

THE COUNTERMAJORITARIAN OPPORTUNITY

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INTRODUCTION

Barry Friedman raises an important question in his new book: whether a constitutional adjudicator can further public deliberation on important matters of policy and rights.¹ Friedman offers a positive answer to this question in the case of the U.S. Supreme Court, arguing that the Court has encouraged democratic deliberation precisely by blocking the majority. He puts it this way:

The value of judicial review in the modern era is that it . . . serves as a catalyst for the American people to debate as a polity some of the most difficult and fundamental issues that confront them. It forces the American people to work to reach answers to these questions, to find solutions—often compromises—that obtain broad and lasting support.²

To establish that Americans, or citizens of any large modern democracy, can be understood to deliberate intensively, if imperfectly, on important issues of fundamental rights in ways that shape an emerging consensus is a striking and important claim about the practice as well as the possibilities of modern democratic life. It is a claim that contrasts sharply with the more or less standard political sociology of today's citizen: Someone who mostly pays little attention to politics or public issues, and whose main concerns are with day-to-day existence; someone who can rouse herself to vote in elections from time to time, but who is otherwise content to leave the resolution of political issues to elected officials.

And if Friedman is right, the phenomenon ought not to be limited to the United States, but ought to be found wherever the institutions and practices of constitutional adjudication arise. Since the Second World War, many new democratic constitutions have created

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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 16.

a constitutional court endowed with the authority to override decisions taken by other institutions and regulate the relations among them.³ We have described the operation of some of these new institutions in earlier papers and have explored, briefly, some of the effects of these courts on the operation of their democracies. The creation of constitutional courts—with the power of a kind of judicial review—in post-war Europe offers a kind of laboratory for the investigation of Friedman’s hypothesis. There are, of course, many differences between American judicial review and European constitutional adjudication, but both practices are, essentially, counter-majoritarian in that both force the majority (either the parliamentary or popular majority) to revisit an issue it had tried to settle: To think again, to debate and deliberate, and, in light of the court decision, to enact new law. Later in this article, we shall begin a tentative set of explorations into how Friedman’s hypothesis may extend to some European constitutional democracies.

Some readers have placed more emphasis on another phenomenon that Friedman discusses as well—cases in which the United States Supreme Court has appeared to back down in the face of political pressures or threats. Emily Bazelon, in her *New York Times* book review, for example, emphasizes Justice Owen Roberts’s famous “switch in time” in *West Coast Hotel Co. v. Parrish*,⁴ the Court’s apparent retreat from rights of those accused or convicted of crimes, and its retreat from the attempt to abolish the death penalty after Nixon’s 1972 crime-obsessed presidential campaign.⁵ There are many other examples she could have mentioned, many of which are amply discussed in Friedman’s book. Such incidents, where judges retreat in the face of popular or political pressures, are distressing insofar as they may seem to undercut the idea that American democracy can tolerate truly independent judges or maintain rule of law. Indeed, Friedman himself sometimes sounds exactly this theme, arguing that “[j]udicial power exists at popular dispensation,”⁶ which can be read to suggest a subordinate role for the Court.

But in this and other similar passages, Friedman is directing his fire on a fairly narrow notion of judicial power: The idea that judges could regularly and for long periods of time successfully impose their views of the Constitution on an unwilling public. But it seems to us

3 See generally John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671 (2004).

4 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

5 Emily Bazelon, *Supreme Courtship*, N.Y. TIMES, Sept. 27, 2009, at BR12.

6 FREIDMAN, *supra* note 1, at 370.

that this idea—judicial dictatorship—is really a straw man. Indeed, Friedman quotes with approval a statement by two journalists: “No appointive body of nine men can fly in the face of public opinion for too long without provoking an answering attack.”⁷ But “judicial power” may be more limited than this: It may simply denote the possibility of the Court putting a stop to some legislative project and offering reasons, grounded in constitutional interpretation, as to why the legislature or the people should respect its holding. Sometimes, of course, the legislature or the people are moved to reject the Court’s reasons, such as happened in the *Legal Tender Cases*.⁸

Direct confrontations between the Court and the public are in fact exceedingly rare. One could, however, point to particular instances such as that in 1937, when, so it must have seemed, high levels of public support for New Deal programs confronted a Court bent on ruling that Congress lacked the authority to enact them. But, the Court changed soon afterwards either as a result of Justice Roberts’s change of heart or (more likely) because Franklin D. Roosevelt was soon able to appoint new Justices. But as F.D.R. was soon to learn, popular support for an attack on the Court even then, when he may have thought that the popular wind was behind him, was fragile, and evaporated once the President decided to try to pack the Court with more favorable justices.

Indeed, the structure of the American constitutional system and basic features of public opinion make such confrontations not only rare, but also not very threatening to the Court.⁹ For the Court to actually face a genuine threat to its institutional power (i.e., to face a credible threat of jurisdiction-stripping or court-packing legislation) would require not only an aroused and focused public, but one that stayed that way long enough to elect majorities in both chambers and take the Presidency, too. How often can that sustained confluence occur, given the disorganized nature of American public opinion and notorious fragmentation of its political parties? Maybe in the early 1930s, something like this may have occurred. And maybe such an alignment persisted for a while in the high period of Reconstruction in 1866–1870. But in each case, the high state of popular arousal

⁷ *Id.* (internal quotation marks omitted).

⁸ See *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1869), *overruled by* the *Legal Tender Cases* (*Knox v. Lee* and *Parker v. Davis*), 79 U.S. (12 Wall.) 457, 553 (1871).

⁹ This argument is presented in John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990), and it is developed in a historical setting in Jenna Bednar, William N. Eskridge, Jr. & John Ferejohn, *A Political Theory of Federalism*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 223, 256 (John Ferejohn et al. eds., 2001).

soon lapsed, and within a few years, F.D.R. was forced to give up on his court-packing scheme. And the post-Reconstruction Court had the chance to reinterpret the post-Civil War amendments as it thought best, without worrying too much about what the public or its political representatives would do. Simply put, the U.S. Constitution and the United States's relatively decentralized (and often disorganized) political parties make it very unlikely that the Court would face a credible challenge to its authority to interpret the Constitution.

This is not to deny that on some particular issues, the Court needs to be attentive to public views. The best examples are those in which the Court had to worry about whether people or officials would actually pay attention to or comply with a particular ruling. Friedman gives a range of significant examples: The refusal of the State of Georgia to honor the Court's holding in *Worcester v. Georgia*,¹⁰ the Court's worry that its ruling in *Brown v. Board of Education* would be ignored in many school districts, and widespread noncompliance with its school prayer ruling in *Engel v. Vitale*.¹¹ What is significant in these cases is that popular majorities were not needed to undercut Court rulings. All that had to happen was for a few critically located people or officials to refuse to respect or apply judicial rulings in circumstances where this refusal could not be easily challenged (or even noticed). Here, the Court's fear was not that it would be overpowered politically, but that it would simply be ignored or its rulings disregarded.

But issues of this kind seem to us to illustrate the boundaries of the judicial power to change an entrenched set of social practices. These instances seem rare, even if they are dramatic. And it is hard not to agree with Rosenberg that when they occur, the courts need political reinforcements if the entrenched practices are to be changed.¹² And it is not clear that sustained political support for ending the practices could be sustained if it is sufficiently popular among the people whose behavior has to change.¹³

10 *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561–63 (1832) (holding unconstitutional a Georgia criminal statute prohibiting non-Indians from entering Indian lands without a state license).

11 *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that New York's program of daily prayer was a religious activity, and use of public school system to encourage such prayer was inconsistent with Establishment Clause of Constitution).

12 See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 5 (Benjamin I. Page ed., 1991).

13 A similar issue arose in Germany when the FCC required that crucifixes be removed from non-demoninational state schools, on the ground that such displays were inconsistent with what it called "negative" freedom of religion required by Article 4 of the [Basic Law]

Friedman's more profound contribution, it seems to us, is in suggesting a more general approach to the question of how democracy and legality interact. He observes that the Court and public opinion rarely stay far apart *for long periods*, at least not on issues that are significant to many people, but tend to converge over time.¹⁴ But there are several ways that convergence can come about, each with different implications for law and democracy. The Court's jurisprudence could change because some members change their views, possibly in response to felt political pressures, or because some members are replaced. But it is also possible that on some issues, public opinion moves toward the Court's favored position. Indeed, this movement can be seen on the largest issue discussed in Friedman's book—the eventual and sometimes grudging popular acceptance of the practice of judicial review even in cases where the public strongly disagreed. The most important and surprising story Friedman tells is the one by which the public, over time, moved toward the (antipopulist) views articulated early on by Hamilton, Marshall, Story, and others, that the proper body to adjudicate constitutional issues is an unelected panel of politically-appointed judges, serving with life tenure.¹⁵ Political scientists call this disposition to accept even unpopular Court rulings “diffuse” support, in that it gives the Court latitude (in public opi-

(the German Constitution). Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 10, 1995, 93 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 1 (Ger.). In Germany, the Laender governments are responsible for schools (according to Article 7 of the [Basic Law]). The Bavarian state constitution required that Bavarian children be educated according to Christian principles, and the state government had required crucifixes to be displayed. The public reaction to the Constitutional Court's ruling was extreme, with many people calling for the Bavarian government to defy the Constitutional Court. Cornelia Koch, Classroom Crucifixes, Teacher Headscarves, Faith Healers and More—the German Experience of Religious Freedom Under a Bill of Rights 21 (Univ. of Adelaide Law Sch., Working Paper, Aug. 13, 2009), available at <http://ssrn.com/abstract=1521307>. Koch writes:

The political reaction in Bavaria to the Constitutional Court's *Crucifix* decision was to pass a new law which arguably undermined the Court's ruling. The law stipulates that crucifixes will generally remain in Bavarian classrooms but that a compromise will be sought in cases where parents object to their presence. As a result, on the occasion of the one year anniversary of the *Crucifix* judgment the crosses had only been removed from the classrooms of six Bavarian schools. The new legal situation has also led to further litigation in lower courts instigated by teachers and students who asked for the crucifixes to be removed from their individual schools.

See id. at 21 (citations omitted).

14 Since the appearance of Robert Dahl's seminal article, many scholars have noticed this convergence. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

15 Friedman, *supra* note 1, at 14–15.

nion) to make unpopular decisions.¹⁶ But, and this is our emphasis, it is possible that on some issues, both public and judicial views co-evolve “deliberatively,” through what Friedman calls dialogue, in ways that tend to move the two usually to converge rather than remain apart. On controversial social issues such as abortion, gay rights, and euthanasia, just such evolution seems to be taking place.

Friedman presents an ideal-typical sequence: “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.”¹⁷ Friedman tends to emphasize in his examples the second part of this process, in which the Court somehow does the conforming. He does not neglect the first stage—where the public (if it pays much attention) responds to a decision and argues and deliberates to arrive at its considered views on the matter. Rather, he puts less emphasis on this mechanism. And he certainly emphasizes that the public debate takes place in light of the actions of the Court, and is therefore likely subject to judicial influence to some extent. The emphasis on judicial conformity neglects the fact that in most cases, it was a decision by the Court that set the public debate going, and that the Court itself played a major role in laying out the terms under which public arguments are made and judged. The point is that the agenda is set and structured by an initial decision. Thus, if the Court later on revises the initial decision or even overturns it, the basic ideas and considerations were, in many cases, already implicit (or even explicit) in its earlier rulings. If this is right, it may not be accurate to think of the Court being pulled along by public opinion (which is, in many cases, not very well developed). It may be more correct to view the Justices as deliberating through concrete cases that come before them, while the public, too, deliberates, and reflects on similar issues.

