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Barry Friedman's The Will of the People: Probing the Dynamics and Uncertainties of American Constitutionalism

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BARRY FRIEDMAN'S *THE WILL OF THE PEOPLE*:
PROBING THE DYNAMICS AND UNCERTAINTIES
OF AMERICAN CONSTITUTIONALISM

Edward A. Purcell, Jr.*

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Coming from a professor of constitutional law, *The Will of the People*¹ is somewhat unusual, some might even say "radical."² "Great" cases abound, but they are treated as "great" not because they are monuments to constitutional principles but because they were targets of public outcry. The book's focus, moreover, is not on the Supreme Court, individual justices, or inter-curial negotiations, nor is it on jurisprudential theories, methods of interpretation, or the meaning of particular constitutional provisions. Legal arguments and technical analyses are, in fact, almost wholly absent. Perhaps most surprising, the book advances no normative theory of either constitutional law or Supreme Court decision-making. Instead, it attempts something quite different. Drawing thoughtfully on the methods and insights of history and political science, it probes the American past seeking

* The author is the Joseph Solomon Distinguished Professor at New York Law School. He wishes to thank Doni Gewirtzman for helpful comments and suggestions.

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. Given the strict creedal and ritualistic requirements currently mandated for Senate confirmation, for example, no nominee for a federal judgeship would likely dare admit agreement with many of its claims.

an honest understanding of the evolving *de facto* relationship between public opinion and the Supreme Court's distinctive practice of judicial review.

I. COMMITMENTS

On first reading, *The Will of the People* brings to mind Charles Warren's classic study, *The Supreme Court in United States History*.³ Like Warren, Friedman focuses on the political and social context in which the Court works and the critical interaction between the justices and the views and values of the American people.⁴ Unlike Warren, however, Friedman heralds the latter, not the former, as the ultimate constitutional authority and the key to the proper operation of the nation's constitutional system.

Writing in the 1920s, the politically conservative Warren, whom Friedman aptly terms an "apologist for the Supreme Court,"⁵ sought to protect the Court from Progressive critics who challenged its position and urged legislative restrictions on its power. The Court, Warren believed, was the essential foundation of American constitutionalism and the guarantor of its principles and values.

That the Court is not infallible, that like all other human institutions it makes its mistakes may be acknowledged; yet in spite of the few instances in which it has run counter to the deliberate and better judgment of the community, the American people will unquestionably conclude that final judgment as to their constitutional rights is safer in the hands of the Judiciary than in those of the Legislature, and that if either body is to possess uncontrolled omnipotence, it should be reposed in the Court rather than in Congress, and in independent Judges rather than in Judges dependent on election by the people in passionate party campaigns and on partisan political issues.⁶

Friedman, in contrast, is the people's champion, a scholar who joins the contemporary liberal effort to open constitutional law more widely to the influence of popular attitudes by challenging the view that the Court is the final authority on the Constitution's meaning.⁷ The Court, he believes,

3. CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) (a study in three volumes).

4. "Some prominent works of political science and history have taken into account the relationship between the popular will and judicial power, but they fail to capture how that relationship has evolved throughout the course of American history." FRIEDMAN, *supra* note 1, at 11.

5. *Id.* at 181.

6. 3 WARREN, *supra* note 3, at 476-77.

7. *E.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 248 (2004) ("[T]he Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse. The Supreme Court is not the highest authority in the land on constitutional law. We are."). For similar works by other contemporary liberal scholars, see, for

is a melding institution that has come to mediate between the Constitution and the pressures of inexorable social change by adapting the law to the evolving values and interests of the American people.⁸

Ultimately, Thayer's and Hand's instinct is correct: we have nothing but ourselves to fall back upon. But it is wrong to claim, as many have, that the judges have stolen the Constitution from us. Judicial review is our invention; we created it and have chosen to retain it. Judicial review has served as a means of forcing us to think about, and interpret, our Constitution ourselves. In the final analysis, when it comes to the Constitution, we are the highest court in the land.⁹

Thus, unlike his scholarly predecessor, Friedman looks not to a wise and near perfect judicial guardian but to the people themselves. "Ultimately, it is the people (and the people alone) who must decide what the Constitution means."¹⁰ He looks to the people, moreover, not because he attributes to them unusual intelligence, wisdom, or virtue. Rather, he looks to them because their authority is both normatively proper as a matter of democratic principles and, more telling, practically unavoidable as a matter of the historical record. From theoretical questions about whether the Court is, or should be, the supreme and final authority on the Constitution's meaning, Friedman moves to more practical and experiential questions about the extent to which popular opinion and values—regardless of normative theories—have in fact shaped the Court's evolving constitutional jurisprudence.

It is toward answering such historical questions that Friedman devotes his book. "What history shows," he declares, "is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*."¹¹ Rather than enforcing an unchanging Constitution or serving as a sacerdotal check on popular passions, the Court unevenly tracks and ultimately accommodates the people's shifting values and attitudes. The Supreme Court's greatest successes have come when it confirmed or successfully anticipated significant

example, SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); RICHARD D. PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). For discussions of such liberal commentary, see, for example, James E. Fleming, *The Constitution Outside the Courts*, 86 *CORNELL L. REV.* 215 (2000) (book review); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 *GEO. L.J.* 897 (2005); L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 *TEX. L. REV.* 855 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)). Although Friedman says little about his own politics, his basic liberal sympathies seem clear. *E.g.*, FRIEDMAN, *supra* note 1, 8-9, 14, 234. For his criticism of some liberal theorists, see *id.* at 302-03.

8. See FRIEDMAN, *supra* note 1, at 14-16.

9. *Id.* at 384-85.

10. *Id.* at 367.

11. *Id.* at 382.

and long-term shifts in public opinion. Its greatest failures have come when it tried to stand against strong and persistent public opposition.¹² When it confronted such opposition, success came only if and when it avoided issues, backtracked on its decisions, or simply reversed itself.

Warren's view may be more conventional and comforting. Friedman's is more acute and challenging.

II. FRIEDMAN'S "LESSONS" OF HISTORY

A. The Court and Popular Opinion

The Will of the People examines American constitutional history from a realistic perspective. It considers constitutional doctrine as a set of reasonable interpretations and adaptive rules that have been developed, remolded, and sometimes discarded over the years in response to changing conditions, problems, and values. "[W]hat the Constitution is understood to encompass," Friedman emphasizes, "has changed over time in ways that are dramatic, sweeping, and often permanent."¹³ The dread "countermajoritarian difficulty," the book shows, represents but one contingent characteristic of the American constitutional system, a characteristic that has had a fluctuating significance over the course of the nation's history as well as one whose actual "difficulty" has been both misunderstood and overblown.¹⁴ Inevitably, the book highlights the inadequacy of modern "originalism." While many other scholars have shown why originalism cannot work as a generally applicable method of constitutional interpretation,¹⁵

12. *E.g., id.* at 136 ("Still, the Supreme Court was constantly in jeopardy during [the Civil War and Reconstruction], apparently because the justices were unable to read the public mood or unwilling to temper their actions in the face of it. . . . From *Dred Scott* through the end of Reconstruction, Congress exercised control over the Court when the justices proved unable to understand what they could and could not safely accomplish. The Supreme Court's conduct, and congressional supervision of it, brought the derision of the country upon the justices.").

13. *Id.* at 367.

14. Friedman's prodigious and superb scholarship on constitutional law and history includes an elaborate five-part study of the history of the countermajoritarian difficulty. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

15. Perhaps the most recent and compelling examples of the failure of originalism as a determinative method of constitutional interpretation occurred in the Court's decisions in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) and *McDonald v. City of Chicago*, 130

Friedman shows that it is also false to the history of American constitutional interpretation.¹⁶ In spite of their frequent, if varied, claims about adhering to an “original” meaning of the Constitution, the Court and the American people have interpreted it in changing ways over the years to reflect altered historical conditions and shifting popular attitudes. Thus, originalism is not only incapable of prescribing the proper interpretation of the Constitution in the future, but it is also inaccurate in describing how it has actually been interpreted in the past.¹⁷

In discussing such constitutional “methodologies,” Friedman offers an important insight: “Ideas take hold and flower when they make sense of the world in which they are planted,” he explains.¹⁸ “Just as discussion of the living Constitution flowed logically from the pens of liberals in the 1970s, originalism fitted conservative intuitions about the Constitution in the 1980s.”¹⁹ The power of any interpretative theory, he suggests, comes from its consistency with, and utility for, the goals and values embedded in a broader ideological perspective. As an interpretative theory comes to fit and serve the needs of that perspective, it gradually becomes for its adherents a matter of fundamental theoretical truth as opposed to remaining a mere consciously-used partisan tool.

