

## RESPONSE: ON SUBSTANTIATION OF POSITIVE SOCIAL THEORY

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### I. INTRODUCTION

I am grateful to the editors of the *Northwestern University Law Review* for devoting an issue of the *Law Review* to a symposium on the counter-majoritarian difficulty, a topic that was proposed by Professor Stephen Calabresi and me.<sup>1</sup> The topic had already been much discussed—to say the least—but the contributions to this Symposium amply justify our belief that interesting things remained to be said. Contributors were invited either to comment on my Article<sup>2</sup> or to advance their own views of the difficulty. They have done the one and the other in various combinations, and for the most part no responsive comment by me seems necessary or appropriate. The contributions of Professor Barry Friedman<sup>3</sup> and, to a certain extent, Professor Andrew Koppelman,<sup>4</sup> however, raise interesting methodological questions about the substantiation of positive social theory. I treated those questions briefly in my Article,<sup>5</sup> but Friedman in particular lays down challenges to my thesis on that front. I am not sure I fully understand his position on the issues he raises, but those issues are sufficiently important that further treatment of them in this Response might be useful.

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<sup>1</sup> See Editor's Note, 95 NW. U. L. REV. 843 (2001) (providing a brief introduction to the *Northwestern University Law Review* Spring 2001 Symposium exploring the counter-majoritarian difficulty).

<sup>2</sup> See Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845 (2001).

<sup>3</sup> See Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001).

<sup>4</sup> See Andrew Koppelman, *Talking to the Boss: On Robert Bennett and the Counter-Majoritarian Difficulty*, 95 NW. U. L. REV. 955 (2001).

<sup>5</sup> See Bennett, *supra* note 2, at 876-80. My contribution to this Symposium is part of a larger exploration of a conversational understanding of American democracy, and I have written about the methodological dimensions of the project in earlier pieces. See Robert W. Bennett, *Democracy as Meaningful Conversation*, 14 CONST. COMM. 481, 482-84 (1997) [hereinafter Bennett, *Meaningful Conversation*]; Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 517-18 (2000) [hereinafter Bennett, *Extra Votes*]. Indeed, for readers of any of that earlier work, I hope that only parts of what I have to say in this Response seem like the proverbial broken record.

For purposes of this Response, the thesis of my Article in this Symposium can be restated in this paragraph and the next. Spurred on by the incentive of competitive elections, American democracy is a very effective engine for producing conversation about public affairs directed to essentially the entire adult population. There is "primary" conversation directed mostly to the citizenry from candidates for office, elected officials, and government employees. And there is an even more extensive "secondary" conversation among and between media, organized groups, and individual citizens. Although ordinary citizens can be active participants in either the primary or secondary conversation, for the most part they are an audience for what is said by others. Despite this largely passive role, I posit that this democratic conversation generates a sense of involvement on the part of the populace in the processes of government, which in turn fosters reconciliation to governmental decisions with which members of the population might otherwise have found themselves in active disagreement. I have no way directly to test the suggested causal link between the democratic conversation and citizens' sense of involvement, but there is a good deal of indirect evidence. Cohesive force exerted by the democratic conversation can, for instance, help explain some of the central features of American democracy, including broad extension of the right to vote, the use of single-member geographically defined legislative districts, bicameralism, a separately elected executive, the vibrancy of state and local units of government with independently elected officials, weak political party discipline, and the central role accorded to freedom of communication.<sup>6</sup> These features of American democracy emerged and took shape at different times and for various reasons, but my thesis is that their endurance can be explained in part because the far-flung conversation they help stimulate allows American democracy to "weather its storms."<sup>7</sup>

The cohesive force of the conversation can also help explain behavioral and attitudinal phenomena, such as why people vote in large numbers and their patterns of attention and inattention to various things about American democracy. In an earlier work, I advanced a conversational explanation of why the conceptually appealing idea of "extra" votes for parents on account of their children is virtually unheard of in American political discourse.<sup>8</sup> I have also offered a conversational explanation for the seeming satisfaction with the United States Senate as a legislative body.<sup>9</sup> And my Article in this Symposium focuses on the attention paid to the so-called "counter-majoritarian difficulty" said to be presented by judicial review in the name of the Constitution. Friedman and others have previously

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<sup>6</sup> I elaborate on these features of American democracy in Bennett, *supra* note 2, at 876 and in the other sources cited at *supra* note 5.

<sup>7</sup> See Bennett, *supra* note 2, at 877.

<sup>8</sup> See Bennett, *Extra Votes*, *supra* note 5, at 562-63.