We do not need to take a strong view of deliberation to make sense of this hypothesis. Deliberation is the process by which people or groups decide what to do, and this typically involves weighing reasons for and against an action. Popular deliberation in a complex modern democracy is necessarily messy and incomplete, and would be regarded as imperfect by philosophers. In thinking about public

¹⁶ For the distinction between diffuse and specific support for an institution, see David Easton, *Theoretical Approaches to Political Support*, 9 CANADIAN J. POL. SCI. 431, 440–43 (1976). For an early application of these types of support to the Supreme Court, see Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636 (1992).

¹⁷ Friedman, *supra* note 1, at 383.

deliberation, therefore, it is better to make use of a minimal notion of “deliberation” to denote simply the use of argument and reasoning in support of various courses of public action (even if these are presented as terse phrases on placards). Think of the public debates on abortion or gay marriage filled, as they are, with appeals to identity and emotion as well as logical argument. Even in these highly emotive cases, the two sides have typically done much more than simply shout out their preferred positions. Each side presents arguments, often, of course, based on premises that only they and their allies share, and they work to craft alternative policies which they hope can claim wider support than perhaps the core proponents of the other side would want. But the fight is often for the middle ground of uncommitted people who may not yet have formed deeply held views. For example, abortion opponents, following repeated judicial setbacks, have continually tried to craft new regulations that might, they hope, be acceptable to state legislatures (which are presumably not controlled by or committed to one side or the other) as well as to the Supreme Court. At the same time, opponents also try to shift the membership of the political branches, as well as the Court, in a favorable direction.¹⁸ Often, these new regulations attempt to appeal to some other norm, such as the view that teenagers ought to be accountable to their parents for important decisions, or that late-term abortion is difficult to distinguish from killing.¹⁹ Sometimes these appeals may “work,” in the sense of persuading those with little prior stake in the issue.²⁰ The same has been true on both sides in the case of gay marriage. Again, we see a similar mix of argument and campaigns for new state-level regulations aimed at winning the support of the middling sort of voter to one side or the other.²¹

18 See Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, in *THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE* 128, 146–47 (Donald T. Critchlow ed., 1996).

19 For further discussion, see Justice Thomas’s dissent in *Stenberg v. Carhart*, 530 U.S. 914, 982 (2000), where he complains that “[t]oday, the Court inexplicably holds that the States cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide.”

20 This may account for the enactment of the Partial-Birth Abortion Ban Act of 2003, Pub.L. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2006)).

21 Proposition 8 proponents tried hard to make their appeals palatable to ordinary voters who may not have thought of themselves as anti-gay. See Martin Wisckol, *Gays Would Lose Few Legal Rights with Marriage Ban*, *ORANGE COUNTY REG.*, Feb. 4, 2009, <http://www2.ocregister.com/articles/domestic-gay-marriage-2299598-couples-married> (quoting Frank Schubert, co-manager of the “Yes on 8” campaign, as saying, “We were not taking away fundamental rights. . . . What we’re talking about is preserving the institution of marriage as being between a man and a woman. It binds men and women together, and creates the most desirable environment for raising children”).

Therefore, as we see it, the central contribution of Barry Friedman's book is in demonstrating how it is that, over the course of American history, the Supreme Court has operated in a manner that has induced a practice of widespread and *real* public deliberation on difficult and important issues. In this sense, the countermajoritarian nature of judicial review is not a "difficulty," but an "opportunity." A countermajoritarian court can make it possible for a democracy to become more deliberative.

Friedman demonstrates that the U.S. Supreme Court has put important issues on the political agenda and kept them there for long time periods, prodding interest groups, political parties, other political institutions, and ultimately ordinary people to react and try to find or create new initiatives that might pass constitutional muster. In doing so, the Court has usually given shape to the conflict, laying out constitutional issues that political actors have missed or undervalued, and articulated values that may be implicated in any eventual legislation. And these efforts have shaped subsequent public debate in various ways. At other times, the Court tried to settle difficult political disputes, sometimes quite controversially, in ways that may have resolved the issue in question, but also revealed fundamental political and constitutional conflicts in society. The effect in many cases has been to open public deliberation widely, to provoke and activate a variety of people to argue and form interest groups, to inject and define new issues concerning constitutional rights and values into the debate, and to keep the discussion going until some kind of resolution can be found. Importantly, Court-induced deliberation has seldom been restricted to occupants of formal governmental institutions, nor to a narrow political or social elite, and certainly not to the judiciary or to Court itself. Rather, it seems to have been more or less regularly open to new voices and new forms of speech and action arising from the People Themselves (so to speak).

I. COUNTER-MAJORITARIAN DIFFICULTY

First we should try to clarify a bit the idea of the countermajoritarian "difficulty," which motivates Friedman's study. When a court strikes down legislation it is obviously thwarting a particular legislative majority—those particular legislators who had voted for the legislation. This majority could, however, be quite transient: it could be built out of a series of ad hoc compromises having to do with a specific bill. The representatives' support for the statute might be based on normatively irrelevant factors (like the fact that some members may have voted for the bill in exchange for some favor or in response to a

threat). In any case, the majority in the legislature may no longer enjoy popular support generally, and certainly not for the particular piece of legislation. So what is actually wrong with a court striking down such a law if, in its judgment, the legislation is constitutionally defective? It is true that the legislative bargain would have been frustrated. But if that bargain lacks popular support, could one not say that the court's action was actually promajoritarian? So there are two issues. First, what is the meaning of "countermajoritarian?" And second, what is the normative problem with the court taking a countermajoritarian action (whatever that means)?

Something needs to be said about democracy in order to assess the significance of the countermajoritarian problem. In our view, there is not yet a satisfactory normative theory of representative government, and perhaps not even an attractive normative theory of democracy either. We do not have space to try to supply such a theory but will assume, for now, that democracy has to be justified as some kind of self-rule. This can be given a positive or negative turn. The positive view, articulated by Rousseau, is that to be a free person is to be subject only to laws she herself makes.²² The difficulties with this view are well known, and indeed notorious: Rousseau was driven to engage in the controversial metaphysics of the general will to make it seem plausible.²³ Besides, in a large country, and at least since the eighteenth century, most writers have thought it impossible that each person could really be the author of the laws that bind her in the way Rousseau posited.²⁴

Hans Kelsen gave a more modest answer along roughly the same lines, saying that majority rule was a system of governing that maximized the fraction of people who could be free.²⁵ Still, this seems a

²² Rousseau argues throughout his treatise that a person is free only if he is subject to rules of his own making: "[T]o obey a law that we have imposed on ourselves is freedom." JEAN-JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY AND THE SOCIAL CONTRACT 59 (Christopher Betts trans., 1994) [hereinafter THE SOCIAL CONTRACT]. "The people, being subject to the laws, must create them . . ." *Id.* at 75.

²³ See Book II of THE SOCIAL CONTRACT, *supra* note 22, at 63–90, for Rousseau's description of the "general will" and its properties. He argues there that each person in the state shares in the general will and that the general will is the only legitimate source of laws. So that the laws that bind each person are of his own making, which means that the state enforcement of law is forcing the person to obey himself.

²⁴ See BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT (1997). Manin argues that it became widely accepted at that time that direct democratic rule of the kind Rousseau prescribed was impossible in a large country, and thus, that representation by elected elites was the only possible way that a nation could be "self"-governing.

²⁵ Kelsen's argument originally appeared in HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE (1929), parts of which were published in English as ON THE ESSENCE AND

bit of a trick, and not a very attractive normative position, because nearly half the people may not be free under any given law. Moreover, it is not clear that this idea can extend in any meaningful way to indirect or representative government in which ordinary people do not vote on any laws. Kelsen himself was moved to introduce the notion of a party state in which people vote for disciplined political parties by majority rule, and the winning party forms the “will” of the state.²⁶ Kelsen finally argues that the notion of a party state in this sense is consistent with the notion of an individual being free, even if they are required to comply with laws they did not vote for (or those enacted by a party they did not support).²⁷

The negative justification seems to us a bit more plausible—no one else can be presumed to have the right to rule over you. So for anyone to have a valid claim to such a right, you have to have given your consent. This line of thinking is very old, of course, tracing certainly to Hobbes, but traces of it are found in classical sources, too.²⁸ But again there are many difficulties here also, not least of which is interpreting what counts as giving consent. And in any case, what reason is there to think that the kind of government you would agree to would run itself on the principle of majority rule? Why would

VALUE OF DEMOCRACY, IN WEIMAR: A JURISPRUDENCE OF CRISIS 84 (Arthur J. Jacobson & Bernhard Schlink eds., Belinda Cooper trans., 2000) [hereinafter ON THE ESSENCE AND VALUE OF DEMOCRACY]. In a postwar English language paper, Kelsen reproduced the argument: “[I]t is the principle of simple majority which secures the highest degree of political freedom that is possible within society.” Hans Kelsen, *Foundations of Democracy*, 66 ETHICS: INT’L J. SOC. POL., & LEGAL PHIL. 25 (1955).

26 ON THE ESSENCE AND VALUE OF DEMOCRACY, *supra* note 25, at 87–88, 92.

27 *Id.* at 89.

28 Hobbes wrote:

The only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another, and thereby to secure them in such sort, as that by their own industry, and by the fruits of the earth, they may nourish themselves and live contentedly; is, to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much as to say, to appoint one man, or assembly of men, to bear their person; and every one to own and acknowledge himself to be author of whatsoever he that so beareth their person, shall act, or cause to be acted, in those things which concern the common peace and safety; and therein to submit their wills, every one to his will, and their judgements, to his judgement. This is more than consent, or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner, as if every man should say to every man, *I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.*

THOMAS HOBBS, *LEVIATHAN* 114 (J.C.A. Gaskin ed., 1996).

In the *Crito*, Socrates acknowledges that he has an obligation to the “laws” because he has enjoyed the fruits of Athenian citizenship and therefore, implicitly consented to their binding force. PLATO, *COMPLETE WORKS*, 37–48 (John M. Cooper ed., 1997).

people not consent, instead, to a government that contained a court with the power to correct the majority? At any rate, while the positive justification (usually attributed to Rousseau and Kelsen) is aimed at justifying majority rule, it is hard to see how the negative theory (neo-Hobbesian) could reach that form of rule (without adding a lot of implausible assumptions). Thus, on either positive or negative accounts, it is hard to see the “difficulty.”

Things get worse when speaking of representative or indirect democracy. In such systems, representatives are chosen in relatively infrequent elections (for example, one day out of every two or four years), and they have to deal with issues that cannot have been anticipated on election day and cannot, moreover, be explained to the voters in any detail. Joseph Schumpeter presented a justification for this kind of government based on the observation that ordinary people cannot really be competent to determine what the best policies would be, and that as long as elections are contested, leaders are somehow accountable to voters and their decisions are the best that can be hoped for.²⁹ Later on, Anthony Downs gave a more concrete defense of Schumpeter’s idea that elite competition would tend to produce good public policies.³⁰ While the Schumpeter-Downs theory has some attractions as a descriptive theory of how modern democracies work, its normative appeal seems limited and not well articulated. Even if competitive democracy produces moderate outcomes (as the median voter theorem implies in some cases), what is good about that?

Hans Kelsen, in *On the Essence and Value of Democracy*, observed that the majority from election day does not necessarily last for long, so that (speaking in Rousseauian terms) some of those who were “free” the day of election may become “un-free” just few days later.³¹ In any representative democracy it is always possible to have a double majority where the parliamentary and popular majorities diverge, and this indeed becomes likely as the election recedes in time. This elemen-

²⁹ See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (Harper & Bros. 3d ed. 1950) (1942).