Friedman identifies four “critical periods” in the changing relationship between the Court and popular opinion.²⁰ The weight of public opinion, he argues, shifted from bitter rejection of an overtly partisan national judiciary during the Federalist Era, to frequent defiance of federal judicial power during the first third of the nineteenth century, to persistent efforts to control the uses of that power in the long period from the Civil War to the New Deal, and finally to a broad contemporary acceptance of an authoritative judicial power that has learned sagely to accommodate dominant currents of public opinion.²¹ While “[t]he nature and extent of the Supreme Court’s

S. Ct. 3020 (2010); *see, e.g.*, Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83 (2010).

16. For a history of the continuous use of originalist appeals in American history, *see* JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005).

17. For a further exploration of the inadequacies of “originalism” emphasizing the role that statutes play in changing constitutional assumptions and meanings over time, *see* WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010). Regularly, “the Constitution accommodates superstatutory initiatives” by honoring the new values they establish and then entrench, and “the Constitution’s arguable original meaning did not stand in the way.” *Id.* at 23.

18. FRIEDMAN, *supra* note 1, at 313. His view echoes that of William James. *See, e.g.*, William James, *The Will to Believe*, in AMERICAN THOUGHT: CIVIL WAR TO WORLD WAR I 147-49 (Perry Miller ed., 1959).

19. *Id.*

20. *See, e.g., id.* at 12-16.

21. *See id.* for the author’s brief description of the four periods.

authority have plainly grown over time,”²² the Court has acquired “this power only because, over time, the American people have decided to cede it to the justices.”²³ They have done so because in recent times the Court’s “decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution.”²⁴ Friedman thus traces a national learning curve and draws from it a Whiggish conclusion that contains, for the moment at least, a great deal of truth.

More interesting, he also suggests that the more difficult questions about the Court’s decision-making involve when, why, and to what extent his conclusion about deference to popular opinion does not hold. He readily acknowledges that “there is some slack between what the governed want and what the governors provide”²⁵ and that “a variety of factors” protect the independence of the justices “and allow them to deviate from popular opinion.”²⁶ Thus, the crucial point in his argument is not merely the broad claim that the Court follows public opinion but the complicating qualification that a range of exceptions and limitations exist.²⁷

Friedman identifies one of the most important factors creating “slack” between popular opinion and the Court’s decisions as “low public salience,”²⁸ a factor whose significance he may well substantially understate. One can readily think of many decisions and lines of cases—such as those involving standing, preemption, the dormant Commerce Clause, the Seventh and Eleventh Amendments, due process limits on personal jurisdiction, congressional power under Section 5 of the Fourteenth Amendment, and the President’s power to make sole executive agreements—that are of major practical importance but that have hardly caused a ripple in popular opinion. Beyond the relatively small number of truly towering issues in the nation’s constitutional history, in truth, the great bulk of the Court’s constitutional decisions have likely had—at most—only an indirect and squinting relationship to public opinion.

Indeed, it seems likely that truly “popular opinion” hardly exists on many constitutional issues and that, to the extent it does exist, it is largely the processed product of elite debates, media propagation, interest group activism, and political party agitation.²⁹ Friedman acknowledges that such

22. *Id.* at 9.

23. *Id.* at 14.

24. *Id.*

25. *Id.* at 375.

26. *Id.* at 377.

27. *See, e.g., id.*

28. *Id.* “The Roberts Court,” he points out as an example, “has decided a large number of ‘pro-business’ cases” that the media and public have largely ignored. *Id.* at 377-78.

29. As a general matter, Friedman would seem to agree with this.

“elite” factors substantially dilute the impact of popular opinion.³⁰ Sometimes “the justices listen to elite voices, rather than that of the average person,”³¹ and some constitutional provisions—such as the First Amendment—command their “own special constituency” which is able to exert particularly effective pressure on the Court and the political system.³² Thus, the quality of “low public salience” may be far more significant, and the slack the Court enjoys from truly “popular” opinion far broader, than *The Will of the People* seems to indicate.

Equally important, Friedman notes that the Court’s decisions have a “sticky” quality, meaning “that they are difficult to change or get around.”³³ This stickiness, he continues, has “a certain virtue” in that “it plays an essential role in separating out the considered ‘constitutional’ views of the American people from passing fancy.”³⁴ Granting that virtue, such stickiness nonetheless also means that many decisions may remain law even though they fall outside the “mainstream of popular judgment” and, further, that a kind of path dependency may sustain many decisions and their evolving lines of progeny with little or no regard for popular opinion.

As a final factor limiting the impact of public opinion, Friedman acknowledges “the sheer difficulty of enacting a law to punish the justices” or reverse their decisions.³⁵ Such retaliatory laws are not only difficult to enact, but they are also difficult to formulate with enough precision to actually achieve whatever results the Court’s critics desire. The legal tools available to chastise the judiciary are, after all, notoriously cumbersome and unreliable. Moreover, it is often nearly impossible to get critics to agree on a specific retaliatory proposal that all can rally behind. When explaining why Progressives failed to control the Court as so many of them hoped to do, for example, Friedman stresses the fact that they simply “could not agree” on a specific reform that all or even most could support.³⁶

Thus, Friedman’s general claim about the impact of popular opinion is not as broad as it might initially appear. Indeed, his final explanation for the “slack” in the system edges toward tautology. “Ultimately, though, the best explanation for the justices’ independence may simply be that the public decides to grant it to them.”³⁷ A deep reservoir of “diffuse”—that is general and institutional—public support allows the Court to assert its independence in a wide range of areas, even if it is always subject to possible inter-

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

31. *Id.*

32. *Id.*

33. *Id.* at 383.

34. *Id.*

35. *Id.* at 377.

36. *Id.* at 185.

37. *Id.* at 379.

ventions by a deeply aroused public.³⁸ When and how such interventions take place and when and how they succeed, however, remains unclear. “[W]e do not know nearly enough about popular preferences in this regard,” he acknowledges.³⁹ Indeed, the very concept of “public opinion” is itself so complex and amorphous that it is often impossible to chart its true nature, let alone its relationship to the Court’s decisions.⁴⁰ This overarching difficulty poses an unavoidable challenge to any effort to specify the limits of the book’s thesis.

While the precise way that public opinion influences the Court may be unclear, Friedman suggests several transmittal mechanisms. One is that the justices are “only human” and consequently share the general values and attitudes of the public.⁴¹ He might have added, further, that they also generally share the more specific values and attitudes of some particular elements of that public. Another mechanism is the apparent willingness of some justices “to play to immediate public opinion.”⁴² It “does not require many justices on the Court at any time to be sensitive to public opinion,”⁴³ he notes, and a shift of only one or two in response to popular outcries may be sufficient to stop or reverse a line of decisions.⁴⁴

More important, returning to his central thesis, Friedman insists that the justices simply “do not have much of a choice” about heeding public opinion if they wish to preserve the Court’s institutional authority, ensure that its decisions will be enforced, and avoid “being disciplined by politics.”⁴⁵ The justices, by and large, are practical men and women who have increasingly learned to pay heed to the public and to the limits of their power. Friedman gives great weight to what he sees as the justices’ continuing concern with the threat of political retaliation.⁴⁶ Thus, although he acknowledges the great difficulty critics face in attempting to “discipline” the

38. *See id.*

39. *Id.* at 380.

40. Earlier, Friedman had written that scholars:

do not know enough about how the public gets its information about constitutional decisions, about public support for the institution of judicial review, about the extent to which the Justices are aware of or influenced by public opinion, and about the conditions under which political actors will heed judicial decisions with which they disagree.

Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 951 (2001).

41. FRIEDMAN, *supra* note 1, at 374.

42. *Id.* at 374-75.

43. *Id.* at 375.

44. *Id.* at 250, 254-58 (suggesting Justices Frankfurter and Harlan changed positions on civil liberties issues in the late 1950s in response to public criticism of the Court’s mid-decade decisions).

45. *Id.* at 375.

46. *See id.*

Court, he nonetheless insists that the people's disciplinary tools impose a vital and meaningful limitation on the justices' sense of freedom and independence. "If the preceding history shows anything," he writes, "it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices."⁴⁷

Friedman's emphasis on the relatively direct influence of public opinion and the real possibilities of political retaliation—or at least the justices' genuine concern about such pressures—is meant, among other things, to qualify theories of "regime" politics. Many historians and political scientists have argued that the primary and regular mechanism through which public opinion affects the Court is the political process of elections, presidential appointments, and Senate confirmations. When the voters choose one party over another, especially when they do so with some consistency over a series of elections, that party will be able to fill the bench with its ideological adherents, and the federal courts will consequently reshape the law to reflect the basic policies and values of that party.⁴⁸ When the popular majority shifts to another party, subsequent elections may establish a new political "regime" which will, in turn, eventually re-staff the federal courts and remold the law once again.

For Friedman, such theories are inadequate. "The appointments process, standing alone," he declares, "cannot guarantee responsiveness to public opinion."⁴⁹ Even when presidents carefully select justices who reflect their own views, for example, "ideological drift" may move them in unexpected and unwanted directions.⁵⁰ Instead, he maintains, public opinion itself often plays a direct role in determining the Court's course. "Political scientists in particular tend to focus on the institutions of government, rather than the people at large," he explains.⁵¹ "But the United States is a democracy, and the will of the people still prevails, at least on the big issues."⁵² He is likely right, but the contention only returns us to one of the central questions the book raises: Which issues, after all, are the truly "big" ones?

47. *Id.*

48. On "regime" theories, see, for example, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Lee Epstein, Jack Knight, & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L. J. 583 (2001); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (2007). For a general review of the literature, see Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007).

49. FRIEDMAN, *supra* note 1, at 374.

50. *See id.*

51. *Id.* at 375.

52. *Id.*

B. Fundamental Questions

Whatever the relative importance of public opinion as opposed to regime politics, *The Will of the People* has the great virtue of placing at center stage some truly fundamental questions about American constitutionalism: How has our system functioned—notwithstanding its imperfections, abuses, and failures—to maintain our ideals and practices of limited government, public accountability, individual rights, and popular democracy? What is the true nature of our constitutional “rule of law,”⁵³ and how is it to be properly understood given an honest recognition of both our *de facto* national experience and the realities that mark the operation of our legal and political systems?⁵⁴

In approaching those fundamental questions, Friedman offers some well-considered conclusions and underscores one haunting worry. Perhaps his most provocative conclusion is that by the late twentieth century Americans have succeeded in hammering out a “dialogic system of determining constitutional meaning,” a system that “works” with a kind of rough but reliable “magic.”⁵⁵ The Constitution itself is based on an “intractable tension” between the ideals of democracy and government under law, and after long and sometimes tumultuous experience the Supreme Court’s power of judicial review “has become the American way of mitigating the tension

53. “The rule of law” is a frequently misused concept, for many different kinds of “rules of law” are possible. Holding aside the varieties that exist in other nations and cultures, for example, in the United States the kinds of “rules of law” we live under vary from those that are relatively clear, simple, and specific (laws, for example, that involve automobile and highway usage) to those that are more complex, elaborate, and flexible (laws, for example, that involve corporate securities regulation) to, finally, the law of the United States Constitution itself which is inherently incomplete, evolving, and value-based. The fact that constitutional law differs in many ways from automobile law, securities law, and any number of other areas of law does not negate its character as providing a “rule of law.” Rather, it exemplifies the fact that there is no single form of “the rule of law,” although its many varieties share a common-and-essential-element: established institutions, mechanisms, and norms regularly used in reasonable and orderly ways to subject human behavior to sets of generally known and fairly applied rules and standards. The specification of that essential element varies, of course, with the subject matter addressed. As Aristotle noted, “it is a mark of the trained mind never to expect more precision in the treatment of any subject than the nature of that subject permits.” ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 65 (J. A. K. Thomson trans., Penguin Books rev. ed. 1976).

54. Although Friedman’s book has a great deal in common with the work of Bruce Ackerman, he does not attempt to shape his arguments into a general normative theory of constitutional change or constitutional legitimacy. Compare BRUCE ACKERMAN, *WE THE PEOPLE 1: FOUNDATIONS* (1991), and BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*], with FRIEDMAN, *supra* note 1.

55. FRIEDMAN, *supra* note 1, at 382. The “dialogic” process is an idea Friedman has been mulling for many years. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580-81 (1993).

between government by the people, and government under a Constitution.”⁵⁶ “[T]he most important lesson that history teaches” is that the critical element of judicial review “is not the Supreme Court’s role in the process, but how *the public reacts* to [its] decisions.”⁵⁷

Almost everything consequential about judicial review occurs after the judges rule, not when they do. Judges do not decide finally on the meaning of the Constitution. Rather, it is through the dialogic process of “judicial decision—popular response—judicial re-decision” that the Constitution takes on the meaning it has.⁵⁸

The inherent tension between the Court and the people varies over time and occasionally heightens to the point of crisis, but through a variety of working transmission mechanisms the Court soon adapts and the views of the people prevail.⁵⁹ Thus, he concludes, “through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values.”⁶⁰

The Court’s alleged “switch in time” in 1937 seems the most famous example of the process Friedman outlines.⁶¹ “[T]he obsessive focus on whether the justices switched—i.e., whether they changed their position on crucial constitutional questions because of the threat to the Court [from F.D.R.’s Court-packing plan]—is a bit misplaced.”⁶² While Friedman be-

56. FRIEDMAN, *supra* note 1, at 367.

57. *Id.* at 381. Thus, while Friedman discounts the significance of the counter-majoritarian difficulty, his argument is nonetheless compatible with Alexander Bickel’s view of the Court’s practical influence:

The Supreme Court’s judgments may be put forth as universally prescriptive; but they actually become so only when they gain widespread assent. They bind of their own force no one but the parties to a litigation. To realize the promise that all others similarly situated will be similarly bound, the Court’s judgments need the assent and the cooperation first of the political institutions, and ultimately of the people.

ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 90 (1970).

58. FRIEDMAN, *supra* note 1, at 381-82.

59. Friedman may give insufficient attention to what seems a key part of the process, the ways in which the Court’s decisions sometimes alter the nature of popular debate and bring shifts in the political coalitions involved in contesting the relevant issue or issues. Thus, while public opinion can influence the Court, the Court can also help reshape public opinion. See, e.g., Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 *LAW & HIST. REV.* 281, 284 (2009).

60. FRIEDMAN, *supra* note 1, at 367-68.

61. He identifies other “switches” as well. E.g., *id.* at 145 (describing Justice Bradley’s “unmistakable change of heart” on Reconstruction). *Id.* at 250, 254-58 (explaining that Justices Frankfurter and Harlan changed positions on civil liberties cases in the late 1950s), 287 (discussing how the “Court quickly moved into line with public opinion” in its death penalty decisions after the popular reaction against *Furman v. Georgia*, 408 U.S. 238 (1972)). Along similar lines, Friedman also notes instances when the Court ducked issues to avoid confrontations with popular opinion. *Id.* at 121 (during the Civil War the “Court did its best to stay out of harm’s way”).