<sup>9</sup> See Bennett, *Meaningful Conversation*, *supra* note 5, at 511-12.

taken note of the fixation with this supposed difficulty—particularly (but not exclusively) among law professors.<sup>10</sup> This fixation is puzzling, because the rest of American democracy is not sensibly thought of as “majoritarian.” If the courts present a difficulty, then it must be for some reason other than their “counter-majoritarianism.” The sense of difficulty might be the product of simple confusion, but the conversational perspective provides a different explanation. That sense is fed, I suggest, by the “counter-conversationalism” of the courts. While the courts engage in intense conversations with parties before them, they do not reach out conversationally in the manner of officials of the more “democratic” branches. Many nonparties are nonetheless affected by the decisions courts make, and this may grate on those nonparties because of their conversational exclusion. Or at least law professors and other observers of the courts might be left uneasy by that counter-conversationalism. The ease with which a conversational perspective accounts in this way for the sense of democratic “difficulty” with judicial review fortifies the claim of explanatory power of conversationalism for American democracy more generally.

I advance this conversational account of American democracy as “positive”—meaning, descriptive and explanatory—not normative, and Friedman says that I stumble twice in doing so. First, he insists that my effort is a normative one, my protestations to the contrary notwithstanding. Second, when he suspends belief and evaluates the conversational perspective as description, he finds it seriously wanting.

It may be that these two criticisms are really one. Almost all of the evidence Friedman adduces to argue that my conversational perspective is normative is that it fails as description. The case he makes for that failure seems to be fed in turn by two major observations. First, he asserts that I have produced something that is “casually empirical at best.”<sup>11</sup> There are scholars who could be helpful in doing descriptive work, those trained in “the methodology of true empiricism.”<sup>12</sup> But I have not sought out the aid of such scholars, nor otherwise provided the desirable “quantification.”<sup>13</sup> Without measurement, there seems to be no way to know whether conversationalism is “more accurate than some other” descriptive approach.<sup>14</sup> I used the word “model” to characterize the conversational perspective, and Friedman finds that word inappropriate. “[M]odels,” he says, “are falsifiable. . . . Bennett’s model is not falsifiable in any strict sense.”<sup>15</sup>

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<sup>10</sup> See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 578 (1993) (describing “constitutional scholars” as “obsessed”).

<sup>11</sup> Friedman, *supra* note 3, at 943.

<sup>12</sup> *Id.* at 942.

<sup>13</sup> *Id.* at 943.

<sup>14</sup> *Id.* at 944.

<sup>15</sup> *Id.* at 951.

Second, Friedman claims to have a better descriptive account, or rather two descriptive accounts that are better than the one I offered: one of the law professor fixation with the counter-majoritarian difficulty and a second of American democracy more generally. The first is an historical account. "[I]n the aftermath of the New Deal Court-packing fight" law professors "were persuaded by the Legal Realists about the indeterminacy of constitutional doctrine, yet unable to accept this indeterminacy given rule of law concerns."<sup>16</sup> They believed in both "democratic governance and judicial review," and "experienced ['the counter-majoritarian problem'] internally" to deal with the tension.<sup>17</sup> In part at least this was because of the "high esteem accorded to the iconic figures of the profession" who had first identified the problem in counter-majoritarian terms.<sup>18</sup> When judicial activism was dormant in the 1940s, 50s, and early 60s, the tension was real but not pressing. When the court thereafter began a new period of activism in defense of "constitutional liberty,"<sup>19</sup> constitutional scholars accepted the counter-majoritarian terminology as a way to express their discomfort with the tension between democracy and judicial review that they were unwilling more fully to resolve. For these reasons, Friedman sees "the legal academy . . . [as] stuck in a time warp."<sup>20</sup>

For American democracy more generally, Friedman suggests "a descriptively plausible . . . understanding of democracy in which votes are threats."<sup>21</sup> As mentioned above, I urged that a conversational understanding of American democracy can help explain why so many people vote.<sup>22</sup> In objection to this, Friedman rightly notes that "large numbers [of Americans eligible to vote] do not [do so]."<sup>23</sup> For this reason, he contends, I am "wrong that conversation produces votes."<sup>24</sup> "Votes-as-threats" supposedly deals with this problem. Knowing that people have the capacity to vote even when they do not do so, "[p]oliticians . . . act to fulfill voter preferences, fearing that if they do not they will be turned out of office at the next election."<sup>25</sup> Friedman recognizes that "[t]he electorate is not a monolith; [and that] we take our representation wholesale."<sup>26</sup> With these caveats, he concludes that "[i]f political outcomes give potential voters much of what

<sup>16</sup> *Id.* at 934.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 939.

<sup>19</sup> *Id.* at 940.

<sup>20</sup> *Id.* at 937.

<sup>21</sup> *Id.* at 943.

<sup>22</sup> My "conversational" explanation, which Professor Friedman quotes, is that "voting is a product of the sense of involvement, which in turn is produced by conversational interactions. People vote not because they see it as governance, but because they already feel involved." Bennett, *supra* note 2, at 875.

<sup>23</sup> Friedman, *supra* note 3, at 943.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 943-44.