³⁰ Downs’s theory relies on the median voter theorem—the notion that in a one dimensional policy space where all individuals have single-peaked preference orderings, the most preferred policy of the median voter will not lose to any other policy in a majority vote. Downs argues that if there are two parties engaged in competitive elections, each will find it best to offer that position as its platform. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 117–22 (1957).

³¹ See *ON THE ESSENCE AND VALUE OF DEMOCRACY*, *supra* note 25, at 87. The tragic instantiation of this was the Weimar republic, where the constituent and political majority of 1919 became a permanent minority in the country and in the Parliament starting in 1920!

tary fact may justify some confusion about the countermajoritarian difficulty. Any sensible person will ask: Which majority is being thwarted by a decision of the constitutional adjudicator? Of course, the standard theory of representative government rejects this dualism, saying that the only majority that counts is the majority of duly elected representatives as they are entitled to represent the people between elections.³² But this has always been a kind of fiction or exaggeration, as has become patently clear with the advent of public opinion polls. In any representative democracy, there is always a kind of double body of the people. A *represented people*: the elected officials who claim to monopolize the role of authorized interpreter of the popular will.³³ But at the same time, there is also the *popular majority* itself, which can be revealed or measured with some accuracy, and while this majority may itself change (and while the meaning of public opinion polls can be challenged), it cannot be completely suppressed by the representatives. In this sense, the popular majority is itself a somewhat autonomous political actor in constitutional politics. Because the popular and the represented majority can diverge, the constitutional courts can play an important role in reconciling them. In the French and Italian cases that we are analyzing, the trend seems to have been to push the representatives to converge with public opinion, but evidently, there are cases in which the movement is the other way around (one can think of the decision of the South African Constitutional Court cancelling the death penalty in agreement with the representative majority and against the majority of the public opinion).³⁴ It is wrong to assume as Gospel the principle *vox populi vox dei*.

In any case, modern democracies are not purely representative or indirect. Even where voters cannot vote directly on laws in popular initiatives or referenda, voters can and do often form and express opinions about what should be done. The voters can and do learn things about some legislative proposals from many sources (newspapers, interest groups, opponents, comedians, etc.) and sometimes form opinions as to what should be done. Therefore, while the rep-

³² ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

³³ This "interpreted" popular will stands for the will of the people only by synecdoche, since the majority of the representatives pretend to speak for the people as a whole. Notice that nowadays, in countries like Italy and France, the leader of the majority claims to monopolize this interpretative role and to assert that, like Louis the XVI, he is the true representative of the people. As a result, these democracies start looking a little bit like elected absolute regimes.

³⁴ *State v. T. Makwanyane* 1995 (3) SA 391 (CC) at 665 (S. Afr.).

representatives may have a legal claim to monopolize the legislative power, their normative claim is a little shaky, or at least contested. After all, on some issues, the people may know very well what they want even if their representatives have quite different views. One could say that the people simply have to wait until the next election day to get rid of the representatives they do not like. But why? Why would the people not prefer to have a representative government that has courts with the power to interfere with the legislative majority? Why couldn't they refuse to concede the whole legislative power to the representatives and instead create courts with the power to check legislative acts? And if that is what they prefer, who is to say that when the court strikes down a legislative act, that this is a "difficulty"?

We argue that in a modern, representative government, there are really three constitutional actors: The representatives, public opinion, and the constitutional adjudicator. Each of them has a kind of normative power. The representatives may be highly competent to make judgments as to public interests and effective means to pursue them. And courts have strong normative claims based on values of law and justice. But while the people (public opinion) may be less competent in making certain kinds of judgments than the other constitutional actors, in a democracy, they cannot be ignored if they have a strong and stable view. In the end, the people can replace the others. In effect, then, constitutional history is a stage on which these three actors interact, and where the countermajoritarian power of the court is the power to force the other actors to deliberate again about what to want or do.

II. DELIBERATION

We need to distinguish between descriptive and normative accounts of deliberation. Deliberation may be defined as the process by which people or groups decide what to do. It can be done well or badly, like anything else, but always involves deciding on the best course of action in view of relevant reasons. Agreeing on which kinds of reasons are relevant or appropriate for evaluating possible actions is often difficult and controversial. In a modern, constitutional democracy, most would agree that the fit of a potential public action with the constitution or its animating principles would count as a consideration. But there would remain disagreement as to what the constitution requires or what its basic principles are.

In a modern democratic state, real deliberative activity takes place in the context of a sprawling and complex set of governing institutions and a diverse civil society, and is structured by the makeup of

those amorphous entities. It is not particularly egalitarian in practice, displaying all the biases (toward wealth, education, and political enthusiasm) that sociologists and political scientists have documented in myriad studies of political participation.³⁵ Secondly, we need to keep in mind that actual deliberation is not made of cool appeals to reason, but entails frequent resort to emotional appeals, demonstrations, strikes, and tax revolts, as well as sporadic acts of violence. Most frequently, it seems to us, public deliberation is marked by the formation and regular activities of associations and organizations, and by the mobilization of resources of influence throughout civil society and around political and judicial institutions. In that respect, much public deliberation is effectively routinized in the everyday actions of organized groups and associations, such as raising money, lobbying, advertizing, and recruiting both members and policy makers. Reasons and reasoning play an important role in some of these activities, but no one should mistake popular deliberation for a seminar in a classroom.

However, as John Rawls argued in his very important book, *Political Liberalism*, within the American constitutional system, the Supreme Court has played an exemplary deliberative role.³⁶ The notion that the Court is exemplary conveys a clear, normative endorsement of its deliberative practices. As he put it: “[I]n a constitutional regime with judicial review, public reason is the reason of its supreme court.”³⁷ Rawls focused, in that passage, on the Court’s practice of producing opinions based on what he called “public reason”—the kinds of reasons that could be endorsed by people holding any reasonable comprehensive view.³⁸ He pointed out that “public reason is well suited to be the court’s reason in exercising its role as the highest judicial interpreter.”³⁹ Presumably, this is so because the materials that the Court can draw on to justify its rulings are confined to public and legal materials, broadly construed (obviously there is much internal disagreement within the court as to which materials are to be employed). At the same time, Rawls acknowledged that the Court is the:

highest judicial interpreter but not the final interpreter of the higher law[I]n constitutional government the ultimate power cannot be left

³⁵ See generally SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (1972).

³⁶ See JOHN RAWLS, POLITICAL LIBERALISM 231 (expanded ed. 2005).

³⁷ *Id.* at 231.

³⁸ *Id.*

³⁹ *Id.*

to the legislature or even to a supreme court . . . Ultimate power is held by the three branches in a duly specified relation with one another with each responsible to the people.⁴⁰

Rawls's argument that the Supreme Court is an exemplary deliberative institution has two aspects. First, he suggested that Supreme Court justices typically deliberate by limiting the arguments they make in a particular sense: Using only arguments that do not rely on contested comprehensive doctrines, but are restricted to legal materials and principles (public reason). And secondly, by calling the Court an exemplar, he implied that the Justices made the contents of their deliberations (their reasons and reasoning) transparent and accessible to outsiders.⁴¹ By describing the Court in this way, Rawls seemed to imply either that other American institutions could not be expected to deliberate in one or both of these ways, or that (for some reason) they may fail for various reasons to do so. In this respect, the Court constituted a special kind of forum: A place where public reason could be expected to prevail, if it could prevail anywhere.

Jurgen Habermas, in his magisterial review of Rawls's theories, raised an objection to the idea that any court had or should have had this kind of special status in a democracy.⁴² His concern was that courts were institutions that vindicated liberal rights (property and civil liberties), and to accord them special status would tend to exalt such rights over collective or democratic rights. In this essay, he argued that "[f]or the higher the veil of ignorance is raised . . . the more Rawls's citizens . . . find themselves subject to principles and norms that have . . . already become institutionalized beyond their control."⁴³ He goes on to say that for Rawls, "the act of founding the democratic constitution cannot be repeated" and, therefore, "the public use of reason does not actually have the significance of a present exercise of political autonomy."⁴⁴ These criticisms amount to arguing that Rawls, in both of his major books, elevated the protection of liberal rights (the liberties of the moderns)—and, presuma-

40 *Id.* at 231–32.

41 As we have written elsewhere, constitutional courts vary greatly in how fully internal reasons are revealed publically. John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 21–36 (Wojciech Sadurski ed., 2002).

42 Jurgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109, 128 (1995) (critiquing John Rawls's theories and assertions in his book *Political Liberalism*).

43 *Id.*

44 *Id.*

bly, the institutions charged with protecting them—over the democratic rights (the liberty of the ancients). Habermas claimed that this was institutionalized in Rawls's liberal constitution, and therefore permitted the judicial use of reason to regulate and limit the autonomy of citizens.⁴⁵

Rawls replied to these criticisms by clarifying (and possibly revising) the arguments in the expanded edition of *Political Liberalism* published posthumously.⁴⁶ In effect, Rawls argued that the constructions advanced in the two books did not elevate one kind of liberty over the other, and citizens were capable of full political autonomy in the sense of being free to reconstruct their constitutional arrangements at any time.⁴⁷ He did not deny that a people could establish a supreme court that could act in a countermajoritarian fashion, but denied that such a court would have ultimate authority of the kind Habermas thought it would.⁴⁸ When, in reply to Habermas, he revisited the issue, he wrote: "In discussing what I call the wide view of public political culture, we shall see that the idea of public reason applies *more strictly* to judges than to others, *but that* the requirements of public justification for that reason *are always the same*."⁴⁹ Moreover, he had already argued (in the original edition) that legislators and members of the executive branch, as well as ordinary citizens, *ought* to be guided by public reason as well, at least when they are making decisions concerning fundamental rights or constitutional essentials.⁵⁰ After all, as he insisted, "public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution."⁵¹ But Rawls also insisted that "the limits imposed by public reason do not apply to all political questions but only to those involving . . . 'constitutional essentials' and questions of basic justice."⁵² He emphasized that many political questions (he lists taxes, property regulation, and environmental legislation) may not concern such matters and says that (insofar as some question does not) "the restrictions imposed by public reason may not apply to them; or if they do, not in the same way, or so strictly."⁵³ The picture we are left with is

45 *Id.*

46 *See generally* RAWLS, *supra* note 36.

47 *Id.* at 440.

48 *Id.*

49 *Id.* at 443 (citations omitted) (emphases added).

50 RAWLS, *supra* note 36, at 216–17.

51 *Id.* at 214.

52 *Id.*

53 *Id.* at 215.

one of a supreme court that is to be guided by public reason at all times, and of other political officials (and citizens as well) who are to be so guided on some occasions, but less so on others. And when others have made decisions infringing on fundamental rights, the court may be called upon to play a special role in regulating these officials in a countermajoritarian fashion.