62. *Id.* at 229.

lieves that the evidence strongly points to such a switch by Chief Justice Charles Evans Hughes and Justice Owen J. Roberts, he insists that the central question is not one of judicial doctrine and consistency but one of public perception and insistence.⁶³ How much pressure was the public willing to place on the Court, and how did the public react to its 1937 decisions that suddenly validated much of the New Deal? “In assessing the Court’s vulnerability to public pressure, what matters is not so much whether the justices consciously changed the direction of constitutional law under pressure as whether the public believed they had.”⁶⁴ And, Friedman states, in 1937 the public clearly believed that the Court had changed its views, and it fully supported that change.⁶⁵ “All told, contemporary evidence suggests powerfully that had the Court not switched, the public would have supported disciplining it.”⁶⁶

This is a critical contention. It is a key part of Friedman’s answer to those who would deny that public opinion guides the Court, and it is his particular answer to those who do deny that F.D.R.’s threat to pack the Court caused the justices to “switch” their views. Such switch-denying scholars offer a variety of arguments to support their dismissal of the president’s threat.⁶⁷ They maintain that no individual justice in fact altered his doctrinal position, and hence, that there was no “switch” in the first place; they argue that substantial constitutional change was already underway prior to the threat and hence that the apparent change in 1937 was merely a normal phase in an ongoing doctrinal evolution that had nothing to do with the Court-packing plan; and they argue that both the public and Congress swung emphatically against the Court-packing plan over the first half of 1937 and, hence, that the President’s threat was hollow and could not have

63. As Friedman notes, a “switch” might well require only one or two justices to alter their views. *See id.* at 375.

64. *Id.* at 231.

65. *See id.* at 233.

66. *Id.*

67. Works of prominent scholars who deny that the Court packing plan influenced the Court include BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000); and Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994). For the more traditional view arguing that some of the justices did “switch” and attributing the change to political pressure, see, for example, JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938); EDWARD S. CORWIN, *CONSTITUTIONAL REVOLUTION, LTD.* (1941); BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* (1942); and WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1995). On the current state of the debate, see, for example, Alan Brinkley, *AHR Forum: The Debate Over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2005).

pressured the justices because the plan could not have been enacted.⁶⁸ Friedman's thesis essentially avoids the significance of all of those contentions. It makes the various doctrinal arguments irrelevant on the ground that the public had little understanding of them and, in any event, cared little or nothing about them. Further, it makes the growing opposition to the plan the result of the widespread belief in Congress and among the public that the Court had in fact "switched" and that, consequently, the President's plan was no longer necessary.⁶⁹ The technical merits of the doctrinal debates were unrelated to the dynamics of the actual "dialogic process" that was underway, and the shifts in popular and congressional opinion simply represented the successful conclusion of the dialogue. Whatever it was the justices did as a doctrinal matter, the public perceived the results as both substantial and in accord with its demands.

While undoubtedly capturing a great deal of truth, that analysis does not seem entirely satisfactory. If the Court did not, in fact, actually "switch" in some significant way in the first half of 1937, it is not clear why Friedman's claim about the public's willingness to discipline the Court would matter or what his claim about its "impact" on the Court would mean. Could it be that the public had somehow been distracted, mistaken, or misled? Conversely, if the Court did "switch," but did so only later, as some argue, then a "regime" theory emphasizing the role of Roosevelt's new judicial appointees would seem to explain the course of events.

A more complete explanation for what happened in the spring of 1937 might begin by modifying two elements that figure in the traditional debate: first, deemphasizing the alleged impact of the Court-packing plan itself and, second, conceiving the "switch" as something more subtle than a willful embrace of that which had previously been rejected. The first modification would highlight the full and complex range of social pressures that played on the Court at the time,⁷⁰ and the second would recognize the elastic and incomplete quality of constitutional doctrine and the complex and often subtle human factors that guide judicial reasoning. Such an approach would suggest, then, that Hughes (possibly) and Roberts (likely) gave some weight

68. See generally sources discussed *supra* note 67.

69. FRIEDMAN, *supra* note 1, at 232-34.

70. For example, Hughes and Roberts were surely aware that many conservatives and Republicans reacted strongly against the Court's "conservative" decision in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), which voided a state minimum wage law for women. "Even normally conservative newspapers termed the ruling 'regrettable,' and the Republican presidential candidate, Alfred M. Landon, carefully distanced himself from the Court's conservative bloc. The Republican Party platform that year specifically approved of state regulation of wages and hours for women and children." MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 684-85 (2009). *Tipaldo* was one of the decisions that the Court abandoned in its "switch" in the spring of 1937. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

to those social pressures—including their estimates of “public opinion” and the possibility that some kind of disciplinary action might be taken—and gently shaded their doctrinal principles and applied them in a somewhat different manner than they would have done at an earlier point in time.⁷¹ Thus, public opinion would have played a role in pressuring a doctrinal shift, but the process would be seen as a somewhat nuanced and finely-grained shift rather than as an abrupt and fully self-conscious about-face.

Beyond his argument about the “switch” itself, Friedman draws two other general conclusions from the Court-packing episode. First, he declares that “[t]he true significance of 1937” was that “[t]he American people signaled their acceptance of judicial review as the proper way to alter the meaning of the Constitution, but only so long as the justices’ decisions remained within the mainstream of popular understanding.”⁷² The New Deal justices “wrote a new Constitution,” and unlike F.D.R.’s effort to change the law by “packing the Court, this method of constitutional change was widely hailed as the proper one.”⁷³

His recourse to the “mainstream” metaphor at this point seems both apt and revealing, for that image has come to serve as the dominant normative criterion in the political rhetoric of the modern judicial confirmation process. Those who support a judicial nominee must insist that their candidate is well within the “mainstream” of American values, while those who oppose must—if they hope to prevail in the absence of a determined and substantial opposition bloc in the Senate—show that the candidate is clearly, and even outrageously, outside that “mainstream.” The metaphor is thus apt because it informs the controlling rhetoric of the judicial confirmation process, and it is revealing because its widespread use suggests the extent to which those on both sides have come to accept the political premise—usually acknowledged in public only with great care and greater art—that judges should, in fact, tailor their constitutional views to accord with popular opinion.

Second, Friedman concludes that a mutual understanding grew out of the Court-packing experience and over the subsequent years came to inform

71. Cf. Edward A. Purcell, Jr., *Rethinking Constitutional Change*, 80 VA. L. REV. 277, 280 (1994) (suggesting that the Court’s doctrines allowed the justices to support a variety of decisions in the cases they decided in the 1930s and that “[t]o show that a doctrinal passageway existed is important, but it is not to show why the individual Justices—particularly Justice Roberts in a five-to-four decision—chose to walk through it”). *Contra* Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95 (1999) (arguing that Hughes and Roberts remained doctrinally consistent and that those who believed they “switched” did not understand the nature of their constitutional jurisprudence).

72. FRIEDMAN, *supra* note 1, at 196.

73. *Id.* Friedman’s conclusion is similar to Ackerman’s theory that judicial review is a potentially legitimate non-Article V method of amending the Constitution. *See* ACKERMAN, *TRANSFORMATIONS*, *supra* note 54, at 279-382.

both the people and the Court.⁷⁴ The former no longer made serious attempts to assert control over the Court, and the latter remained closely tied to the public's dominant attitudes. "[I]t has taken the Court and the public some time to learn how their relationship might work," he explains; "now that it is understood, violent upheaval is no longer necessary."⁷⁵ Recognition of the process has generated a new systemic stability. "Now that the justices and the public understand how things work, the system tends to rest in a relatively quiet equilibrium."⁷⁶

The haunting worry that Friedman identifies follows directly from those central conclusions and, of course, from the corollary that the countermajoritarian difficulty is no serious difficulty at all. "But if we can at long last move past the question of *whether* the justices are influenced by popular opinion, a question whose only conceivable answer is yes," he declares, "we can at least start to tackle the really meaningful question of when and how the justices are free to stand up to the popular will in the name of the Constitution."⁷⁷ From the nation's beginning, the Supreme Court was hailed as the institution that would protect the minority from the majority,⁷⁸ a function that gave rise to what might be called the countermajoritarian boast. Whether seen as a "difficulty" or a "boast," however, the belief that the Court would play a countermajoritarian role has proven largely unwarranted. The assumption that judges will "stand up against the majority," Friedman warns, is "deeply problematic."⁷⁹ In fact, he suggests, the assumption is highly dubious if not largely false. "If any worry seems legitimate, it is that the" Court will not hold out against the majority and will, instead, "kowtow to public opinion and pay insufficient heed to the traditional role of judicial review in protecting minority rights."⁸⁰

That last sentence seems puzzling. If Friedman is right that the countermajoritarian difficulty has been badly overblown and that the Court tends to follow public opinion, how can he also maintain that the role of "protecting minority rights" has truly been the "traditional role of judicial review." Perhaps he means either a "theoretically idealized" role of protecting minority rights or the "sometimes actually realized" role of protecting some mi-

74. FRIEDMAN, *supra* note 1, at 376.

75. *Id.*

76. *Id.*

77. *Id.* at 374.