<sup>26</sup> *Id.* at 944.

they want much of the time, the vote-as-threat model may best describe what is happening."<sup>27</sup>

With one exception, the only other "evidence" Friedman seems to adduce in arguing that my theory is really normative is pure assertion.<sup>28</sup> He says that "much of constitutional scholarship" is "inevitab[ly]" normative.<sup>29</sup> If Friedman meant by this that all social theorizing partakes of normativity, then he might have a point. In Part II, I will turn to the difficulty of holding the line between the positive and the normative. I resist saying that it is impossible to hold the line, but that also may be true. This, however, is not Friedman's point. He clearly thinks that descriptive and explanatory work is possible. He believes that he himself has escaped the "inevitable" grasp of normativity,<sup>30</sup> and, as mentioned, he insists that law professors can do useful descriptive work if they find the right scholarly coworkers. He asserts that law professors have a "comparative advantage" in doing normative work, because "by experiencing the practice [of the law], by being trained in it, by being immersed in it, law professors have a special ability to say how it should work."<sup>31</sup> Instead of reveling in their comparative advantage, or alternatively seeking out the right partners so that they can do useful descriptive work, however, law professors succumb to a vision of the law they know in their heart of hearts to be false, a vision of the law as objective, a "brooding omnipresence in the sky," in Holmes's enduring phrase.<sup>32</sup> Presumably caught between the urge to do one thing and facility in doing another, law professors "pathologically" insist that their work is descriptive when it is really normative. Aside from the weakness of my effort as description, according to Friedman, the reason my effort must be

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<sup>27</sup> *Id.* Because he starts the thought with "if" (and continues with "may"), it is not clear that Professor Friedman means to assert this as fact, or even necessarily as hypothesis. Nonetheless, I am assuming because of the context that he is asserting that "votes-as-threats" can in fact be expected to lead to "potential voters" getting "much of what they want much of the time."

<sup>28</sup> The exception is that he has caught me using normative language. In explaining why constitutional decisions do not invite further conversations in the same way that statutory decisions do, I wrote of the "bleak reality that the chance of even chipping away at a [constitutional court] decision remains a remote and time consuming possibility." Bennett, *supra* note 2, at 903; Friedman, *supra* note 3, at 950; see also Friedman, *supra* note 3, at 944-45. "Bleak," as Professor Friedman points out, is a word laden with valuation, with normativity. I am not sure that this example is as telling as Professor Friedman thinks it is. The sentence in which "bleak" appears could well have been characterizing the attitude of actors within the system rather than my own. I do not remember precisely what I was thinking when I wrote it. The more important point, however, is about what the example might be thought to tell. There are precious few descriptive words in the English language that do not carry some normative shading to some people. Professor Friedman's suggestion that descriptive theories (at least those expressed in conventional human languages) must be drained of all words with normative overtones would—if attainable at all—make the prospect of reading those theories bleak indeed. The uneasy relationship between positive and normative theorizing is the subject of Part II *infra*.

<sup>29</sup> Friedman, *supra* note 3, at 933 & n.2.

<sup>30</sup> See Friedman, *supra* note 10, at 580.

<sup>31</sup> Friedman, *supra* note 3, at 952.

<sup>32</sup> *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

normative seems to be that the pathology is so pervasive that I surely have not escaped the scourge.

One problem I have in evaluating these criticisms is that Friedman seems to commit the very "errors" that he finds in my effort. He faults my claim that the fixation with the courts' "counter-majoritarianism" is explainable by judicial counter-conversationalism in part because he knows of few complaints about the courts' conversational behavior.<sup>33</sup> But his analysis relies on a variety of claims about actors saying or thinking they are doing one thing while "really" doing another. Law professors "pathologically" claim their work is descriptive, when it is really normative. In addition, they are caught in a "time warp" that causes them to discuss things in terms of a "counter-majoritarian" difficulty that does not "really" exist. And despite Friedman's charge that I engage in casual empiricism at best, he has no compunction about claiming (without measurement or quantification) that history teaches that "popular discontent with courts has little to do with whether the people can converse with courts, and everything to do with whether people agree with judicial decisions."<sup>34</sup> He asserts that "judicial review . . . yields remarkably majoritarian results,"<sup>35</sup> without pointing to the yardstick that substantiates the correlation. He provides no support beyond mere assertion for the (presumably descriptive) claim that law professors' immersion in the law gives them a "comparative advantage" in doing normative work about it.<sup>36</sup> And he has provided no lab results to substantiate his diagnosis of "pathology."