We agree that the other political institutions may be less likely to be guided by public reason because of certain of their organizational characteristics. The Executive Branch is, perhaps, too hierarchically organized and probably too disposed to secrecy to expose its own inner workings or to allow for open and impartial deliberation. Moreover, it constantly has access to the means to permit it to sidestep demands for justification. It is unrealistic to expect its members to have the moral strength to forbear in using them. And members of Congress might seem too given to political posturing and pandering to constituents to permit the free exchange of ideas contemplated by advocates of deliberation. We cannot always expect the members of that branch to act as public reason demands, even in cases where it is morally required of them. Because of these practical considerations, we would expect a supreme court (if one is created) to have a special burden—to correct the failures of other institutions or, indeed, those of citizens themselves. And we can agree with Rawls that for these reasons it has played a distinctive role in public deliberation. But this is not to say that other institutions, and the people generally, do not deliberate in a meaningful and important (if messy) sense. Indeed, as Friedman has pointed out, we need to see that there is an important and little understood connection between popular deliberations and deliberations in the Supreme Court. Implicitly, it seems to us, Rawls was suggesting that the way deliberation worked (and could best work) in a large modern democracy was by recognizing that certain institutions—the Supreme Court was the most visible to him—had the capacity and the institutional location to deliberate effectively on constitutional issues, giving that institution a special obligation to review and correct other agencies when they threaten fundamental rights. It is not that these other agencies are not required to deliberate in public reason when such issues are at stake, but only that they are designed in ways (for good reasons) that make them more likely to make certain kinds of mistakes from time to time.⁵⁴

⁵⁴ As we have suggested already, one could even read Rawls as anticipating some of Friedman's findings. Rawls implied that even narrowly court-situated deliberation might play a public role in a demonstrative sense: Allowing citizens to see court-offered reasons for decisions as reasons each person could embrace. See RAWLS, *supra* note 36, at 233. On

Again, the justification for a special role for the Court is not that the public reason requirement does not apply to all political officials and indeed, to citizens when they are acting on constitutional essentials and fundamental rights. When a question comes up before a constitutional court (or the supreme court as Rawls used the term), it will frequently concern exactly the kind of issue in which other institutions may have failed to resist the temptation to use nonpublic reasons, a temptation that the United States Supreme Court is particularly well-suited to resist.

The Court is especially well-composed from a deliberative viewpoint: It is made up of equals with secure tenure and assured salaries; it conducts its business through argument and persuasion; there is broad agreement among the Justices as to what kind of arguments would count as persuasive (even though there is much disagreement as to particular arguments); and there is no use of force, bribery, or intimidation. It is constructed in ways that make it, as much as possible, capable of deciding issues in an impartial fashion. So, from the standpoint of constitutional design, the creation of a court with such capacities and duties seems a sound idea—one that people might well endorse in their constitutional convention, as Rawls suggested.

Some of Rawls's critics have argued, however, that as sound as his intuitions may have been, an unintended consequence of a strongly deliberative court would be to make the other branches more likely to act irresponsibly on matters trespassing on constitutional essentials.⁵⁵ Why would the legislature consider seriously whether some popular act—a statute criminalizing flag burning, for example—violates a fundamental right if the court can be counted on to fix the problem later on (and take the heat for it)? The political attraction of taking a stand against burning the flag might be too much of a temptation for many congressmen to resist. In this sense, the creation of a supreme court with powers to overturn statutes and decrees might be said to reduce the amount of deliberation that takes place elsewhere in the government or in civil society.

Friedman's study gives reasons to doubt this criticism of Rawls and, indeed, grounds for advancing the opposite view. He suggests, as we read him, that a counter-majoritarian court can actually increase

this interpretation, Rawls thought that even if few people participate in real deliberations, most or all of us can take part "virtually," by discussing and arguing among ourselves the opinions generated by the justices.

⁵⁵ See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 90 (2008) (illustrating why congressional leaders may take actions that they know the Court will reject).

the quality and quantity of deliberation by provoking public discourse and effectively encouraging new arguments that develop in the rough and tumble of public debate.⁵⁶ In this respect, the Court's role is not so much "exemplary" as it is stimulative or provocative. Of course, the Justices have no monopoly in shaping the resulting public discourse. Think of the shifts in the debates on abortion since the *Roe v. Wade* decision: Outrage over the Court's intervention gave rise to the formation of new groups and the formulation of new state level regulatory policies, or of the creation of various legislative initiatives aimed at restricting or expanding gay rights in various ways. Courts were forced, repeatedly, to respond to these new legislative adventures and sometimes the Supreme Court itself had to resolve the issues. And as these issues arose, the membership of the Court also evolved, partly in response to the political consequences of these reactions.

III. CONSTITUTIONAL DIALOGUE

Friedman, of course, was not making philosophical arguments, but engaged in a descriptive historical enterprise. He showed that those actually engaged in popular deliberation do more than simply give persuasive arguments—they mobilize and deploy valuable economic resources to gain attention and organize public action. Real deliberation in a large and complex modern nation state is an economic activity in this respect, and includes the resources devoted to forming organizations, to advancing political aims, to lobbying political officials, and to supporting and opposing candidates for elective and appointive office (including, importantly, judgeships). But this very list suggests that the use of resources by policy advocates goes far beyond finding a stage and microphone with which to advance reasonable views with the aim to persuade those who hold power: It amounts to the creation and use of power itself. And, though the boundaries can be hard to see sometimes, in the end there is a material difference between persuasion and various other ways of influencing public policies.

Ultimately, there seem to be two reasons that popular deliberation (and deliberation among political officials, too) may fall short of the philosophical ideal, one arising from a realistic view of the person, the other from a realistic view of modern society. First, ordinary people are usually inattentive to many political issues, and they may

56 FRIEDMAN, *supra* note 1.

simply not care to exercise whatever cognitive abilities they have to reason about public policies. And, as many psychological experiments have demonstrated, everyone has cognitive biases and limitations that interfere with rational information processing.

Second, in the context of a large and complex society, making effective arguments requires the use of economic and political power. However, exercises of political or economic power do not necessarily correspond with better arguments. Still, these “realistic” objections notwithstanding, a minimal commitment to democratic rule requires us to see popular deliberation as having some normative claim on public officials. The nature of that claim is contingent and often frail, but sometimes popular arguments can (despite all) have some of the force of reason. At any rate, political officials ought not to ignore this possibility.

When it comes to courts, however, these realistic considerations have less significance. Judges can be seen as (rough) equals in intellect and training and in a sworn allegiance to law. They are assisted by able clerks and persuasive lawyers (on both sides) and indeed by many other resources drawn from the legal and policy communities. Moreover, they can be expected to have somewhat worked out views of divisive social issues of the kind that appear in courts with some frequency. Therefore, while individual judges no doubt have personal biases and cognitive limits like anyone else, the context of judging may tend to ameliorate these limitations. Moreover, coercion, intimidation, and pecuniary motivations are never countenanced in courts. One could hope and even expect that reasoned deliberation will prevail in courts. We have argued in other papers that precisely because judges (usually) do not have reason to take account of career considerations (except, of course, when they are forced to stand for election in a competitive contest)⁵⁷ they are subjected—and are able to subject themselves—to a more demanding requirement of justification of their decisions.⁵⁸ Broadly speaking, we think this means that one can understand higher courts—appellate courts and especially constitutional courts or supreme courts—as capable of deliberating in the more rigorous sense presented by Rawls or Habermas.

We have argued elsewhere that the deliberative role of courts has to be considered in two separate contexts. Justices in many courts deliberate *internally* (among themselves) in order to agree on their deci-

⁵⁷ Of course, if appellate court judges think they could be nominated for a seat on the Supreme Court, careerist concerns might play some role in their decisions.

⁵⁸ See Ferejohn & Pasquino, *supra* note 41, at 22 (arguing that “constitutional courts face special and demanding deliberative expectations”).

sions. But they also, in some form or other, offer reasons for their decisions to the public and, in this respect, engage in *external* or public deliberation.⁵⁹ Both kinds of deliberation involve persuasive speech, but the qualities of the interlocutors are obviously very different.⁶⁰ The public context of “external” deliberation requires that the notion of “deliberation” shift a bit to take account of realistic considerations just discussed: The skills, education, and attention span of citizens and public officials and their greatly unequal positions of wealth and power. And, in addition, the peculiar ways that the public, or parts of it, is able to express itself in the democratic context—by means of elections, of course, but also in many other channels (formation of interest groups, lobbying, demonstrations, etc.). Acknowledging these aspects of the communicative circumstances seems unavoidable in a modern democracy. But to acknowledge political reality in this way is not to diminish the importance of the phenomenon of public deliberation on important issues, which is what Friedman explores in his book.

It seems likely that the U.S. Supreme Court stands out from other constitutional adjudicators in that it engages in much more external or public deliberation than do its peer institutions in other countries. Partly, this is a matter of public or differing political cultures. But partly, it seems due to institutional differences among the courts and specifically to the fact that the Supreme Court has adopted practices which facilitate its external role: Specifically, the practice of publishing multiple opinions makes visible to outsiders the nature of the divisions among supporters and opponents of particular arguments and interpretations.

As is well known, the practice of issuing dissents and concurrence has fluctuated over time, but really began to take off early in the 1940s when the Court began actively to regulate issues of personal liberty such as speech, religion, equality, police activities, and rights of the accused.⁶¹ These issues were not only highly divisive in many cas-

59 Ferejohn & Pasquino, *supra* note 3, at 1679 (noting that the issuance of multiple opinions from courts at all levels provides the public with the opportunity to view and comment upon variations in legal reasoning).

60 This is a difficult and underexplored topic, and one of us (Pasquino) is doing further research on it.

61 The standard dating of this turn is 1938, when Justice Stone inserted his famous footnote in his opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (applying minimal scrutiny to the economic regulation at issue). The footnote suggested that a higher level of scrutiny would be warranted in cases where there was a potential violation of liberties protected by the Constitution, noting that the Court would pay special attention to the violations of the rights of “discrete and insular minorities.” But it was entirely

es, but also their regulation required members of the Court to craft new and persuasive theories to support these decisions and such theories were also divisive. The standard explanation of this change traces it to Chief Justice Stone's permissive attitude toward the practice of multiple-opinion writing (compared to the disapproving attitude of his predecessors), but we think that the change in the Court's agenda, signaled in Justice Stone's famous "footnote 4" is at least as important. In any case, it must not be forgotten that, unlike other constitutional adjudicators, the U.S. Supreme Court administers diverse judicial systems and that its primary tool for doing this is to provide doctrinal guidance to state as well as federal courts. Obviously, this task became much more demanding as the Court expanded its constitutional reach into new and highly conflictual domains after *Carolene Products*.⁶²

To the extent that Friedman is correct, he highlights an important and overlooked aspect of American democracy. In effect, he has shown that, to a greater extent than many have believed, American democracy can be described as, in some way, a deliberative democracy, however imperfect and distorted many of its practices may be. Moreover, his work suggests that American democracy owes its deliberative character partly to the presence of a powerful nonmajoritarian institution, able and willing to check legislative majorities and other governmental institutions when they cross constitutional bound-

unclear how and when this would be done, as nearly every element of the footnote required explication of a kind that could only be worked out as new cases came to the Court.

