of the Court.\textsuperscript{61} If so, the public is correct in one sense—the Court is insulated from the electoral pressures that can corrupt elected officials—but, as Friedman shows, the public is wrong to think of the Court as so different from the political branches.

Perhaps the Court's perceived independence from public opinion is more important than the reality as described by Friedman. Perhaps the public respects the Court and accepts its decisions because it does not realize that the Court is nearly as beholden to public opinion as the other institutions of government the public loves to hate. In other words, the Court may have maintained its high public esteem primarily because it has fooled Americans into thinking it is an independent and apolitical institution even as it is quick to bring its constitutional jurisprudence in line with mainstream opinion.

Interestingly, the federal judiciary's guise of independence is perpetuated by elected officials, who benefit from this misperception. As discussed in Part II, elected state court judges seem strangely unwilling to interpret their state constitutions, preferring to rely on federal precedent and the U.S. Constitution to support their rulings.\textsuperscript{62} Some scholars have suggested that elected state court judges prefer to ground their decisions in federal rather than state law because they want the political cover that comes with a decision that cites the allegedly apolitical federal courts and is eligible for Supreme Court review.\textsuperscript{63} State courts may be reticent to expound on their own constitutions because they fear the political fallout from such decisions, preferring to hide behind the cloak of the power and prestige of the

\textsuperscript{60} Id. at 358 (citing a Gallup poll concluding that "Americans ... felt that the Supreme Court was the best institution to make a final decision to resolve the controversy in Florida—much more so than the Florida Supreme Court, the Florida legislature, or even the U.S. Congress.").


\textsuperscript{62} See supra notes 26-35.

\textsuperscript{63} See, e.g., Edward Hartnett, Why is the Supreme Court of the United States Protecting State Judges from Popular Democracy?, 75 TEX. L. REV. 907, 983 (1997) (positing that state courts prefer to issue decisions that are reviewable by the Supreme Court in order to "insulate[ ] themselves from internal political pressure"); Toby J. Heytens, Doctrine Formulation and Distrust, 83 NOTRE DAME L. REV. 2045, 2080 (2008) (speculating that the Supreme Court began reviewing state court damage awards due to its "increasing conviction that juries had gotten out of control, and that at least some state courts were unwilling to rein them in . . . because the political environment in various states made state court judges reluctant to take action in the absence of cover from the Supreme Court.").
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U.S. Constitution as interpreted by the well-respected federal judiciary. Likewise, examples abound of elected federal officials claiming that their "hands are tied" by Supreme Court opinions, or suggesting that the Court should review and reverse federal legislation—even legislation that these legislators themselves supported—on the ground that it is unconstitutional. All of these elected officials have a vested interest in maintaining the fiction that the Court is uniquely independent of the political pressures that, as Friedman has shown, influence its decision-making.

Recent studies confirm that the public’s good impression of the Court is grounded on its perception of the Court as neutral and apolitical. Most people polled are aware that judging is a discretionary and value-laden activity, and yet they view the members of the Court as more principled than the typical elected politicians. Political scientists James Gibson and Gregory Caldeira sought to determine why the public maintains a high opinion of the Court despite recognizing that judging is in some sense "political." A majority of the people they surveyed agreed that the justices base their opinions on their “personal beliefs,” and that judges’ values and political views influence their decisions, but a majority nonetheless “reject[ed] the view that judges are just politicians in robes.” Gibson and Caldeira concluded that the public’s support for the Court “depends upon seeing judges as different from ordinary politicians, in part because, unlike politicians, they are principled in their decision making.” In another paper, these same two authors found that political advertisements regarding Judge Samuel Alito’s nomination undermined the Supreme Court’s legitimacy, and they speculated that “the message of these ads was that the Supreme Court is just another political institution, and that citizens exposed to that argument were less likely to extend support to the Supreme Court.” The authors conclude

64. Hartnett, supra note 63. Interestingly, the New Hampshire Supreme Court does not shy away from issuing pronouncements based on the state constitution. See, e.g., State v. Ball, 471 A.2d 347 (1983). That court routinely declares that any citations to federal law are merely for “guidance” in interpreting the state constitution, insulating its decisions from review in the U.S. Supreme Court as much as possible. Id. at 352. As Professor Hartnett notes, New Hampshire’s willingness to take the full political heat for its decisions may be due to the fact that its judges are appointed, not elected, and thus have no need for the political protection that comes from the potential for Supreme Court review. Hartnett, supra note 63.


67. See id. at 11.

68. Id. at 12-13.

69. Id. at 15.

70. Id. at 5.
that the "Court is best able to maintain its legitimacy by pointing toward its
distinctive 'non-political' role in the American political system."71

In short, it seems possible that the public views the Court as a "counter-majoritarian" institution, just as many academics did before scholars such as Friedman enlightened us. Admittedly, public opinion polls are blunt instruments. In any case, none have framed the question in precisely these terms, so it is hard to ascertain the public's views on whether the Court is influenced by public opinion. But, if the public's respect for the Court is grounded, at least in part, on its misconception about the Court's independence, then Friedman's book might actually change the relationship between the public and the judiciary. If word gets out that the Court is as susceptible to public pressure as the other political institutions, then it will no longer serve as political cover for the elected branches of government, its decisions will not be as easily accepted by the public, and it will lose the diffuse support that enables it to help shape public opinion about constitutional values. In other words, perhaps the Court has flourished not only because it follows the will of the people, but perhaps also because it gives the impression that it need not do so.

CONCLUSION

Barry Friedman's book The Will of the People is the culmination of fifteen years of research and writing challenging the assumption that the Supreme Court is a counter-majoritarian institution. As Friedman suggests, it is time to stop endlessly debating whether the Court is influenced by public opinion and address the serious questions that follow from the conclusion that it is.72 The most basic of those questions is determining the value of a federal judiciary that appears incapable of serving as a check on the majority.

The beginnings of an answer can be found by contrasting the work of the federal courts with those of elected state court judges. As many political scientists have shown, subjecting judges to elections does change the outcome of cases and the tone of the constitutional "conversation" that courts have with citizenry. An appointed federal judge is more likely to protect the criminal defendant and the unpopular civil defendant than is an elected judge, especially when elections are imminent. More important, appointed judges are capable of raising hard questions regarding the nation's constitu-

71. Id.
72. FRIEDMAN, supra note 1, at 373 ("Far too much time has been spent and ink spilled debating whether the judiciary is beholden to or independent of majority will (even among those who should know better). Surprisingly little is devoted to analyzing where between these two poles the answer rests and how the system of judicial review actually works.").
tional values that elected judges—and elected officials generally—have usually avoided. Thus, despite their vulnerability to political and social pressure, appointed federal judges appear capable of protecting constitutional values and debating constitutional meaning in a way that elected officials, including judges, cannot.

The comparison tells us that appointed judges do more than simply “rubberstamp public opinion,” but it does not tell us how or why appointed federal judges reach different types of decisions than their elected counterparts. This Essay suggests that federal judges benefit from their insulation from electoral pressures—pressures that at times can cause elected officials (including elected judges) to veer away from mainstream preferences in an effort to appease politically powerful interest groups who threaten their prospects in upcoming elections. In addition, federal judges have the benefit of appearing to be neutral and apolitical, even though they are not, and thus the public has greater tolerance for judicial opinion than it does for more blatantly political decision-making by the legislative and executive branches.