For these and other reasons, I am not confident that I fully understand Friedman's views about the possibilities and limits of theorizing about complex social phenomena. But I think I can discern in what he has written the outlines of a view of theorizing that is misdirected in important, indeed profound, ways. Friedman seems to think that there is a sharp line that can be drawn between positive and normative theorizing about complex social phenomena. That is why it is "pathology" when law professors imagine they are doing the one when they are "really" doing the other. In addition, normative theorizing seems to involve real choice, while descriptive theorizing does not. Friedman insists that an argument such as mine, which

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<sup>33</sup> See Friedman, *supra* note 3, at 948. There certainly have been some criticisms of the courts for stifling rather than advancing discussion, as Professor Friedman himself recognizes in his citations of ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992) and Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). See Friedman, *supra* note 3, at 948 n.55; see also Professor Tushnet's contribution to this Symposium, Mark Tushnet, "Shut Up He Explained," 95 NW. U. L. REV. 907 (2001). Nonetheless, I concede that criticism in terms of counter-majoritarianism is considerably more common. Indeed, that is central to the puzzle for which my Article in this Symposium advances a conversational solution.

<sup>34</sup> Friedman, *supra* note 3, at 948.

<sup>35</sup> *Id.* at 936.

<sup>36</sup> Each of the three assertions, I think, is wrong, but in none of the cases would I advance something measurable to establish the error.

says that democracy can usefully be understood from a conversational perspective, "must [contain] . . . some claim as to why democracy should be seen as fostered by conversation," and that step, he says, "is purely normative."<sup>37</sup> The only reason I can come up with for why the choice must be normative is that no other basis for choice is available. Descriptive theories, he seems to be saying, can involve no real choice. I assume that Friedman would acknowledge that even in the descriptive realm one theorist may choose something different from what another one chooses, but then one must be right and the other wrong. If votes-as-threats is right, democracy as conversation cannot be. That is why measurement is so crucial. It can sort out the right from the wrong.

These thoughts are the best I can do in defining the elements of Friedman's vision of social theorizing. My vision is very different.

## II. POSITIVE AND NORMATIVE THEORIES

The conceptual distinction between the normative and the positive is clear, but it is notoriously difficult to maintain as theories are elaborated and deployed. A normative account provides an ideal to be pursued, or perhaps only contemplated, but that need not now exist, or even be attainable. It will often be advanced with improvement of the real world in mind, or even in justification of what is; but it is not necessary that a normative account be at all realistic. In contrast, a descriptive account tells us about existing things in the real world, not how they might be made better, but what they are. Without close attachment to the real world, positive theory has no point.

While the distinction seems clear, the line between the two is constantly under assault from both directions. Accounts consciously designed as normative can in theory be entirely divorced from the world as it is, but they are much more likely to have many points of attachment to a reality they seek to instruct. Theorists can engage in ambitious flights of (normative) fancy, but if the distance between what is and what they conceive ought to be is too great, the task of bridging the divide may well seem too substantial to justify the effort.<sup>38</sup> If the instruction that normative theories advance takes hold, and a reformed reality moves closer to the normative ideal, the points of connection with reality will have increased. Or, if the instruction does not take hold, or does not seem likely to, the normative theorist may make further concessions to reality by introducing additional points of connection to increase the chances of bringing reality around. For these reasons, there will typically be a high degree of correspondence between normative accounts and the portion of the real world in view. The normative may then be mistaken for description—by the consumers of

<sup>37</sup> *Id.* at 944.

<sup>38</sup> "[Ideals] . . . should . . . be relevant to human possibilities." ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 284 (1989); see also Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 NW. U. L. REV. 184, 192-93 (1989).

commentary, but also on occasion by the commentators. That, of course, is at least one of the mistakes that Friedman thinks I have made.

At the same time, the line between the normative and the positive is difficult to hold if one's account is descriptive in inspiration. The danger of seduction of positive accounts by normative visions can be traced, in part at least, to the fact that a complete description of anything is impossible. Something as simple and "objective" as a table, for instance, could be described in terms of its material, its shape, the number of its legs, the manner of its manufacture, its age, or its owner. If one set out with the goal of "comprehensive" description of a table, all these things would presumably have to be included, but presumably so would the chemical composition of the table and its molecular structure. Presumably, complete description would have to take not only spatial dimensions into account, but the time dimension as well—just for starters, the table's placement today and yesterday and the day before in the houses or show windows or alleys where it was found. Sooner or later in this effort at comprehensive description, it would become apparent that there is no place to stop.

The impossibility of comprehensiveness in description is even more obvious for complex social phenomena like American democracy. Do we, for instance, include the contrasting accents or senses of humor in Texas and Massachusetts? A useful explanatory account of a complex phenomenon must be brutally selective if it is "to bring salient order to the blooming, buzzing confusion of human experience."<sup>39</sup> Any positive theory of political institutions will necessarily miss some of their "richness and diversity," but if we do not have some simplifying theory "we may be overwhelmed by fascinating facts and unable to orient ourselves."<sup>40</sup>

Within the realm of positive theories of complex phenomena, there is a further distinction to be noted between bare description and a richer form that might be called "explanation." By drawing attention to some characteristics to the exclusion of others, even quite spare description allows us to focus on what is chosen, but explanation helps us "see"<sup>41</sup> much more. It is an observable fact that both whales and tuna inhabit the sea, for instance, but it takes richer explanation for us to "see" that whales are closer relatives of elephants than they are of tuna. Explanation provides an "organizing framework"<sup>42</sup> that draws causal connections between discrete aspects of complex phenomena. It brings "order and connectedness in our view of the

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<sup>39</sup> Rogers M. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 YALE L.J. 2039, 2056 (1999).