62 Political scientists tend to characterize the rise of dissents and concurrences as representing a decline in consensual norms on the Court, imagining that the Court can be understood as a more or less integrated social group bound by internal norms of various sorts. See, e.g., Gregory A. Caldeira & Christopher J. W. Zorn, *Of Time and Consensual Norms in the Supreme Court*, 42 AM. J. POL. SCI. 874-75 (1998) (arguing that levels of concurrence and dissent on the U.S. Supreme Court are functions of norms that arise from Justices' individual behaviors). For a recent survey of this issue and a statistical analysis of the relation among the shift in the Court's agenda after 1938 and dissents and concurrences, see MARCUS E. HENDERSHOT ET. AL., REVISITING THE MYSTERIOUS DEMISE OF CONSENSUAL NORMS IN THE U.S. SUPREME COURT 1 (Apr. 1-3, 2010) (arguing that many influences contributed to the increased usage of concurring and dissenting opinions on the U.S. Supreme Court). While we agree that much can be learned about the behavior of the Justices over time from this perspective, we think it understates the importance of the changing substance of the Court's docket. Therefore, we emphasize instead the distinctive demands the Court faced when it shifted its focus from regulating economic policy to protecting personal rights and liberties. To some extent, the acceptance of this new agenda probably mandated some shift in internal deliberative norms, permitting the Justices to explore and develop new doctrines in new areas of personal liberty and also, to some extent, engage in external expression of reasons in the larger political and legal community.

daries. In this way, the countermajoritarian actions of the Court have represented an opportunity for democracy, at least as much as it has been a “difficulty.” By blocking the majority, the Court has opened up deliberative space to a wider set of participants, leading them to organize themselves to advocate new policies and articulate reasons for them that might persuade those in the middle. To be sure, countermajoritarian actions can slow things down and sometimes prevent a majority from getting what it wants. That can be costly and is surely painful to those who have newly arrived in government. But the advantages of extending and opening public debate are real and lasting, too, and should not be discounted.

Moreover, Friedman’s argument supports the notion that this is not at all a new phenomenon but one which has been evolving since the earliest days of the republic. In a recent book, William Eskridge and one of us have argued that the Court often has (and ought to) embrace a deliberation-inducing posture relative to the other branches.⁶³ As we understand his book, Friedman has extended this view to the length of American history, and to public debate as well as official policy making. While he has made great strides in describing dialogic practices, he has spent less effort (as far as we know) in showing analytically how it was possible for the Court to play the role he describes. One can pose this question at either the constitutional level or at the level of institutional practices on the Court. At the constitutional level, the answer seems easy: The constitutional guarantees of judicial independence and the difficulties in overriding Court decisions turn out to be sufficiently high hurdles that successive Courts have been able to resist popular and governmental pressures for long periods of time. It can keep unpopular points of view alive even when others think they are settled. Or it can open up long-settled agreements to renewed political debate and disagreement.

The Court itself has also adopted internal practices and “institutions” that permit it to play its deliberation-inducing role more successfully. These practices include open oral argument and the publication of multiple opinions, which permit the different sides of controversial policies to be laid out publicly in ways that allow public officials and interested citizens to understand not only the ruling, but

⁶³ See generally WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010) (presenting a nontraditional framework for thinking about American constitutionalism). This view is developed further in William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273 (2009) (arguing that judges should listen to and respect other institutions).

possible alternatives. In an earlier article, we distinguished between internal and external deliberation in constitutional courts: internal deliberation is aimed at persuading other justices, ideally leading to the formation of a consensus or compromises on an opinion for the court. This kind of intensive, internal deliberation is common in constitutional courts in Germany and Italy. External deliberation is aimed at persuading external publics or, as Friedman stresses, provoking and stimulating them to deliberate about the issue. From the standpoint of the Court, both kinds of deliberation have benefits, but both have costs as well; the American Court is distinguished from other constitutional courts in placing so much weight on external deliberation.

In a way, therefore, Friedman's work can be seen as justifying on deliberative grounds the rigid, supermajoritarian constitutional structures that many democrats have previously criticized. He might even say that without an "obdurate constitution" (to use Larry Sager's locution⁶⁴), our deliberative democratic practices would not have developed; we might have evolved a system in which policies rapidly reflected the preferences of the current majority. On these grounds, he might defend the high hurdles of Article V, which have seemed, to many democrats, to be thinly-veiled bulwarks of privilege.

Others have argued that certain countermajoritarian actions of courts can be democracy enhancing, either by guaranteeing that democratic preconditions are actually satisfied⁶⁵ or by arguing that courts have an important democratic pedigree so that their actions are indirectly democratic.⁶⁶ Others go further and essentially redefine democracy to include the (judicial) protection of liberal rights.⁶⁷ Friedman's argument largely sidesteps these issues and focuses instead on a different mechanism. Indeed, he tends to resist the whole idea of a tension between the majority and the Court, emphasizing that the Court and public opinion *eventually* come into some kind of "agreement." But if this convergence is generated by the Court's caving in to popular views, there would be little reason to think that the Court is enhancing democracy in any of the ways argued above. But we think he is committed to no such claim. Once the door to delibe-

64 See LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 82 (2004).

65 See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102-03 (1980).

66 See, e.g., CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001).

67 See Frank Michelman, *Democracy and Positive Liberty*, *BOSTON REV.*, (Oct.-Nov. 1996) <http://bostonreview.net/BR21.5/michelman.html> (reviewing Dworkin's substantive definition of democracy).

ration is opened, convergence may be generated in any number of ways, including public acceptance of judicial views or (more likely) a dialogue between the Court and the people that leads to a stable outcome.

As we emphasized at the start of this essay, it may be important to recognize that the quality of deliberation that occurs in the highest court may be different than that which occurs among ordinary citizens. Rawls's claim that the Supreme Court is exemplary may seem to endorse that idea. This recognition may not, however, undermine the achievement of a moderately deliberative democracy which Friedman credits to the Court. People differ greatly in their abilities to make persuasive arguments, and one might think that these differences would tend to produce a deliberative elite. For example, it may be helpful to remember that Classical Athens, surely as democratic a government as has ever existed, was led throughout the middle of the fifth century by Pericles, an orator whose speeches have justly survived to the present day.⁶⁸ And a century later, Demosthenes and Aeschines and a few others seem to have dominated the Athenian courts and assembly, in the sense that they were generally the most persuasive speakers and were recognized as such.⁶⁹ There seems little doubt that these orators were especially proficient in making persuasive arguments and especially in getting Athenians to agree to very costly policies.⁷⁰ But their persuasiveness does not undermine the claim that the causes they advanced were made attractive by their being presented as being in the enlightened interest of the demos. The rhetors' influence may have been largely due to their ability to get ordinary people to see where their shared interest lay.

Some of the differences in capacities to deliberate effectively may be "natural," but probably most are due to education, social and institutional circumstances. Thus, to argue that the Supreme Court has operated to make American democracy more deliberative is not necessarily to argue that it has made it more democratic if that notion embeds an egalitarian aspect. Whether or how deliberation and de-

68 Of course, we do not have Pericles's words directly from him, but only from the masterful telling of Thucydides. See THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR* (Henry Dale trans., Harper & Brothers 1863) (431 B.C.E.) (providing an account of the Peloponnesian War in Ancient Greece).

69 See MOGENS HERMAN HANSEN, *ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* (1999).

70 Demosthenes, for example, repeatedly convinced the Athenians to oppose and resist the rising power of Philip and Alexander of Macedon, with dreadful consequences for Athenian democracy. For an example of Demosthenes's persistent militance against the Macedonians, see 2 PLUTARCH'S *LIVES* 397 (1992).

mocracy fit together seems to be partly a question of definitions (as we implied above), and partly a question of how political institutions actually work. But Friedman argues, strikingly, that the kind of deliberation the Court has induced has opened public deliberation to many new groups and factions. So, at the very least, the Court has opened up debates to new points of view situated outside government and outside the settled boundaries of politically correct beliefs, even if each of these new viewpoints are themselves expressed by elites.

IV. EVIDENCE FROM EUROPE

Since the Second World War, a number of countries have established constitutional courts and given them the power to overturn legislation. This means, of course, that the United States is no longer alone in permitting judges to correct or cancel the actions of the majority. This new constitutional development permits us to ask Friedman's question in other contexts: Has the introduction of a judicial power to overturn legislation promoted more widespread deliberation? There are of course many differences between constitutional courts and the American Supreme Court, and, indeed, among the new constitutional courts. One difference is that constitutional courts have a narrowly focused mission to review state actions to see if they violate the Constitution, whereas the Supreme Court of the United States ("SCOTUS") has a much broader mandate. Secondly, the constitutional court is not a part of the judiciary as the SCOTUS is, but stands outside it. Third, the constitutional court has a monopoly on the power to conduct constitutional review—other courts cannot strike down legislation on constitutional grounds. Fourth, the membership of these new courts is chosen differently from the way ordinary judges get their jobs. Whereas ordinary judges in continental Europe are often chosen in competitive civil service examinations, constitutional judges are more frequently chosen "politically," in that some body (perhaps the legislature) elects or nominates them discretionarily. In addition to these institutional differences, the new constitutional courts have adopted some common practices—they rarely permit open oral argument, and few of them permit the publication of multiple opinions. Rather, the courts usually deliberate *in camera* until they reach a consensus around a single opinion that is issued in the name of the whole court.

In addition to these general similarities among constitutional courts, there are also some notable differences among them. The one we have singled out in our previous work is the way the court can be asked to make a constitutional ruling. We have argued that there

are three ideal, typical methods of posing constitutional questions which we have called French, Italian, and German. Other courts have generally adopted one or the other of these three methods of referral. The French referral has (since 1974) been that a parliamentary minority refers a statute passed by the legislature but not yet promulgated to the *Conseil Constitutionnel*. The Constitutional Court (C.C.) then has a month to decide whether the statute is constitutional, and, if the answer is yes, the statute is then promulgated as a law.

The Italian method permits an ordinary judge, in the course of hearing a case, to refer the question of a statute's constitutionality to the Constitutional Court, which will then resolve the constitutional issue and refer the matter back to the ordinary judge for application to the case.

The German method occurs much later in the legal process: after someone has exhausted all legal avenues in ordinary courts, if she feels that her constitutional rights have been violated she can file a constitutional complaint with the Constitutional Court, which is obliged to rule on that question.

There are many other important differences between these courts (and others), but the differences in the method of referral seems to us crucial for several reasons. First, the differences affect the speed with which constitutional questions are addressed: In France, the constitutional question is posed very quickly and at an abstract level (without a concrete case) in front of an existing government committed to the legislation; in Italy, it takes somewhat longer because a court case must be filed and the constitutional issue raised during the trial. In Germany (as in the United States), the process takes longer since other legal avenues have to be exhausted before a constitutional complaint can be filed.⁷¹ This difference in speed is relevant to the size of the audience of the opinion of the C.C. In France, the audience is the government and the parliament. If a statute is struck down in whole or part, it is they who have to deliberate and react, formulating new legislation. In Italy, it is the ordinary judge whose task it is to apply the laws, as long as they are constitutional, and the legal community who has the duty to represent litigants. And in Germany, the audience includes the judge whose decision is challenged, but is also includes, in a sense, the whole body of citizens who

⁷¹ In exceptional cases, though, the constitutional complaint can be sent to the German Constitutional Court immediately if there is a reason for fearing irreparable damages to the plaintiff.

need to know if and when they have reason to file a complaint before the Constitutional Court (which can be done without the assistance of a lawyer).

Evidently, the European constitutional courts, like the USSC, can use countermajoritarian measures to stop or slow down majorities, and thereby make space and time for political deliberation. But unlike the constitutional courts, the Supreme Court gives a lot of guidance to subsequent debates. The USSC holds highly visible public oral argument, and it often issues multiple (conflicting) opinions that serve to guide judges, legislators, and interest groups in understanding the thinking behind its decisions. Such information is obviously valuable not only in applying Supreme Court rulings in lower courts and administrative agencies, but also in formulating new legislative and administrative initiatives. Importantly, the production of multiple opinions on important legal issues encourages press coverage and popular attention to the substantial matters at stake, and serves to widen the discussions to the broader public.⁷²

By contrast, what we have called the practices of external deliberation are relatively meager in European constitutional courts. The courts deliberate in closed sessions and issue single opinions justifying their decisions. In some courts, notably French courts (until quite recently), the decisions have to be issued very quickly, and the accompanying opinions are therefore brief and technical. In Italy (and now in France as well), decisions and opinions are directed to a specialized audience—the judge who referred the constitutional question—and secondarily to the legal community. In Germany, the decision directs an offending official (a judge or administrator) to correct an action that violates the constitutional rights of a complaining citizen. In all of these cases, reasons are given to justify the decision, but the reasons offered are given in the name of the whole court. This practice makes it difficult for those on the outside, especially nonlawyers, to know very much about the internal conflicts and controversies surrounding a decision or to know very much about the range of possible legislative actions that would satisfy the court.⁷³

⁷² We cannot be too sanguine about these effects. It seems possible that the flood of dissenting opinions in the last decades produces a cynical attitude among American law students that seems completely absent among European law students.