78. See THE FEDERALIST, NO. 78 508 (Alexander Hamilton).

79. FRIEDMAN, *supra* note 1, at 370. "It is difficult to understand *Korematsu* [*Korematsu v. United States*, 323 U.S. 214 (1944)], the most prominent of the internment cases, as anything but stark capitulation to the decisions made by military and political authorities." *Id.* at 372.

80. FRIEDMAN, *supra* note 1, at 372. "What we ought to care deeply about, what we ought to be asking, is how much capacity the justices have to act independently of the public's views, how likely they are to do so, and in what situations." *Id.* at 373.

nority rights. Or, perhaps, his sentence simply illustrates our recurrent efforts to create from selected bits and pieces of the past grand normative “traditions” that we believe useful for present purposes.

To his compelling concern about the need to protect minority rights, Friedman offers both a hope and a challenge. The hope is explicit. “But perhaps the central function of judicial review today is to serve as the catalyst for the people to take their Constitution seriously, to develop their constitutional sensibilities, in the hope that they will adhere to those sensibilities when the chips are down.”⁸¹ The challenge is more implicit. It is ultimately up to us, the American people, to see that individual and minority rights are protected and that the society remains one of order, freedom, justice, tolerance, and equality. There are no other guarantees, and neither clinging to constitutional myths nor relying on judicial guardians can ultimately secure and preserve those ends.

Beyond those incisive analyses and provocative conclusions, *The Will of the People* provokes some even more deeply puzzling questions: How and to what extent does the Constitution bind the American people together, and how and in what ways does it help us mediate our disputes and resolve them relatively peaceably and effectively? Would the Constitution, in fact, bind us together more effectively and beneficently if we assumed that it had an “original” meaning that could be objectively ascertained and that our most basic disputes could be resolved by determining that true meaning in novel and changing circumstances? And, if we adopted such an assumption, would its principal value lie in the extent to which it distracted us from real and intense conflicts that could bring us to blows while diverting our energies relatively harmlessly into passionate—if necessarily misguided and unending—searches for the true and predetermined solutions to those disputes? Or, conversely, would the Constitution bind us together more effectively and beneficently if we assumed that it authorized and required changing applications and that our most basic disputes could best be resolved by adapting its provisions fairly and pragmatically to meet the nation’s changing needs and values?⁸² And, if we adopted that latter assumption, would it actually help us focus more effectively on the pressing issues that confront us, or would it make our real and practical conflicts even more raw, bound-

81. *Id.* at 384. The contemporary debate over building an Islamic mosque two blocks from the site of the World Trade Center seems an obvious test case for Friedman’s hope.

82. Stephen Skowronek identifies the pragmatic “living Constitution” approach, an approach that Friedman seems to share, with twentieth-century progressivism. “The progressives wanted to strip discussions of power of their constitutional pretenses so as to force the defenders of established arrangements to engage in a pragmatic, open-ended, and explicitly political debate over what the largest interest, ‘the public interest,’ demanded.” Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2086 (2009).

less, and ultimately irreconcilable? Which, in other words, is of greater long-term social and political value: a national faith that the Founders created a talismanic and eternally-specified Constitution or a hard-eyed understanding that unavoidable political battles determine the meaning of a wise and noble, if partially malleable and evolving, Constitution?⁸³

While few may wish to hazard confident answers to those questions, there are promising middle-ground possibilities, and Friedman suggests the outline of one such response. Even accepting the fact that its meaning changes in rough accord with public opinion, the Constitution nonetheless proclaims our most fundamental values, underwrites an open and tolerant political culture, and establishes a cumbersome but shrewd political structure that creates innumerable opportunities for public opinion to influence and even determine governmental outputs while at the same time creating equally innumerable obstacles and filters that shape, channel, and delay the impact of that public opinion. Friedman's "dialogic process" between the Court and the people, then, would appear as one more manifestation of the salutary principle of separation of powers that lies at the heart of our constitutional system, a principle that helps generate the system's power to induce—generally, if not invariably, for the better—relatively slow, considered, stabilizing, and significantly consensus-based change.⁸⁴ Perhaps this means that the American people have, through the institutions of their Constitution and their long resulting experience in ordered self-government, been transformed into their own trustworthy guardians. For that reason, they are capable of accepting a hard-eyed understanding of their constitutional system while still maintaining an abiding faith in its institutional virtues and political values.

Such, at least, would be the theory.

III. SOME HISTORICAL PARTICULARS

The richness of *The Will of the People* and the shortness of space necessitate a highly truncated discussion of historical particulars. Three inter-related issues involving the Court's history in the late nineteenth and early

83. Caught up in immediate controversy, Americans can . . . fail to see that what looks to be a roaring battle over judicial power is simply the latest round in a much broader struggle over the proper interpretation of the Constitution. . . . It is the meaning of the Constitution itself that is up for grabs, and judicial power is nothing more than a pawn in that battle.

FRIEDMAN, *supra* note 1, at 9.

84. "The system works not because the justices are solons with a special capacity for distinguishing between [mere passing popular attitudes and the fundamental and well-considered views of the public] but because separation occurs through the regular process of decision, response, and redecision, as it plays out over time." *Id.* at 384.

twentieth centuries merit special comment. Each in its own way supports Friedman's general thesis even if it qualifies parts of his historical analysis.

A. The Origins and Significance of the Judiciary Act of 1875

Friedman follows those who have pointed to the pro-business motives that underlay passage of the Judiciary and Removal Act of 1875, which granted general "federal question" jurisdiction to the national courts.⁸⁵ While congressional Republicans did support the act to "increas[e] corporate access to the federal courts,"⁸⁶ Friedman's emphasis on that purpose tends to obscure profound political and economic shifts that occurred in the decades after 1875. In the immediate post-Civil War years, Northern commercial and financial interests surely pressed Congress for advantageous legislation, and, as a general matter, they also preferred litigating in federal as opposed to state courts. The availability of federal forums, however, was not nearly as pressing a political issue for them in 1875 as it would become during the subsequent quarter century.

For corporate interests in the 1870s, the new federal question jurisdiction offered few particularly noteworthy advantages,⁸⁷ while long-established diversity jurisdiction remained their most commonly used and vigorously defended route into the national courts. Federal constitutional law generally gave wide berth to state laws regulating business⁸⁸ and only two years before the 1875 Act was passed *The Slaughter-House Cases*⁸⁹ had disappointed business interests and essentially negated the Privileges and Immunities Clause as a national limitation on state regulatory powers. In the 1870s, moreover, the Court was highly suspicious of the new national corporations, dubious about their growing size and power, and often sympa-

85. See *id.* at 163 (citing, inter alia, FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 64-65 (1927); Cf. Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 517 (2002) (arguing that the 1875 Act was intended to bring commercial matters into the federal courts but emphasizing that it was political and institutional changes during the following fifteen years that transformed the federal courts into havens for "national commercial interests," at 517). Although an undisputed classic, the Frankfurter and Landis book must be read cautiously. See Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 681-706 (1999).

86. FRIEDMAN, *supra* note 1, at 163. For his discussion of the period, see *id.* at 150-66.

87. One of the few advantages of federal question jurisdiction would have involved an expanded opportunity to challenge state anti-drummer legislation in federal court. See, e.g., *id.* at 150-53; Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631, 636 (1978).