<sup>40</sup> DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 5 (1991).

<sup>41</sup> WILLIAM F. HARRIS II, *THE INTERPRETABLE CONSTITUTION* ix (1993).

<sup>42</sup> Susanne Lohmann, *The Poverty of Green and Shapiro*, in *THE RATIONAL CHOICE CONTROVERSY* 131 (Jeffrey Friedman ed., 1996).



world."<sup>43</sup> An explanatory model will, in Ronald Coase's words, help "us to understand what is going on by enabling us to organise our thoughts."<sup>44</sup> This is explanation, the furthering of understanding. And then, "by unifying apparently diverse phenomena . . . [explanatory models] can change the way we look at the empirical world."<sup>45</sup>

Success in explanation will not be wholesale. Precisely because explanatory theories of complex phenomena are simple and selective, there will be aspects of the larger reality they address that they will fail to explain. Evolutionary theory, for instance, has no particularly convincing explanation for why so many human beings live well past the age of reproduction. The result is that two "competing" theories may each enjoy a large measure of success. This can either be because they explain different things about the complex phenomenon or because they each partially explain the same things. And there need not be any metric for judging which theory has the greater success. The competition will then be judged, *inter alia*, on the simplicity of the explanation, the range of phenomena explained, and the plausibility of the causal connections posited. The choice may be easy, as in the case of evolutionary theory, where the mystery of creation by a supreme being seems to be the only serious competitor that the mind of man can conceive at present. Or the choice may be difficult, as I am prepared to acknowledge is the case among explanatory theories of American democracy.

If an explanatory theory can repeatedly predict the future, that will provide powerful substantiation of the theory. If it can be tested in measurement, that too will provide evidence of its power. But neither prediction nor measurement is determinative of the success of an explanatory theory. For large and complex phenomena, controlled experimentation will often be very expensive or entirely unavailable. There will then be scant opportunity for testing the predictive power of an explanatory theory. Measurement too, or at least useful measurement, will often be unavailable. There are apparently experiments being conducted now to determine whether the evolution of certain species can be accelerated in the laboratory, to explore whether speciation is indeed a response to the imperatives of survival in varying environments, as Darwinian theory posits. But the success of Dar-

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<sup>43</sup> Stanley Kelley, Jr., *The Promise and Limitations of Rational Choice Theory*, in THE RATIONAL CHOICE CONTROVERSY, *supra* note 42, at 99; see also James M. Buchanan, *Richard Musgrave, Public Finance, and Public Choice*, 61 PUB. CHOICE 289, 290 (1989).

<sup>44</sup> R.H. Coase, *How Should Economists Choose?*, in ESSAYS ON ECONOMICS AND ECONOMISTS 15, 16-17 (1994). Another commentator remarks on "the need to simplify, to reduce the world to livable dimensions, to choose out of the plenitude some terrain on which to build our settlement." Roger Shattuck, *Decline and Fall?*, N.Y. REV. BOOKS, June 29, 2000, at 55.

<sup>45</sup> John Ferejohn & Debra Satz, *Unification, Universalism, and Rational Choice Theory*, in THE RATIONAL CHOICE CONTROVERSY, *supra* note 42, at 71, 72; see also RICHARD FEYNMAN, "SURELY YOU'RE JOKING MR. FEYNMAN!": ADVENTURES OF A CURIOUS CHARACTER 341 (1985) ("You can't look at everything. When you look at everything, you can't see the pattern."). Evolutionary theory has been particularly fruitful in opening up new ways for us to "see" old things. See Emily Eakin, *Tilling History with Biology's Tools*, N.Y. TIMES, Feb. 10, 2001, at B7.

win's explanation for the observed pattern and diversity of living things has been secured—at least until a more successful theory is devised—by the “order and connectedness” it brings to so many observed phenomena. It does not depend on finding something to count, or otherwise measure. Even repeated failure to produce speciation in the laboratory would hardly call Darwinian theory into question.

In such an environment, normative visions may intrude. Most of us carry around normative judgments of commonplace and relatively simple phenomena, if not of tables, then of cell phones or broccoli, cocker spaniels or roaches. Even more so, for complex social phenomena such as American democracy, in which people are situated, “value commitments” are typically “embedded in the very institutions and practices analyzed,”<sup>46</sup> and “biases are built into the very languages and concepts employed.”<sup>47</sup> The result is that “if we think that what we are describing and explaining consists of value-neutral ‘brute facts’ . . . we are on the brink of misunderstanding.”<sup>48</sup> This problem is present for controlled experimentation and measurement as well. The choice of what to measure is fully as fraught with the possibility of being pushed around by normative predispositions as is choice without measurement. A second consequence of selectivity is that the resulting shortfall can be depicted as inaccuracy. Something—indeed typically quite a lot—about the phenomenon described will unavoidably fail to be captured by the description or explanation. The inclination to challenge a depiction and the terms of the challenge will, again, often reflect the contestant's normative stance or presuppositions.