⁷³ Lawyers who follow the constitutional court closely can, of course, make sophisticated inferences from the language of the opinion or gain inside information in various ways. But these constitutional court “Kremlinologists” are a small, external audience. It is not possible to find in Europe a Linda Greenhouse or Adam Liptak or Jeffrey Rosen, who have devoted their considerable intellects and persistence to explaining what the United States Supreme Court has done in specific decisions and why.

We may illustrate these points by considering some controversial and important decisions reached by three European constitutional courts. We will focus on several recent decisions in the three constitutional courts we have discussed. In Italy, we shall consider two cases: the Di Bella case where the court forced the government to pay for a dubious cancer treatment,⁷⁴ and the Italian Constitutional Court's (ICC) nullification of the law protecting the prime minister Silvio Berlusconi from prosecution while he remained in office.⁷⁵ In France, we will examine the recent rejection in the Conseil Constitutionnel of President Sarkozy's proposed carbon tax, which had been enacted by the Parliament.⁷⁶ Last, we will consider the GCC's abortion decisions, the first in 1975 and the second following German unification in 1993.⁷⁷ Each of these decisions provoked reaction and debate outside of the Courts, both inside governing circles and in the public at large, and each resulted in government reactions, bringing about a kind of deliberative compromise among the constitutional actors.

A. *The Di Bella Treatment*

In 1997 and 1998, the Italian mass media devoted significant attention to a new treatment, created by Luigi Di Bella, a medical doctor in Modena, aimed at certain types of aggressive cancers. *Newsweek* even nominated him "Dr. of Hope."⁷⁸ A lot of people went to see him and used his therapy with the hope of defeating their deadly sickness. They also asked the government to reimburse the cost of the therapy since Italy has a system of universal health care. After a number of investigations, the (center-left) government, run by Romano Prodi, refused to reimburse the patients, arguing that Di Bella's therapy was ineffective. There was a strong division of public opinion, and some organizations were established to support the value of the therapy.

⁷⁴ Corte Cost., 26 maggio 1998, n. 185, Giur. it.

⁷⁵ See Corte Cost., 19 ottobre 2009, n.262, available at http://www.cortecostituzionale.it/versioni_in_lingua/eng/attivatacorte/pronunceemassime/recent_judgments_2007.asp (follow "Judgment No. 202 of 2009" hyperlink) (providing an English translation on the Court's website).

⁷⁶ See Conseil constitutionnel [CC][Constitutional Court] decision No. 2009-599DC, Dec. 29 2009, J.O. 296 (Fr.).

⁷⁷ Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] 1975, 39 [BVerfGE] 1 (Ger.), available at http://groups.csail.mit.edu/mac/users/rauch/germandecision/german_abortion_decision2.html (providing the English translation); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 1993, 88 [BVerfGE] 203 (Ger.).

⁷⁸ *The Latest Tech Revolution*, NEWSWEEK, Apr. 29, 2002, at 5.

Throughout the country, there was a debate about Di Bella's treatment—a scientific debate and, more importantly, a popular one. It was barely possible to have a dinner in Italy those days without being involved in a discussion concerning Di Bella's treatment (most of those discussions were based on prejudices or, more likely, on nothing, but still people had opinions). Public opinion seemed to run fairly strongly against the government's position, and many people thought that, in the absence of an absolute certainty about the inefficacy of the treatment in question, the government had a duty to reimburse the patients using the treatment.⁷⁹

The constitutional court was asked to make a decision by a referral sent by the administrative Supreme Court (*Consiglio di Stato*). Of course, the justices could not themselves answer the scientific question as to the effects of the therapy, but they decided to make a popular choice. The ICC opinion asserted that in the absence of certainty, it was unconstitutional to treat the patients of Di Bella *differently* from those who utilized other therapies which were regularly reimbursed.⁸⁰ The ICC, in the *sentenza* (or opinion) N.185 (of the year) 1998, therefore decided that the governmental decision violated Article 3 of the Constitution—the principle of equality.⁸¹ The crucial point of the *sentenza* is the following:

In case of extreme therapeutic needs, if there is urgency and no alternative solution, as it is true for some oncologic pathologies, one has to take into account that during the stretch of time the experimentation goes on in order to verify the validity of the therapy expectations originate that have to do with the minimum of right to health [guaranteed by Article 32 of the Italian Constitution—in that context: trying to survive]. It follows from the principle of equality that the satisfaction of this right cannot be conditional on the different economic conditions of the patients⁸²

In other words, it is not compatible with the principle of equality that the rich can pay to try to postpone death while the poor see their hopes curtailed by their economic situation. The rich probably do not care very much about reimbursement; but the poor do. And

79 See Eva Benelli, *The Role of the Media in Steering Public Opinion on Healthcare Issues*, 63 HEALTH POL. 179 (2002) (discussing the role of median and public opinion in the Di Bella case in particular).

80 See Corte Cost. 26 Maggio 1998, n.185.

81 See *id.* Article 3 of the Italian Constitution states that "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions." See Art. 2 Costituzione [Cost.] [It.].

82 See *id.* Article 3 of the Italian Constitution states that "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions." See Art. 2 Costituzione [Cost.] (It.).

since the efficacy of the treatment remained unclear (at least to the ICC and the general public), refusing to reimburse for the treatment would be discriminatory since the rich can pay, and the poor cannot.

The decision was legally bold and politically ironic—a court with a journalistic and popular reputation of being on the center-left rejected what appeared to be a reasonable decision (to deny reimbursement for unapproved medical procedures) of the first, republican, center-left Italian government. But the ICC was also, in this case, deciding a question that put the *citizens* and the *government* in sharply opposed positions, and so by overturning the governmental policy, it was not taking an unambiguously countermajoritarian action. However, it has to be said that its decision placed an extraordinary burden on the government's efforts to regulate national health insurance.

Two remarks. First, it may be interesting to note that eventually it was proven beyond any reasonable doubt that the so called Di Bella therapy was absolutely inefficacious.⁸³ Second, in the case we are considering, the ICC was not originating a debate, but taking a side in a contrast between the elected branches and the public opinion supporting one party to the debate, encouraging it and postponing the final decision by the political branches.

B. *The Lodi*⁸⁴ *Schifani and Alfano*

Notoriously, the Italian Premier Silvio Berlusconi has had trouble with judges both in Italy and abroad. Since the inception of his political adventure, he has been very keen to fix these problems by enacting various pieces of legislation, making himself immune from prosecution at least while in office, where he hopes to stay forever. The Parliament passed in June 2003 a statute (*lodo Schifani*) immunizing the five highest state personalities (most importantly, the Prime Minister) from any crime or misdemeanor even antecedent to the mandate, and this for the entire duration of it.⁸⁵ The Constitutional

83 *Evaluation of an Unconventional Cancer Treatment (the Di Bella Multitherapy): Results of Phase II Trials in Italy*, 318 *BMJ* 224 (1999) (finding that Di Bella multitherapy did not show sufficient efficacy in patients with advanced cancer to warrant further clinical testing).

84 This old Italian word means the agreement suggested by an arbitrator and accepted by the parties, now used hypocritically as equivalent to a statute voted by the majority.

85 Legge 20 giugno 2004, n.140 (It.) (“Disposizioni per l’attuazione dell’articolo 68 della Costituzione nonché in materia di processi penali nei confronti delle alte cariche dello Stato”). This translates to: Act June 20, 2004, No. 140, Article 1. Provisions for implementing Article 68 of the Constitution and in criminal proceedings against the high State offices). The Act states: “They cannot be subjected to criminal proceedings, including any offense in the facts before taking the office or function until the termination thereof,

Court was soon asked by ordinary judges about the compatibility of this statute with the Constitution, and its response was to cancel this provision of the statute in its *sentenza* n. 24 of 2004.⁸⁶ The argument used by the Court was, again, the principle of equality: The Prime Minister or the President of the Constitutional Court (included in the five highest public officials) have no special privilege vis-à-vis ordinary citizens; the law in a constitutional state is the same for everybody (notice that the statute protected the Premier from any type of crime, including homicide, and that in Italy there is no impeachment procedure for the prime minister).⁸⁷

The new Berlusconi government responded by getting the Parliament to enact a similar statute (*lodo Alfano*, from the name of the Attorney General who introduced the bill) in June 2008 immunizing, this time, only four high officials (excluding the President of the ICC).⁸⁸ Again, the statute was referred to the ICC within a year, and the referral raised the same issue: Whether the new law was consistent with the equality provision (Article 3) of the Italian Constitution. The Constitutional Court, applying this time the principle of *stare decisis*, which is crucial in European constitutional adjudication (contrary to what many people tend to believe in the US), cancelled the statute,⁸⁹ thereby entering into an open conflict with the elected majority. The Court could not have easily reversed the previous decision since the statutes were so similar in nearly every respect and, in any case, such reversals are extremely rare in Constitutional Courts. One has to consider, moreover, that the justice who wrote the *sentenza* in 2004 was now, in 2009, the President of the ICC: Francesco Amirante, an old magistrate coming from the Cassation Court with no political background at all. It is also important to remember that Italian judges are not politically appointed, but get their jobs in the same way as ordinary civil servants, through a public competitive exam. He

the President, Senate President, the President of the Chamber of Deputies, the President of Council of Ministers, the President of the Constitutional Court.”

86 Corte Cost. 20 gennaio 2004, n.24 (It.).

87 *Id.* See the section *Considerato in diritto* for the Court’s presentation of constitutional reasons for its decision.

88 Legge 23 luglio 2008, n.124 (It.).

89 See Corte Cost., 19 ottobre 2009, n. 262 (It.), available at http://www.cortecostituzionale.it/versioni_in_lingua/eng/attivitaacorte/pronunceemassime/recent_judgments_2007.asp. (providing an English translation on the Court’s website); see also Rachel Donadio, *Court Rejects Berlusconi’s Immunity*, N.Y. TIMES, Oct. 8, 2009, at A6 (“After deliberating for two days in a tense political climate, the Constitutional Court ruled that the law—which grants the nation’s four highest officeholders immunity from prosecution while in office—violated a clause in the Constitution granting citizens equality under the law.”).

had no reason to tarnish his reputation as a judge by signing a decision reversing the one he accepted to write for the Court five years earlier when the material facts had remained unchanged.

The Alfani Law and the decision of the ICC were the objects of widespread discussion and debate among citizens. To our knowledge, the ICC did not know about the leaning of public opinion, but after the decision, a survey among the voters made the day following the announcement (October 8, 2009) shows first that there was a high level of public awareness of the ICC decision, and second that the popular reaction to the decision was essentially structured by political affiliations. Here are the results (source: *La Repubblica* October 9th, 2009):

TAB. 1. Do you know the decision of the constitutional Court? (in %)

	Total of the sample	PD – IdV Center-left	PdL - Lega Center-right	Others	Voters who abstained in 2008 or refuse to declare a political opinion
Do you know the decision of the <i>Corte Costituzionale</i> concerning the Lodo Alfano?					
yes	77	77	78	76	74
no	23	23	22	24	26
total	100	100	100	100	100

TAB. 2. Do you agree with the decision of the CC.

