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LEADERSHIP AND MAJORITARIANISM: A RESPONSE

*Barry Friedman**

In *Dialogue and Judicial Review*¹ I sought to replace the prevailing description of the role of judicial review—that of the “countermajoritarian difficulty”—with a description that more accurately portrays the role constitutional courts play in American society. In the context of the “countermajoritarian difficulty,” courts are seen as aloof from society, occasionally trumping the will of political majorities. I suggested that to the extent majoritarianism is a meaningful concept, courts are no less majoritarian than other branches of government. But I also recognized that the idea of majoritarianism is, as a description of any part of our political process, including courts, extremely problematic. Finally, I redescribed the process of constitutional decisionmaking as a dialogue among numerous elements of society. In that dialogue courts speak to the issues, but they also facilitate and tend the dialogue.

In their comment on my article, Professors Solimine and Walker disagree with certain aspects of my approach. Primarily, they find flawed to a certain extent my reliance on polling data to support my argument that the Supreme Court is no less majoritarian than other branches of government.² The area of disagreement between us may not be great, however, for Solimine and Walker “agree with [my] broad conclusions.”³ Ultimately they conclude “[m]ajoritarianism is not a dichotomous variable, but is instead continuous.”⁴ Then Solimine and Walker move from the descriptive to the normative, arguing: “It is dangerous for any branch, elected or not, to be too majoritarian.”⁵

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1. Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577 (1993).

2. Michael E. Solimine and James L. Walker, *The Supreme Court, Judicial Review, and the Public: Leadership Versus Dialogue*, 11 Const. Comm. 1, 2-3 (1993).

3. *Id.* at 5.

4. *Id.* Indeed, we probably do not disagree at all. Fully one-third of my article is devoted to demonstrating the bankrupt nature of the entire dichotomous approach to majoritarianism.

5. *Id.*

Finally, they express the fear that “the public in the future will demand an even more majoritarian Court, perhaps to our deep regret.”⁶

In their shift from the descriptive to the normative Solimine and Walker reveal a paradox that perhaps colors all our thinking regarding judicial review. Solimine and Walker believe no branch should be too majoritarian because government is supposed to provide leadership, and leadership is inconsistent with the idea of majority rule.⁷ Similarly, a blind adherence to majoritarianism will lead to the tyranny of the majority, a state of affairs no one, from the framing to the present, has argued is entirely desirable.⁸

The paradox is that majoritarianism *is* inconsistent with leadership, but most of us seem to want both out of government, including the judiciary. This paradox was quite evident in the last presidential election, particularly with regard to the campaign of Citizen Perot. Ostensibly, Perot’s campaign was a populist, grass roots campaign. Its appeal rested in returning government to the people. According to Perot and his adherents, government was off on some tangent of its own, instead of listening to the folks that paid the bills. But reality diverged from rhetoric in the Perot campaign, as Perot’s detractors made clear. Perot’s campaign, though ostensibly grass roots, apparently was funded and run from one focus: Perot himself. To some Perot seemed the autocratic despot, who would bully the country into following his edicts to the peril of our balanced system of government.

The paradox of Perot’s campaign is that despite Perot’s followers’ desire for returning government to the people, Perot’s autocratic nature was probably as much a selling point to them as it was a negative to his detractors. Just as much of the criticism of George Bush and the Congress was that they were doing little to move the country in any direction, much of Perot’s appeal seemed to be that he was a “take charge” sort of person who would pursue strong policies to cure the country’s ills. In short, for all the rhetoric about returning government to the people, what the Perot candidacy really seemed to be about was a desire for leadership in government. When Perot supporters talked about returning government to the people, they really meant to turn government over to their chosen leader.

6. *Id.* at 6.

7. *Id.* at 5.

8. *Id.*

The paradox was not confined to Perot's campaign, however: it was present in reverse in the other candidates' campaigns. In the eyes of many, the 1992 presidential election campaign was about leadership. Thus, candidates Bush and Clinton tried to present themselves as leaders. Meanwhile, their pollsters—as is common in our latter-twentieth century politics—worked hard to keep their hand on the pulse of the American people. Why? So their candidates would know what policies, as “leaders,” they ought to suggest. Perot aside, the election was an exercise in “leaders” asking what the public wanted so they could appear to be leading.