### III. EVALUATING FRIEDMAN'S CRITIQUE

It is against this background that I evaluate Friedman's criticisms. If positive and normative theories are hard to keep distinct, that is hardly the same as saying that there is no difference between the two. Friedman clearly thinks there is a distinction, and so do I. He says that my conversational approach is “really” normative, but what can he “really” mean by that? For the reasons stated in Part II, I may well have allowed normative predispositions to creep into my descriptive and explanatory account. I will, for instance, admit to being a fan of American democracy, and when I say that its conversational cohesiveness allows it to “weather its storms,” I may betray a sentiment that for this particular voyage weathering storms is a good thing. If descriptive and explanatory work had to be purged of all

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<sup>46</sup> RICHARD J. BERNSTEIN, *THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY* 82 (1976).

<sup>47</sup> *Id.* at 110.

<sup>48</sup> *Id.* at 82.

hints of normativity, however, there would be precious little—if any—of it, by law professors or those in other disciplines.<sup>49</sup>

I am, however, far from an uncritical fan of American democracy, and I certainly do not believe that the conversation that provides cohesion for it is all—or even mostly—attractive. Friedman says that “[c]onversation without voting is just a bunch of yapping,”<sup>50</sup> and I do agree that the democratic conversation as I depict it can often be vacuous, or malicious, or even consist of unrelieved falsehood. Hopefully there is a self-limiting quality to at least the outright falsehoods, but I make no judgment that the substance of the democratic conversation in the United States as a whole is particularly wholesome. I advance the conversational account because of its explanatory power, not its normative appeal. For better or worse, that is what I mean when I characterize my effort as explanatory, and I do not understand any basis on which Friedman might say that he knows better.

Although my choice of a conversational perspective is not normative in inspiration, it is nonetheless a real choice. If I have read him correctly, Friedman must be wrong in suggesting that there is no meaningful choice to be exercised among worthy descriptive accounts. His own historical account of the contemporary fixation with a democratic difficulty with judicial review, for instance, need not compete frontally with a conversational account. The one depicts the origins of the contemporary sense, and the other its contemporary staying power, just as a table can be depicted in terms of its history or its present suitability to adorn my home.

Even two or more contemporary explanations can comfortably coexist. Friedman thinks that he has exposed a weakness of the conversational account by noting that a large number of eligible persons do not in fact vote. But there is a large literature exploring the “paradox” of the fact that so many people do vote.<sup>51</sup> That literature is grounded in a rational choice perspective from the vantage point of which the payoff from voting for any individual voter is so small that it is hard to understand why so many people bother. Now, if the rational choice picture tells the nonvoting part of the story and the conversational picture tells the voting part, then each might be “accurate” in the only way that inevitably oversimplified accounts can be. Friedman is thus mistaken in the belief that explanatory power of a theory can be simply written off by showing that there is something it does not explain, or even that there is some competing theory that also explains a good deal.

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<sup>49</sup> Thus, I would not be inclined to quarrel with Professor Tushnet's expression of “doubt that one could fully account for the sense of a *difficulty* absent some normative position.” Tushnet, *supra* note 33, at 909 n.8.

<sup>50</sup> Friedman, *supra* note 3, at 945. I do not, by the way, agree with that presumably normative judgment. A benevolent dictator could make benevolent use of conversation between his advisors.

<sup>51</sup> See generally DENNIS C. MUELLER, PUBLIC CHOICE II 348-69 (1989). The paradox was apparently first noted by Hegel. See GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox, trans., 1952) (1821), in 46 GREAT BOOKS OF THE WESTERN WORLD (Encyclopedia Britannica ed., 1952).

The voting example also demonstrates the limits of measurement. An explanatory theory that explained nothing would, of course, be a failure, and measurement might be quite suggestive of such failure. Measurement can certainly undermine a theory or provide a degree of support for it. Thus, I can conceive of very interesting investigations of voting patterns that might help undermine or bolster the conversational explanation that I advance. It appears, for instance, that voting turnout increases in elections that are projected to be close.<sup>52</sup> The conversational explanation for this is that close elections make for more intense and engaging pre-election conversation. It then seems fair to ask whether in a presidential election one would expect the relevant "closeness" to be national or state-by-state? The vote that "counts" is state-by-state, but much of the conversation is carried on across state borders, often nationwide. If the conversation causes voting, then the projected closeness of the national vote should have some effect on turnout that is independent of the state-by-state vote. But such a finding would no more conclusively establish the accuracy of the conversational perspective than Friedman's recitation of nonvoting has undermined it. Voting behavior is a product of many causes. A theoretical "explanation" isolates some causes to the exclusion of others. While measurement, where feasible, can help to evaluate an explanation, it is neither necessary nor sufficient for such evaluation. If descriptive and explanatory theorizing required measurement of its important elements to escape the (fatal) epithet of "casual empiricism," we would have been deprived of a great deal of useful work, including Darwin's theory of natural selection.