	Total of the sample	PD – IdV Center-left	PdL - Lega Center-right	Others	Voters who abstained in 2008 or refuse to declare a political opinion
Do you agree or you don't with the decision of the Corte concerning the Lodo Alfano?					
Agree	59	84	29	63	66
Don't agree	40	15	70	30	33
Without opinion	1	1	1	7	1
Total	100	100	100	100	100

TAB. 3. Trust in the CC

	Total of the sample	PD – IdV Center-left	PdL - Lega Center-right	Others	Voters who abstained in 2008 or refuse to declare a political opinion
How much do you trust the <i>Corte Costituzionale</i> ?					
A lot	37	58	17	42	42
Quite a lot	32	29	30	30	38
A lot + quite a lot	69	87	47	72	80
Not enough	23	11	41	20	11
Not at all	6	1	8	7	7
Without opinion	2	1	4	1	2
Totale	100	100	100	100	100

It is interesting to observe that the poll shows that the majority of the public opinion did support the ICC decision—only those identifying with center-right parties failed to support the Court. And it may be significant that this was also true of those who were either unaffi-

liated with the left or right or refused to admit such an affiliation. It seems to us that there was some kind of a public dialogue that took place in this case (and probably also in the Schifani case, but we do not have the data), where the public essentially came to support the ICC's decision, after it became apparent that there was a direct confrontation between the ICC's interpretation of the Constitution and the parliamentary majority. We should say that we do not know whether the distribution of public attitudes was a cause or consequence of the ICC decision. It is very likely that those on the center-left (and perhaps many independents) already thought that the *Alfano* law was a craven attempt to subvert constitutional norms even before the ICC spoke to the matter. If this was the case, once again we have a case in which public opinion and the government are opposed and where the ICC aligns itself with the public. But it also seems plausible that public opinion concerning the *Alfano* law's constitutionality was solidified by the Court's ruling. If this is true, we could say that the ICC and the government opposed, and the public solidified, the Court's ruling by coming to its support.

In any case, the political significance of the ruling is that because granting immunity for the Prime Minister violated the principle of equality, the government would need to enact a constitutional amendment—a statute passed by the majority does not do. And of course, the majority knows that there is no supermajority among the elected representatives to pass such an amendment. So, it appears that now the government is preparing a third bill, which will certainly be approved by the Parliament and will again soon be sent to the Constitutional Court.⁹⁰ Only the electoral result of the next election can tell us if the Court will again be able to stop the attempt of the government to subvert the constitutional order of the peninsula. But it seems that in this struggle, the Constitutional Court has a good deal of popular support, so even if the conservatives prevail in the next election, it is not evident that the government can succeed in getting immunity for its high officials. We may add a coda here reminding the reader that the entire constitutional adjudication mechanism Italian style is essentially based on a dialogue between the ordinary judges who send questions to the constitutional court, that the ICC answers in ways that generally adhere to its own cumulated precedents. The ordinary judges then apply the rulings of the ICC in the specific cases before them. Nowadays, this relationship tends to be very cooperative. Indeed, the decisions (*sentenze*) addressed by the

⁹⁰ See *La Repubblica*, April 15th 2010.

ICC to the ordinary judges are called “auto-applicative,” which means “self-enforcing.” Actually, they are not self-enforcing, but enforced by ordinary courts. Nonetheless, the ICC’s expectation is that they will be enforced, which, as we have seen, might not be the case if the addressees were the political branches.⁹¹

C. *The Taxe Carbone*

We saw in the first Italian example (the so-called Di Bella treatment) a supposed “center-left” Court opposing a center-left government. Nowadays, in France, the Constitutional Council, on the verge of becoming a true court after the constitutional reform of 2008, commonly believed to be on the right of the political spectrum,⁹² has been regularly opposing (rejecting, modifying, or forcing the government to present a new bill taking into account the objections of the CC) decisions of the conservative president (Sarkozy).⁹³ The last example is the decision of the Conseil Constitutionnel to strike down the *taxe carbone*.⁹⁴

It is important to say a few words about the political background of this case. Like Silvio Berlusconi, Nicolas Sarkozy had a solid majority in the representative assemblies at the time that the carbon tax was introduced by the government. In fact, he enjoyed a quasi “constituent” majority in the *Congrès* (the French term for constituent assembly encompassing the two houses of the Parliament), and he was, notably, able to pass a constitutional reform in 2008 (notwithstanding the opposition of the socialist group in parliament).⁹⁵ But he did not

91 See ITALIAN CONST. C., http://www.cortecostituzionale.it/versioni_in_lingua/eng/lacortecostituzionale/cosaelacorte/cosaelacorte.asp (last visited Nov. 13, 2010).

92 Eight of the nine members of the French Constitutional Court in December 2009 had been appointed by conservative presidents, house speakers and presidents of the Senate (after March 2010, all of them are of conservative nomination).

93 Some recent relevant examples are:

a) *Hadopi*, a statute concerning the copyright on internet. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-590DC, Oct. 29, 2009, J.O. 18292.

b) Electoral gerrymandering. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2008-573DC, Jan. 14, 2009, J.O.724.

c) Detention after the imprisonment. See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2008-562DC, Feb. 21, 2008, J.O. ____ (Fr.). [*rétention de sûreté*. <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2008/decisions-par-date/2008/2008-562-dc/communique-de-presse.12323.html>].

94 Conseil constitutionnel [CC] [Constitutional Court] decision No. 2009-599DC, Dec. 29, 2009, J.O. 296 (Fr.).

95 Pasquale Pasquino, *The New Constitutional Adjudication in France: The Reform of the Referral to the French Constitutional Council in Light of the Italian Model*, 3 INDIAN J. CONST. L., 105–117 (2009), <http://www.astrid-online.it/>.

enjoy majority support among voters, at least not by the time the carbon tax issue became a political crisis. According to a recent survey (Spring 2010), two out of three French, adult citizens under 65 are hostile to the President.⁹⁶ And the carbon tax proposal was apparently unpopular too, since it was imposed mainly on households and drivers; the bill passed by the conservative majority in the French Parliament exempted the big and industrial polluters from the tax. This seems another fairly clear case of opposed parliamentary and popular majorities, which we can call a “double majority.” Once the governmental proposal was passed in the parliament, the Socialists immediately referred it to the CC on the grounds that the burdens it imposed infringed on the constitutional equality principle. In its *arrêt* (judicial opinion), the French CC agreed and censured the provisions of the statute which infringed upon the principle of equality.⁹⁷

The rapid pace of French constitutional adjudication makes it impossible to develop a public debate in the short time between the vote in the Parliament and the decision of the CC. This decision of the CC, however, generated a huge debate in the newspapers, something that happens rarely in France concerning the CC. And it was especially so since shifting the tax toward industrial polluters was likely to be very divisive for the government’s majority. In any case, the government presented a new bill in January 2010 that proposed to remove some, but certainly not all, of the business exemptions (though still taxing businesses at a lower rate than households) and continued to exempt agriculture, fishing, and transport altogether.⁹⁸ It was not clear at the time whether those changes would have satis-

⁹⁶ See, e.g., David Gauthier-Villars, *Sarkozy’s Rating Falls*, WALL ST. J., Mar. 19, 2010, <http://online.wsj.com/article/SB10001424052748703523204575129902932797976.html>.

⁹⁷ See Bastien Hugues, *Le Conseil Constitutionnel Retoque La Taxe Carbone*, LE FIGARO, Dec. 30, 2009, available at <http://www.lefigaro.fr/environnement/2009/12/29/01029-20091229ARTFIG00513-le-conseil-constitutionnel-retoque-la-taxe-carbone.php> The article states:

The Constitutional Council has notably remarked that “completely exempted from carbon tax were the emissions of thermic plants producing electricity as well as the emissions of the 1018 most polluting industrial sites” (refineries, cement works, coke plants . . .), “the emissions of the airplanes” and also “those of the public transportation of passengers. These exemptions would have had as a consequence that 93% of the emissions from industrial origin, with the exception of fuel, be exonerated from the carbon tax” according to the decision. The tax would have had hence “an effect essentially on fuel and the heating products, which are only one of the sources of carbon dioxide.”

Id. (translated by the author).

⁹⁸ Pierre Melquiot, *Taxe Carbone, Retour Prévu Le 1er Juillet 2010*, ACTUALITES NEWS ENV’T, Jan. 01, 2010, <http://www.actualites-news-environnement.com/22665-Taxe-carbone-retour-prevu-juillet-2010.html>.

fied the CC in the event that the new bill was enacted. In the face of strong public opposition to the legislation, and after a large defeat in the regional elections, the government gave up on the legislation, indicating its intention to pursue European Union-wide legislation for a harmonized tax.⁹⁹

Although it is fairly rare for the French to have an extensive public debate before a statute is discussed and approved by the representatives, such a debate did occur in the case of the law forbidding girls under the age of seventeen to wear headscarves in public schools.¹⁰⁰ Public opinion largely supported the project, as did the major political parties.¹⁰¹ As a result, the statute was never referred by the parliamentary minority to the CC since the Socialists were not inclined to refer the statute to the CC. Thus, we cannot really know for sure how the CC would have ruled on this statute.¹⁰²

As can be seen in the previous examples, in both Italy and France, there are frequently conflicts between the government and its majority and the organs in charge of the guardianship of the constitution (the CC). In this conflict, a third party—the citizens—can sometimes play an important role. By expressing their opinions, mostly through surveys, they can diminish the capacity of their representatives to credibly speak in their names. This diminution allows more opportunities for the CC to check the elected government. The golden age of absolute representation, when the Parliaments could claim a monopoly over the interpretation of the popular will, is definitely over, both on the old continent and in the United States. Constitutional pluralism, rather than popular constitutionalism, is the name of the game. The constitutional dialogue now takes place among three (and not just two) partners.

This is not to say that a richer dialogue between a Constitutional Court and public opinion is impossible in Europe, where the CC itself responds pretty directly to public views. Indeed, we may consider the role of the German FCC in the area of abortion, where it has twice played an important role in regulating women's access to abor-

99 Isabelle de Foucaud, *Le Gouvernement Reporte Sine Die La Taxe Carbone*, LE FIGARO, Mar. 23, 2010, <http://www.lefigaro.fr/impots/2010/03/23/05003-20100323ARTFIG00518-le-gouvernement-abandonne-la-taxe-carbone.php>.

100 Loi 2004-228 du 15 mars 2004 [Law 2004-228 of March 15, 2004], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 17, 2004, p. 5190, translated in 4 WORLD LAW BULL. 14 (2004).

101 See *The War of the Headscarves*, The Economist, Feb. 5, 2004, www.economist.com/node/2404691?story_id=2404691

102 It is very likely that, thanks to the possibility of ex post review introduced in March 2010, the statute will reach the French Constitutional Court at some point in the future.

tion services in various ways. We may start by drawing attention to an important difference between the role of the United States Supreme Court and the European constitutional courts. In the American constitutional structure, legislative power is divided between the national government and the member states. This is hardly the case in France and Italy, notwithstanding a limited, recent devolution of local legislation to the “regions” in the latter country.¹⁰³ Even in Germany, which has had a federal structure since its inception, the legislative power of the *Laender* is much more limited than that held by the member states of the United States.