88. E.g., *Munn v. Illinois*, 94 U.S. 113 (1876).

89. 83 U.S. (16 Wall.) 36 (1872).

thetic to the aggrieved individuals who sued them.⁹⁰ Substantive due process under the Fourteenth Amendment was still but a glimmer in the minds of a few corporate attorneys.⁹¹ Further, common-law claims, even those falling within the so-called “general” or “federal” common law, raised formally “state” law issues that could not confer jurisdiction as “federal questions.”⁹² When such claims came to the national courts, they did so through diversity jurisdiction, not through federal question jurisdiction. Equally important, by the 1870s, the Court and the lower federal judiciary had demonstrated that diversity jurisdiction was more than adequate to enable them to check the efforts of the mid-western towns and counties that sought to repudiate their bonds.⁹³ Finally, the massive influx of tort and contract actions against national corporations that would soon swamp the courts had not yet begun, and the bitter battles over federal jurisdiction between corporations on one side and state regulators and an emerging plaintiff’s personal injury bar on the other still lay in the future.⁹⁴

Thus, emphasis on the pro-business origins of the 1875 Act risks obscuring the fact that the 1880s and 1890s were decades of drastic change in both the politics of federal jurisdiction and the social orientation of the Supreme Court.⁹⁵ The events of those later decades transformed the general and long-established preference of interstate businesses for the national courts into a near-frenzied conviction that such access was essential to preserve economic investment and avoid a widespread and class-driven spoliation of corporate wealth.⁹⁶ More to the point, those changes also helped

90. EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958* 64-86 (1992); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 66, 78-79, 92 (1992).

91. See, e.g., MICHAEL A. ROSS, *JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA* 251 (2003). The Court did not determine that corporations were “persons” within the meaning of the Due Process Clause for another decade in *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886), and what is regarded as the first substantive due process case, *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890), did not follow until four years after *Santa Clara*.

92. See *Delmas v. Ins. Co.*, 81 U.S. (14 Wall.) 661, 665-66 (1871); *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 287 (1876); *United States v. Thompson*, 93 U.S. 586, 588-89 (1875).

93. “Preoccupation with the protection of bondholders caused a majority of the Justices to be insensitive to all other considerations in these complex situations. What is more, slovenly work concealed egregious deviations even from professed principles.” CHARLES FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88, PART I* 1101 (1971).

94. PURCELL, *supra* note 90, at 19-22.

95. See *id.* at 28-103.

96. By the 1890s, for example, Supreme Court Justice David J. Brewer warned against coercion by the democratic masses and the threat of governmental “spoliation and destruction of private property,” while federal circuit court judge William Howard Taft told

transform the Court from a relatively balanced and cautious overseer of a nationalizing economy into a bold protector of both the national market and the national corporate interests that controlled it. Indeed, into the 1880s the Court generally sought to keep the jurisdiction of the national courts narrow and to limit the reach of federal law, and it was only in the 1890s that it began methodically and broadly to expand both.⁹⁷ Thus, the Judiciary Act of 1875 proved a critical element in that later transformation, but only as it was subsequently deployed by an ideologically transformed Court and exploited by newly aggressive corporate interests in a distinctly different social and political context.

B. The Ugly Head of “Formalism” Reared Again

Although Friedman mentions the term only in passing, he continues the well-established practice of characterizing the late nineteenth and early twentieth century as a period of judicial “formalism.” “At the turn of the twentieth century,” he writes, “many judges and some prominent academics took a ‘formalist’ approach to legal interpretation, in which answers to legal questions could be derived as a doctrinal matter purely from the cases themselves.”⁹⁸

Friedman does not, of course, seem to believe that the Court was “formalistic” in the sense of actually deciding cases solely by reasoning “logically” from principles and precedents. In identifying the Court’s “shift in perspective” to a centralizing and pro-corporate orientation, for example, he contrasts its decision in *Munn v. Illinois*⁹⁹ with its decision a decade later in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*.¹⁰⁰ In the former, the Court found no Commerce Clause problem and upheld a state’s power to

the American Bar Association that corporations “all carry their litigation into the Federal courts” whenever possible because “of the deep-seated prejudice entertained against them by the local population” in the states of the south and west. David J. Brewer, Justice of the U.S. Supreme Court, Protection to Private Property from Public Attack, Address Before the Graduating Classes at the Sixty-Seventh Anniversary of Yale Law School (June 23, 1891), in 19 NEW ENGLANDER & YALE REV. 97, 107-08 (1891); William H. Taft, Judge of the U.S. Circuit Court of Appeals, Criticisms of the Federal Judiciary, Address Before the American Bar Association (Aug. 28, 1895), in 29 AM. L. REV. 641, 651 (1895). During the decade both Brewer and Taft worked purposely and assiduously to strengthen the legal position of corporations and to expand their ability to use the federal courts. PURCELL, *supra* note 90, at 79-81, 109-12.

97. See Edward A. Purcell, Jr., *Ex parte Young and the Transformation of the Federal Courts, 1890-1917*, 40 U. TOL. L. REV. 931, 934-35 (2009).

98. FRIEDMAN, *supra* note 1, at 192. In an endnote, Friedman does suggest skepticism about the nature of such judicial “formalism.” See *id.* at 477 n.225 (citing BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009)).

99. 94 U.S. 113 (1876).

100. 118 U.S. 557 (1886).

regulate rates charged by grain elevators “even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction.”¹⁰¹ In the later case, the Court found that a state’s effort to regulate railroad rates on intrastate trips did violate the Commerce Clause.¹⁰² Although the state law “purports only to control the carrier when engaged within the State,” *Wabash* reasoned, quoting the Court’s decade-old decision in *Hall v. De-Cuir*,¹⁰³ “it must necessarily influence his conduct to some extent in the management of his business throughout his entire [interstate] voyage.”¹⁰⁴ Consequently, the Court held that the state law intruded into interstate commerce and transgressed the Commerce Clause. After *Wabash* the justices “were in the business of reviewing railroad rates,” Friedman declares, and they subsequently “went on a binge of striking down state laws to protect corporate interests and property rights.”¹⁰⁵

Any number of other decisions would confirm Friedman’s point that the Court was not following any “formalistic” method of reasoning but, rather, was seeking quite pragmatically to enforce its views of desirable public policy. The case *Wabash* quoted and relied on, for example, was part

101. *Munn*, 94 U.S. at 135.

102. *Wabash, St. Louis & Pac. Ry. Co.*, 118 U.S. at 576-77.

103. 95 U.S. 485, 489 (1877).

104. *Wabash, St. Louis & Pac. Ry. Co.*, 118 U.S. at 571-72 (quoting *Hall*, 95 U.S. at 489), quoted in FRIEDMAN, *supra* note 1, at 462 n.203.

105. FRIEDMAN, *supra* note 1, 160-61. The exact number of statutes the Court struck down is disputed, as is the practical significance of its efforts. Friedman cites several studies showing that the Court allowed most regulatory laws to pass scrutiny, *see id.* at 472 n.138, and notes that Charles Warren produced a study arguing that the Court invalidated relatively few laws and that it was a “progressive” force. He also notes, however, that Warren circumscribed his study quite narrowly and consequently missed a large number of invalidations that other scholars subsequently identified. *Id.*; citing Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913). Warren also wrote another piece with similar findings that Friedman does not cite. Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 8 COLUM. L. REV. 667 (1913). Those articles were, of course, part of Warren’s efforts to defend the Court against Progressive attacks. In spite of such studies tending to minimize the significance of the Court’s invalidations, those invalidations were nonetheless of great importance. Many of the laws the Court upheld were of minor significance, while many of those it struck down were of far-reaching social and political significance. Further, the Court’s invalidations undoubtedly had the effect of voiding large numbers of similar statutes in other states as well as discouraging or preventing enactment of many other such laws in states across the nation. Whatever the exact number of invalidations, moreover, it is clear that the Court voided hundreds of laws, especially those enacted by the states. FRIEDMAN, *supra* note 1, at 472 n.138. One prominent scholar placed the number of invalidations between 1874 and 1937 at close to 600, with over 500 being state laws, ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* 511 (5th ed. 1976) (citing BENJAMIN F. WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* (1942)), while a recent work states that in the bare ten years from 1920 to 1930 the Court invalidated 140 state laws, UROFSKY, *supra* note 70, at 599.

of another pair of interstate commerce cases that illustrate the same truth. *Hall* was decided in 1878, a year after *Munn*, while *Louisville, New Orleans and Texas Pacific Railway Co. v. Mississippi*¹⁰⁶ came down in 1890, four years after *Wabash*. In *Hall*, the Court invoked the Commerce Clause to invalidate a state law that *prohibited* racial discrimination against passengers on common carriers. There, the Court ignored the fact that the Louisiana Supreme Court had held that the statute applied only to intrastate passengers and ruled—in the language *Wabash* quoted—that the statute “must necessarily influence [the carrier’s] conduct to some extent in the management of his business throughout his entire [interstate] voyage.”¹⁰⁷ Twelve years later in *Louisville*, the Court upheld a state statute that *required* racial segregation on railroads.¹⁰⁸ There, it found no improper intrusion into interstate commerce and relied on the fact that the Mississippi Supreme Court had ruled that the statute applied only to intrastate trips. In *Hall* and *Louisville*, in other words, the Court found a constitutional distinction between two statutes that differed only in the contrasting racial policies they embodied. It found the one prohibiting racial discrimination void; it found the one requiring racial discrimination valid.