Unless the word "strict" is doing all the work, Friedman is thus also wrong in suggesting that my conversational account "is not falsifiable in any strict sense."<sup>53</sup> If he is right in arguing that my account is quite improbable, that counts as falsification. That is precisely the kind of judgment that is repeatedly made about historical theories, such as Friedman's own theory. It is also the kind of judgment that is involved in evaluating theories in the sciences, with evolutionary theory being only the most obvious example. Once a theory is devised, it may suggest controlled experimentation that might bolster it. But theories derive both their initial plausibility and much of their continued appeal from precisely the kind of power I claim for a conversational explanation of American democracy. They draw disparate phenomena together in a coherent but relatively spare framework. To be sure, Friedman may be packing measurement into his use of the word "strict." But falsifiability in the only way it is often possible will depend on a much softer form of evaluation. Friedman criticizes my use of the word "model," and he may well be right in maintaining that the word implies too mathematical a construct. But it is often used more loosely, and I want to be clear that I do not mean to imply by its use that conversationalism can be

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<sup>52</sup> The surprisingly mixed evidence is summarized in MUELLER, *supra* note 51, at 357-61.

<sup>53</sup> Friedman, *supra* note 3, at 951.

reliably tested by measurement or that it imports some other self-defining route to falsifiability.

#### IV. REALISTIC EVALUATION

This is not the place for a full defense of the conversational account of American democracy,<sup>54</sup> but Friedman's suggested alternative can provide a concrete example for comparative evaluation. Professor Koppelman has also suggested an alternative account of American democracy—related to but different from Friedman's—and in his case he has tied the account to the sense of democratic difficulty with judicial review. Koppelman's account thus provides a second example through which the power of competing social theories can be examined.

As suggested in Part III, Friedman's historical account of the counter-majoritarian fixation could comfortably coexist with my account of its staying power. And even his "votes-as-threats" account of American democracy could coexist with my conversational account. Nonetheless, I do believe that choice in this case is possible, indeed that the competition is not really close. "Votes-as-threats" is simply a variant of the vote-centered model that I discussed in my Article, and subject to all the criticisms I leveled against it.<sup>55</sup> The vote-centered model does provide an explanation of citizen fidelity—that it is produced by citizen appreciation of the equal input each citizen has into public policy outputs. But that explanation is quite improbable, for there is no plausible causal mechanism by which that equal input (or for that matter any discernible input at all for large numbers of citizens) would be produced. If anything, votes-as-threats is less plausible as an account of public policy outputs—or of derivative satisfaction with the pattern of those outputs—because there is even less reason to believe that elected officials can discern and thus effectuate the desires and interests of those who abstain from voting than they can of those who do vote.

But even if one were to accept the vote-centered model (or the votes-as-threats variation) on its own terms, it would explain precious little about the peculiarities of American democracy. The conversational account comes to grips with those peculiarities. It also comes to grips with additional behavioral and attitudinal phenomena, such as the ongoing fixation with the counter-majoritarian difficulty. The conversational account in this way integrates varied facets of American democracy into a coherent and relatively spare account that is tied together by plausible causal mechanisms. Others might disagree with my judgments of coherence, simplicity, or plausibility of causal connections, of course, but it is only in those terms that success in positive social theories can typically be assessed.

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<sup>54</sup> I am at work on integrating and expanding my work on conversationalism and American democracy into a book, and that book will treat at length both the criteria for evaluating social theories and the justification for the conversational approach.

<sup>55</sup> See Bennett, *supra* note 2, at 860-70.

Koppelman's alternative account presents a more serious challenge. He also criticizes me for failure to back up my theoretical claims with "empirical data"<sup>56</sup> and "empirical investigation,"<sup>57</sup> but he otherwise seems prepared to discuss my thesis in terms of its explanatory power. He acknowledges that the conversational perspective "might explain . . . [the] strange phenomenon" of fixation with the counter-majoritarianism of judicial review,<sup>58</sup> but he advances what he suggests is a "more plausible" hypothesis, albeit without claiming that it is the single most plausible one.