This matters in our discussion, since for our comparison we need to presume that many of the important decisions made by the United States Supreme Court have to do with the strong federal structure of the political and constitutional system of the U.S. Consider the *Roe* decision, in which the United States Supreme Court overturned a Texas law that barred access to abortions unless necessary to save the life of the mother.¹⁰⁴ In the absence of a federal statute, a citizen may claim that the state statute is infringing upon her rights guaranteed by the federal constitution. It seems difficult to speak in these cases of a countermajoritarian decision given that no majoritarian position has been expressed at the national level—although there may be a majoritarian position expressed at the state level—and of course, there may be a national majority opposed to the Court’s decision. In this case, Hans Kelsen would say that the Supreme Court acted as a positive legislator, since in cancelling a state statute it created a new federal legal regime (i.e., the *Roe* regulatory framework). Importantly, in this case, the Court itself was divided, and it published a range of opinions including strong and articulate dissents.¹⁰⁵ This not only encouraged public debate, but, to some extent, guided it by articulating, in legal/constitutional terms, grounds for opposing the *Roe* regime.

In highly centralized countries like France and, until recently, Italy, there is essentially one legislator—the national parliament. Because no dissents are permitted in the constitutional courts, the perfect equivalent of *Roe* is very unlikely given the federal aspects of that decision. Nonetheless, as we have shown, even in these nonfederal systems, the CC decisions sometimes produce a public debate and force the government (i.e., the majority in the Parliament) to revisit a

103 This shift may have important consequences but it is too early to say.

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

105 *See e.g., id.* at 171–78 (Rehnquist, J., dissenting).

policy decision. But Germany, which is not only a federal system, but also one in which there are important regional differences on some issues, provides an interesting case in which the CC itself may be asked to reconsider its settled constitutional views in light of public debate.

C. Abortion in Germany

In 1975, following a (French-style) referral to the FCC by the CDU and several *Laender* governments, the FCC struck down a newly enacted (social democratic) statute which legalized abortion in the first trimester, saying that abortion must always be illegal under Article 2 of the Basic Law in order to protect human life.¹⁰⁶ At the same time, the court allowed for non-prosecution in certain circumstances, such as when the health of the mother was threatened.¹⁰⁷ The ruling (by the First Senate of the CC) was internally divisive. The Senate divided 5-2, and there was, for the first time in the CC, a published dissent (written by the only woman among the justices, Wiltraut Rupp-von Brünneck).¹⁰⁸ And while there was a significant political reaction to this ruling, especially in stimulating the formation of women's groups, the FCC doctrine remained firm until unification with the former East Germany.¹⁰⁹

Eastern Germany had long permitted abortion on demand during the first trimester, and there is little doubt that the policy was popular there.¹¹⁰ For that reason, the conservative, German abortion law became a contentious issue in the reunification negotiations because negotiators for the East feared the imposition of the restrictive West German abortion law. As a result, the matter of a new abortion law was deferred until after the unification and referred to the first post-unification parliament.¹¹¹ The parliament then enacted an abortion

106 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 1 (Ger.), available at <http://www.hrcr.org/safrica/life/39bverfge1.html> (providing an English translation).

107 *Id.*

108 Joyce Marie Mushaben, *Concession or Compromise? The Politics of Abortion in United Germany*, 6 GER. POLS. 70, 74 (1997).

109 *See id.* at 76 ("The Wall's collapse in November 1989 sparked a new debate over women's right to self-determination.")

110 For a careful analysis, see Lee Ann Banaszak, *East-West Differences in German Abortion Opinion*, 62 PUB. OPINION Q. 545, 548-49 (1998). Banaszak argues that differences in East German abortion attitudes were mostly shaped by the employment status of the women, whereas religious attitudes were a more powerful influence in the west.

111 *See* Mushaben, *supra* note 108, at 77, Mushaben writes:

Fearing that irreconcilable differences over abortion might deprive Germans of an extraordinary window of opportunity, Chancellor Kohl ordered his negotiators to

law in 1992 which permitted legal abortions in the first trimester following mandatory counseling.¹¹² The legislation was opposed by most conservatives, but the party was divided, and some conservatives (including Angela Merkel) from the eastern *Laender*/states supported it. This law was clearly inconsistent with the FCC's earlier ruling that abortion is always illegal under Article 2, and, not surprisingly, on an abstract referral by the CDU and the Bavarian government in 1993, the FCC struck down the statute on the grounds that it was inconsistent with the dignity of human life required by the Basic Law.¹¹³ Again, the Bundestag, with strengthened SDP representation following the 1994 elections, was forced to come up with a new law, which it did in 1995.¹¹⁴ While the new law largely followed the FCC's requirements—especially in making abortion illegal in all cases, but outlining circumstances where it would not be prosecuted—it ignored the FCC's requirements in some other circumstances, such that it remains vulnerable to overruling at least in principle. Importantly, however, the government made sure that its language was acceptable to all the major political parties so there would be no referral on abstract review. It is possible, therefore, that the 1995 legislation is inconsistent with Article 2, or at least the CC's interpretation of that Article, but it remains in place nevertheless because it cannot easily be challenged (at least so long as a fetus cannot bring a constitutional complaint). Moreover, it is likely that the CC is not only aware of, but accepts this basic situation.

Moreover, the CC's action and parliamentary responses have generated significant reactions at the state level. Several of the Eastern

exclude the issue from the formal treaty. Saxony had threatened to withdraw from the accession process should western prohibitions become automatically binding; and GDR Minister for Women and Family, Dr [sic] Christa Schmidt (CDU), joined the Independent Women's Union in an August 1990 Volkskammer campaign, pushing for a non-criminalisation[sic] guarantee before unity became official. The Unity Treaty of 6 September 1990 offered but a vague assurance that lawmakers would not turn back the clock on rights established in the GDR.

Id.

112 STRAFGESETZBUCH [STGB] [PENAL CODE], Jul. 27, 1992, BUNDESGESETZBLATT § 218a (Ger.), available at <http://www.gesetze-im-internet.de>; see also Christina P. Schlegel, *Landmark in German Abortion Law: The German 1995 Compromise Compared with English Law*, 11 INT. J.L. POL'Y & FAM. 36, 40 (1997).

113 See Mushaben, *supra* note 108, at 80. Mushaben states:

The verdict was six to two against the reform; one woman and five men struck down the law, with Böckenförde issuing a separate opinion. Chief Justice Mahrenholz was one of two dissenters. The judgment imposed a legal framework for abortion consisting of fine distinctions with major consequences; it declared abortion *rechtswidrig aber straffrei*, that is "illegal but free from punishment."

Id.

114 See generally Schlegel, *supra* note 112.

Laender acted to provide payments for abortion services to non-poor women who could not be reimbursed by the national health system. And, in 1996, Bavaria enacted additional legal restrictions on abortion.¹¹⁵

Georg Vanberg quotes one of the judges (on the Senate that handed down the ruling):

There are significant differences between the 1975 and 1992 decisions. The differences can largely be explained by the desire to find a solution that would be acceptable to everyone. . . . That was a very conscious effort; we were looking for a solution. Of course, the court didn't take an opinion poll, but public attitudes did play a role.¹¹⁶

Vanberg notes that public opinion research in Germany suggests that FCC doctrine (abortion is illegal but, following mandatory counselling, is not prosecuted in specific circumstances) and the 1995 compromise are in line with plurality opinion in Germany.¹¹⁷ In any event, the 1995 legislation stands.

It seems clear that abortion was an unusual issue for the FCC in many ways. First, the Court has held to a strict interpretation of Article 2 of the Basic Law, protecting human dignity, and has consistently said that it applies to human life in the fetal stage. Second, public opinion was both attentive and aroused because the legislation split the major parties, which is why the 1975 and 1992 cases arrived at the FCC by means of a referral by the Christian Democrats and some of the state governments. Finally, public attitudes toward abortion were different in Eastern Germany than in the West, and the 1992 legislation was enacted at the historically significant moment of reunification. In this case, members of the FCC probably felt obliged to pay more attention to public attitudes than they might in other circumstances. In other cases, there would be much less public attention to an FCC ruling since many of these arise not on the basis of an immediate abstract referral of legislation to the Court, but rather much later following a constitutional complaint. As a result, there would not be any sense of confrontation between the legislature or well-formed public opinion pressing on the Court (as there was in the abortion cases).

Another feature of German abortion legislation is that, unlike in the U.S., the relevant legislation has generally been enacted by the

115 See Mushaben, *supra* note 108, at 83 (“In June 1996 the Bavarian Landtag introduced a ‘supplementary’ law compelling women to reveal their names as well as their reasons for ending a pregnancy . . .”).

116 GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 128 (2005) (citation and quotation omitted).

117 *Id.* (observing that the legislation largely followed the prescriptions of the 1975 ruling).

national parliament rather than the states. We should note, however, that following the 1995 legislation, there has been some *Laender*-level legislation seeking to regulate abortion. Some of these laws may yet come before the FCC, so it is not at all clear that the issue has really been completely settled. As we mentioned earlier, the national abortion laws have arrived at the FCC by means of a political referral and not a constitutional complaint. It seems possible, however, that restrictive *Laender* legislation may provoke constitutional complaints in the future.

In any case, from the evidence examined here, it seems that that the FCC has effectively permitted a political/constitutional compromise, allowing women effective access to abortion services during the first trimester while, at the same time, preserving its traditional interpretation of the Basic Law. This is not to say that the FCC felt or reacted to political pressures to reach this compromise. It seems likely, as indeed the quotation from Vanberg's text suggests, that the members of the Court sought to find a solution to the regional conflict on this issue that allowed the FCC at the same time to preserve the central core of its constitutional jurisprudence—which is focused on preserving human life and dignity.

V. CONCLUSION

Barry Friedman has made an important contribution in exploring the nature of American democracy and the evolving role of the Supreme Court in that democracy. His idea—that the Court has effectively encouraged public argument and deliberation—is provocative because he has offered powerful historical evidence to support it. But it also provokes a rethinking of the character of American democracy itself by seeing countermajoritarian courts as enhancing its deliberative aspects. We are fairly confident that Friedman would rush to qualify this statement, acknowledging that on some particular issues and for some period of time, either popular or legislative majorities are prevented from choosing policies they want. But he would also insist that in the sweep of history, these interludes are fairly short, however painful they may seem at the time. On the whole, then, we have a policy-making process that stays roughly in step with public opinion over the medium or long run where constitutional issues come to inform popular debates and deliberations about policy.

Moreover, there is reason to think that something similar seems to be taking place in other systems that have introduced systems of constitutional adjudication. Since the Second World War, a growing number of countries have adopted such systems throughout the

world. Some of these courts may not have been very effective, of course, and it is too early to say precisely which ones will “succeed” in Friedman’s sense in enhancing the quality of their democracies. But we have argued that at least in Germany, Italy, and France, the CC’s have been involved in generating dialogue with other governmental departments and sometimes with the people themselves.

Obviously, this process is likely to work best on highly salient policies—policies that touch people in their everyday lives. Ordinary people do not have the time to pay attention to everything, but where a governmental decision affects their lives or central values, they can sometimes be induced to pay attention and to form and express opinions either directly or through intermediaries. Most of the issues we have discussed in this Article meet this criterion, and we think most of those that Friedman discusses do, too.

We have also noted that the key theoretical ideas that we have explored here—democracy, deliberation, and countermajoritarianism—are complex, both descriptively and normatively, and need more theoretical development than we could give them here. Of course, much more remains to be seen from and learned about democracies with constitutional courts. Having made these qualifications, it appears plausible that Friedman’s hypothesis—that a countermajoritarian power can increase public deliberation—has much to be said in its support.