Considering the four cases together throws into even clearer relief the contextual and policy-driven nature of the Court’s decisions in all of them. In the two earlier cases—*Munn* and *Hall*—the Court construed the Commerce Clause differently, narrowly in the economic case and broadly in the race case; in the two later cases—*Wabash* and *Louisville*—it once again construed the provision differently, this time broadly in the economic case and narrowly in the race case. In *Wabash*, the Court relied on *Hall*; in *Louisville*, it distinguished *Hall*. In all, the breadth or narrowness of the Commerce Clause was not determined by factual records that established different impacts on interstate commerce or by the constructions that the state supreme courts had placed on the statutes at issue. Much less were they determined by precedents, legal logic, general principles, or the language of the Constitution. They were determined, rather, by the justices’ views of desirable public policy. In shifting doctrinally from *Munn* to *Wabash*, the Court was moving to restrict state power to regulate interstate business interests; in shifting doctrinally from *Hall* to *Louisville*, it was moving to preserve racial discrimination and segregation.

As those and a multitude of other cases ranging across the judicial spectrum suggest, the late nineteenth-century Supreme Court was a policy-driven institution.¹⁰⁹ Consequently, it is time to abandon the idea that it was

106. 133 U.S. 587 (1890).

107. *Hall*, 95 U.S. at 489.

108. *Louisville*, 133 U.S. at 591-92.

109. *E.g.*, *United States v. Arjona*, 120 U.S. 479, 486 (1887) (creating unprecedented new law to prevent counterfeiting of foreign bank notes in the U.S. and noting the nation’s

distinctively “formalistic” in its decision-making.¹¹⁰ As Friedman’s book makes clear, at no point has the Supreme Court been a “formalist” institution,¹¹¹ and its work during the turn-of-the-century decades constituted no exception. During those years the Court continued as a highly specialized and quite pragmatic institution that sought to shape the Constitution and laws to serve what shifting coalitions of majority justices—influenced by a variety of social, moral, personal, doctrinal, political, professional, and intellectual forces—considered desirable national policies. A true understanding of the Court and its work must come from an understanding of that complex and dynamic historical reality, and in that scholarly effort the concept of “formalism” has ceased to be helpful. Indeed, it has become a substantial obstacle.

Why the idea of “formalism” took root in the writing of American legal and constitutional history is itself an interesting historical question. In part, its widespread acceptance was due to the fact that American legal education changed substantially in the late nineteenth century under the influence of Christopher Columbus Langdell and his “case method” of instruction, an approach that stressed the rigorous analysis of cases to identify the true legal principles that properly applied to specific legal questions.¹¹² In part, too, it was due to the long line of influential writers, beginning with Oliver Wendell Holmes, Jr., who criticized both Langdell’s jurisprudential assumptions and turn-of-the-century judicial decisions that invalidated gov-

substantial and growing foreign financial interests: “No nation can be more interested in this question than the United States”); *United States v. Lee*, 106 U.S. 196, 226 (1882) (establishing federal sovereign immunity on ground, *inter alia*, that “it is essential to the common defense and general welfare” of the nation); see Edward A. Purcell, Jr., *Some Horwitzian Themes in the Law and History of the Federal Courts*, in 2 *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS—ESSAYS IN HONOR OF MORTON J. HORWITZ* 271-81 (Daniel W. Hamilton & Alfred L. Brophy, eds., 2010).

110. Any legal system recognized as such by American scholars would have “formalistic” elements—rules, concepts, and some structure of accepted logic. Further, a court may adopt a relatively abstract method of reasoning that eschews references to social facts and avoids the explicit discussion of policy considerations. Such a method would be a matter of rhetorical style, and the late nineteenth century Court may have tended to employ that style more than earlier or later Courts. See, e.g., PURCELL, *supra* note 90, at 253-54; KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). The idea of “formalism” generally used in the historical literature, however, involves something quite different, the proposition that the Court essentially ignored social realities, consulted only clear and authoritative legal sources, and reasoned logically from those sources to reach necessary legal conclusions. That is the concept of formalism that should be abandoned.

111. “[M]uch of what Marshall did in rendering the *Marbury* decision violated important norms of judging.” FRIEDMAN, *supra* note 1, at 63.

112. There is a large literature on Langdell and his impact. See, e.g., WILLIAM P. LAPIANA, *LOGIC & EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* (1994); BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906* (2009).

ernment regulatory efforts.¹¹³ Progressives believed such decisions were based on exceptionally unrealistic assumptions about the nature of industrial society, and to undermine their authority they began characterizing them as “abstract,” “metaphysical,” “mechanical,” and “conceptualistic,” derisive labels that were gradually subsumed in the term “formalism.”¹¹⁴ More broadly, acceptance of the term “formalism” may also have been the result of the scholarship of those trained in intellectual history who brought their discipline’s methodology to the study of law.¹¹⁵ Seeking to integrate legal thinking into comprehensive analyses that identified the fundamental pre-conceptions of an age,¹¹⁶ they seem to have believed that the theoretical assumptions behind Langdell’s pedagogy must have been fundamentally similar to those underlying diverse types of legal writing, not only philosophical essays and doctrinal treatises but also practitioner’s handbooks and judicial opinions. Thus, “formalism” became a term used to characterize the intellectual assumptions of the turn-of-the-century decades, and many scholars consequently adopted it and assumed that it must apply equally to all areas

113. “I have referred to Langdell several times in dealing with contracts because to my mind he represents the powers of darkness. He is all for logic and hates any reference to anything outside of it” Letter from Oliver Wendell Holmes to Sir Frederick Pollock (Apr. 10, 1881), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932 17 (Mark DeWolfe Howe ed., 1961). For Holmes’s reference to Langdell as a “legal theologian,” see *Book Notices*, 14 AM. L. REV. 233, 1234 (1880). For Holmes’s attack on judicial decisions invalidating government regulations, see, for example, *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). See generally G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 148-353 (1993).

114. Friedman notes that “Progressive lawyers and judges scoffed at this sort of legal formalism,” FRIEDMAN, *supra* note 1, at 192, but he does not explore the extent to which such critics purposely adopted and used the label of “formalism” and its cognates as polemical tools to discredit their political adversaries.

115. As one trained as an intellectual historian, I long ago acknowledged my own earlier complicity in using the term, PURCELL, *supra* note 90, at 394-95 n.13, and urged a thorough reconsideration of the concept, *id.* at 253-54, 395-96 nn.14-15. Other scholars have also questioned the concept in varying ways. *E.g.*, Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American “Styles of Judicial Reasoning” in the 19th Century*, 1975 WISC. L. REV. 1 (1975); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513 (2001).

116. For classic statements of this approach to intellectual history, see, for example, Franklin L. Baumer, *Intellectual History and Its Problems*, 21 J. MODERN HIST. 191 (1949); John C. Greene, *Objectives and Methods in Intellectual History*, 44 MISS. VALLEY HIST. REV. 58 (1957). For examples of the approach, see, HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880S* (1950); STOW PERSONS, *AMERICAN MINDS: A HISTORY OF IDEAS* (1958). Perhaps most influential in bringing the term “formalism”—and an intellectual history approach—into the writing of American legal history was Morton G. White’s book, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949).

of legal thought, including the work of the courts generally and the Supreme Court in particular.