Koppelman's "more plausible" hypothesis is Joseph Schumpeter's idea of democracy:

The people influence political decisions only by voting in elections, and "do not control their political leaders in any way except by refusing to reelect them or the parliamentary majorities that support them." In a democracy, the people get to decide, in essence, whether to replace the current set of oligarchs with a different set.<sup>59</sup>

Schumpeter's ideas about democracy bear some similarity to the vote-centered model, but they make much less sweeping claims. In particular, Schumpeter and Koppelman avoid the improbable suggestion (in the words of Friedman's votes-as-threats notion) that "political outcomes give potential voters much of what they want much of the time."<sup>60</sup>

In Koppelman's rendition of Schumpeter's views, democracy is characterized by a good deal of conversation, but that conversation is generated by "[p]oliticians' vulnerability."<sup>61</sup> The conversation "is a byproduct of our ability to toss the politicians out of office."<sup>62</sup> With this background, Koppelman offers a Schumpeterian account of the fixation with the supposed counter-majoritarianism of the courts. The people cannot throw the courts out in the same way they can jettison elected politicians.<sup>63</sup>

To bolster the greater plausibility of Schumpeter's account, Koppelman offers a few thought experiments that he thinks show that the ability of the people to "fire the boss"<sup>64</sup> is more important in inducing fidelity to the system than the fact that the boss talks to them. I am not sure that those experiments are as telling in the favor of Schumpeter as Koppelman appar-

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<sup>56</sup> Koppelman, *supra* note 4, at 956 n.7.

<sup>57</sup> *Id.* at 958.

<sup>58</sup> *Id.* at 956.

<sup>59</sup> *Id.* at 957 (citing JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 272 (3d ed. 1950)).

<sup>60</sup> Friedman, *supra* note 3, at 944.

<sup>61</sup> Koppelman, *supra* note 4, at 957.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 957-98.

<sup>64</sup> *Id.* at 958-60.

ently thinks,<sup>65</sup> but they are certainly relevant. Additionally relevant, however, are parts of the picture that Koppelman has not treated.

First, Schumpeter was working with a parliamentary model, in which it makes some sense to hold that the electorate as a whole can "fire the boss." In the American system, in contrast, it is not at all clear who or what is the boss. This is not only because of localism, federalism, and separation of powers on a national level, but because "the electorate" never votes for the legislature as a whole. For the American electorate, it is hard to figure how satisfaction or reconciliation could be fostered by the ability to fire a boss that one cannot even identify. In addition, Koppelman has not come to grips with elected courts. They can be fired, but are counter-conversational, so that if we could get a handle on whether they generate a sense of difficulty, we would have an interesting insight into the comparative power of conversational forces and a popular sense of Schumpeterian ability to throw the bums out.<sup>66</sup> And finally—and probably most importantly—Koppelman's hypothesis depends upon the construct of the electorate as a whole. No individual voter can "fire the boss," even in a parliamentary system. It is thus quite unclear how an individual voter would derive some satisfaction in his or her ability to do so, or conversely, dissatisfaction in not having a concomitant ability to fire the courts. This last point is, of course, related to the puzzle of voter turnout. Neither Schumpeter nor Koppelman provides an account of why people vote, while conversationalism does.

For these reasons, the conversational account more than holds its own against Koppelman's variation on Schumpeter. But I reiterate that no absolute choice between the two is required. Part of Koppelman's argument in favor of Schumpeter is that people care about the substance of governmental decisions.<sup>67</sup> Friedman makes that point as well,<sup>68</sup> and I do not wish to deny it.<sup>69</sup> The conversational perspective, in contrast, has nothing to say about citizen satisfaction with public policy outcomes. But the Schumpeterian depiction is one in which citizens make gross periodic evaluations of the sum total of public policy outcomes and then vote "yea" or "nay." That picture ignores all manner of interchange between citizens and government officials on questions of policy that goes on between elections. That over-

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<sup>65</sup> Koppelman, for instance, rightly depicts *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) as having been preceded by a great deal of conversation directed to the Supreme Court. But both professional norms of judicial decision making, and indeed the plurality opinion's stance in *Casey* itself, insist on the irrelevance of that conversation. See Tushnet, *supra* note 33, at 917. When at least the claim of irrelevance is made so clear, the capacity of conversation to generate a sense of involvement is surely diminished. Cf. Bennett, *supra* note 2, at 885 (noting that publication of court opinions only after a decision is reached "may arouse resentment instead of a sense of involvement").

<sup>66</sup> I discuss elected courts in Bennett, *supra* note 2, at 881-82.

<sup>67</sup> See Koppelman, *supra* note 4, at 960.

<sup>68</sup> See Friedman, *supra* note 3, at 945.

<sup>69</sup> "[C]oncern with public policy outcomes is no doubt an important determinant of satisfaction with American democracy." Bennett, *supra* note 2, at 876.

simplification of reality does not make Schumpeter wrong, any more than ignoring concern with substance makes the conversational perspective wrong. Like it or not, if "right" and "wrong" are the only two possibilities in explanatory theory, we shall have to do without theory, and indeed without much in the way of explanation.