This same paradox infects our attempt to understand the role of judicial review.⁹ Nowhere is this more evident than in Alexander Bickel's *The Least Dangerous Branch*, the work that more than any other brought to the fore the problem of the “countermajoritarian difficulty.”¹⁰ In *The Least Dangerous Branch*, Bickel began with his fundamental point: how to explain the role of courts in a government that calls itself a democracy? Courts are neither elected by nor beholden to the people.¹¹ Yet Bickel resolved the problem by assigning to courts the most countermajoritarian view of courts imaginable: according to Bickel, given their insulation from the body politic, courts should be opinion leaders and prophets regarding constitutional norms.¹²

Solimine and Walker offer a view of judicial review similar to Bickel's. After suggesting that I make too much of data that shows public support for many Supreme Court decisions, and public support generally for the Court, Solimine and Walker offer a “restatement” of the problem.¹³ Although they recognize that, at least “over generations, the Court is as majoritarian as any other branch of government is, or ought to be,”¹⁴ they argue that no branch, including the courts, should be too majoritarian.¹⁵ Why? “One of the functions of leadership is to create new majorities and the Court has a leadership role as important as that of any other branch of government, as measured by public support and acceptance (or acquiescence) in its deci-

9. I take no credit for this idea, but merely for its present formulation. For a particularly eloquent statement of the tension in our views regarding judicial review see Louis Michael Seidman, *Ambivalence and Accountability*, 61 So. Cal. L. Rev. 1571 (1988).

10. Alexander M. Bickel, *The Least Dangerous Branch* (Bobbs-Merrill, 1962).

11. *Id.* at 16-17.

12. *Id.* at 239.

13. Solimine and Walker, 11 Const. Comm. at 5 (cited in note 2).

14. *Id.*

15. *Id.*

sions.”¹⁶ They have thus at least partially returned to Bickel’s identificaion of and solution to the countermajoritarian paradox.

In *Dialogue and Judicial Review* my approach was to tackle the paradox by returning the discussion of judicial review from the normative to the descriptive. Normative visions of judicial review had, in my mind, all failed to the extent that they began from the premises of the countermajoritarian difficulty. The countermajoritarian difficulty is deeply flawed as a descriptive matter, in part for many reasons that form the backdrop for this dialogue between me and Professors Solimine and Walker. As an alternative, I offered a description of courts as facilitating and speaking in a society-wide dialogue about the meaning of the Constitution.

As I describe at length in *Dialogue and Judicial Review*, the answer to the paradox rests in the inherent workings of our constitutional system, which constantly moves all branches in and out of line with public opinion. For the elected branches this cycle is regular and apparent, enforced by regular elections. Whether we elect people that do reflect our views, or elect representatives who work hard around election time to make it appear that they reflect our views, the fact is that periodic alignments can and do occur with regard to the elected branches. Thus, at times politicians, whether they are leading are not, may drift away from public opinion, but elections determine whether the leadership meets with our approval.

Despite the fact that judges are not elected, and do not serve for fixed terms, there also is an opportunity for periodic alignment of the judiciary with the views of the public. That alignment occurs in part, though not exclusively, through the process of presidential appointment and Senate confirmation. As Solimine and Walker recognize, “there are indirect mechanisms [for linking the public to the Court] . . . such as the appointment of Justices by like-minded Presidents.”¹⁷

What is evident, however, is that unlike the regular cycle of popular elections, whatever the basis for aligning the courts with the public, it is far less certain and regular than for the elected branches. Thus, the cycling that occurs between public and judiciary is subject to much broader sweeps and longer terms. There are going to be times, such as prior to President Roosevelt’s

16. Id.

17. Id. at 4.

Court-packing plan, when the Court gets very far out of line with public opinion.¹⁸

Yet, it is this very broad cycling that helps in part to resolve the paradox, for it turns out that the judiciary can and will be both majoritarian and countermajoritarian. There will be times when the Supreme Court is very much in line with public opinion; indeed, we may be living through one of them. But just as the courts will sometimes fall into step with public opinion, and sometimes fall behind it, they also will fall in front of it. There will be times when the courts do lead public opinion. The Warren Court is an example, though perhaps it taught us the limits of judicial leadership.

The intriguing area for further inquiry that this understanding opens up involves determining the best balance between leadership and majoritarianism, and how the swings in cycles can be moderated if that is appropriate. Solimine and Walker surely are correct that we wish some leadership from the Supreme Court, just as they are correct that too much majoritarianism can be a bad thing. But by the same token, too much leadership may be no different than no leadership at all, for if *Dred Scott* taught us anything, it is that a public deeply disenchanted with judicial decisionmaking will look for other solutions.

18. See generally Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey, *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* 809-10 (West Pub. Co., 1993).