Whatever the reasons for its persistence, however, the concept of “formalism” should now be retired. The turn-of-the-century Court was a highly instrumentalist and value-driven institution. It may have been—and, indeed, was—a distinctive Court, but its distinctiveness did not lay in any commitment to, or practice of, “formalism” as a method of decision making.¹¹⁷

C. Race, Corporations, and the Turn-of-the-Century Turns

Friedman's treatment of the late nineteenth and early twentieth centuries is particularly important, for his emphasis on the Court's growing sensitivity to popular opinion suggests that the justices recognized the close relation that existed between their economic regulatory decisions and their decisions involving racial issues. Although doctrinally unrelated and presenting formally different constitutional questions, those two lines of decisions were in fact mutually supporting and defined the dominant practical achievements of the turn-of-the-century Court. Indeed, they undermine even further the idea that the Court was “formalist” in its decision-making.

In the aftermath of the Civil War and early Reconstruction, Friedman explains, the Court “now understood the value of having a constituency,” and it acted accordingly.¹¹⁸ Abandoning the goals of Radical Reconstruction and “bowing to public sentiments” on the race issue was “easy enough” and, in any event, may have accorded with the justices' private wishes.¹¹⁹ “The decisions in favor of business and property rights, on the other hand, were the product of a deliberate effort by the country's rulers to pander to the captains of industry.”¹²⁰ The Court understood that it needed the backing of “those with the political power to protect it.”¹²¹ Those two paramount lines of decisions, then, reflected the Court's bow to powerful external forces, general public opinion on racial matters and a political and corporate elite on economic regulatory matters. Thus, Friedman argues, the Court's behavior in both areas was far more calculated and policy-based than many scholars have recognized or acknowledged.

117. The Court's “style” of reasoning may, of course, have been relatively formalistic. See *supra*, note 110. For discussions of late nineteenth- and early twentieth-century American legal thought, see STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* (2000); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* (1998).

118. FRIEDMAN, *supra* note 1, at 138.

119. *Id.*

120. *Id.*

121. *Id.*

Equally important, Friedman implies—if he does not quite assert—that the Court’s race decisions were necessary to ensure the success of its economic regulatory decisions. The latter decisions, after all, were highly controversial, and they largely established the agenda of national political and constitutional debate that dominated the next half century. Contemporary Progressive critics leveled grave accusations against the Court’s reasoning, competence, and alleged social biases, while muckraking journalists, labor leaders, social workers, plaintiffs’ attorneys, and prominent political figures rallied the voting public against the Court’s anti-regulatory decisions.¹²² As public opinion grew highly critical if not flatly hostile to the Court, both the Republican and Democratic Parties—as well as the Populist Party and two successive Progressive Parties—echoed the criticisms and proposed reforms that ranged from mild alterations to drastic reductions in the power of the federal judiciary.¹²³ In spite of those vigorous and extended efforts, however, the Court remained untouched—indeed, its jurisdiction was expanded in 1914—and the lower courts were subjected to nothing more than a handful of limited and relatively minor restrictions.¹²⁴

The Court remained secure from those extended assaults not only because it enjoyed the powerful backing of the nation’s propertied classes and because its critics were divided and uncertain.¹²⁵ It was also secure because it had given white Americans what they had most wanted on the race question, and it had thereby eliminated that galvanizing and explosive issue as a potentially destructive threat to its position and power. The Court’s acquiescence in the post-Reconstruction racial settlement, in fact, was likely essential to guarantee its position and generate the public support that was necessary to underwrite its bold and highly controversial assertions of judicial authority in economic regulatory matters.¹²⁶ No less pious a devotee than Charles Warren himself—the Court’s indefatigable defender—acknowledged that truth. Admitting that the “practical effect” of the

122. See, e.g., WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).

123. See, e.g., *id.* at 70-85, 110-54, 193-232, 285-312.

124. FRIEDMAN, *supra* note 1, at 184-86.

125. See *id.*

126. Indeed, it seems likely that the Court’s acceptance of the post-Reconstruction settlement was an essential prerequisite for that subsequent reshaping of federal law. Had the Justices sought to deny the constitutional terms on which the North and South reunited after Reconstruction, their actions would have provoked bitter and widespread opposition that would have severely undermined the Court’s political support and institutional authority. That, in turn, might well have dissuaded or prevented it from adopting the increasingly expanded supervisory role it began playing in other areas of American politics and government in the late nineteenth and early twentieth century.

Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts”*, 81 N.C. L. REV. 1927, 2033 (2003).

Court's race decisions "was to leave the Federal statutes almost wholly ineffective to protect the negro,"¹²⁷ Warren accepted that result with complete satisfaction:

[T]here can be no question that the decisions in these [race] cases were most fortunate. They largely eliminated from National politics the negro question which had so long embittered Congressional debates; they relegated the burden and the duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.¹²⁸

The decisions were "fortunate," in other words, precisely because they secured and strengthened the Court's position and authority across the board.

While Friedman would surely reject the claim that the Court's race decisions were "fortunate," he does seem to agree that those decisions strengthened the Court politically, and he at least implies that they helped ensure the public support necessary to sustain the Court against those who attacked its economic regulatory decisions. In fact, he seems to state that view at one point with surprising bluntness. "By abandoning blacks and embracing corporations, the Court rose to the pinnacle of power."¹²⁹

Friedman, however, remains vague on one issue, the extent to which the justices themselves shared the racist attitudes common to most white Americans. He readily acknowledges that Reconstruction "crumbled" in part because "[r]acism clearly showed its ugly face in the North and South alike,"¹³⁰ and that "some of the justices, for a variety of reasons, would have been happy to abandon Reconstruction."¹³¹ At one point he even suggests that the Court's decisions "bowing" to popular racial attitudes "may well have accorded with the proclivities of a majority of the justices."¹³² Still, he avoids directly attributing racist views to the justices or suggesting that their decisions were actually guided in some part by racist attitudes. Thus, he readily accepts the claim that the justices bowed to racist pressures,¹³³ but he

127. 3 WARREN, *supra* note 3, at 326.

128. *Id.* at 330. Indicative of his attitude, Warren acknowledged that the Court was abandoning blacks to the control of the states, *id.* at 326-30, but was nonetheless still able to praise it as the trustworthy guarantor of constitutional rights. *See id.* at 330. He declared proudly that "the Court showed itself as determined to defend the rights of an individual, when trespassed upon by an officer of the National Government, as when injured by the action of a State officer," *id.* at 393. He apparently reconciled those statements by embracing the view of the "eminent Southern lawyer," whom he quoted: "What gave satisfaction to the South and strength to bear the affliction in which they found themselves was the determination of the Court to maintain the true character of the Government." *Id.* at 330.

129. FRIEDMAN, *supra* note 1, 138.

130. *Id.* at 148.

131. *Id.* at 457 n.97.

132. *Id.* at 138.

133. *See id.* For the view that the Waite Court did not "bow" to racism, see Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT.

side-steps the question whether some or all of them actively shared those racist attitudes and shaped their decisions accordingly.¹³⁴

Friedman's reluctance to address the question of judicial racism is understandable.¹³⁵ It undoubtedly reflects the awkwardness and difficulty of the issue, and it may also reflect the intense desire of legal scholars to preserve an idealized image of the Court and its justices. It is deeply comforting, after all, to believe that the United States Supreme Court operates with sufficient institutional purity and rectitude that certain kinds of failings are virtually impossible. Thus, the justices could not have shaped the law to accord with their own racist attitudes, some legal scholars seem to believe, because Supreme Court justices could not conceivably have done that sort of thing.¹³⁶

But why not? Racism in the late nineteenth and early twentieth centuries was not hidden, illegal, dishonorable, scandalous, unpopular, or generally considered immoral. Rather, it was openly announced, widely shared, frequently voiced, scientifically justified, morally acceptable, and often religiously sanctioned.¹³⁷ Indeed, racist attitudes were frequently advanced

REV. 39, 41. Benedict qualifies his view by acknowledging that after 1888 the subsequent Fuller Court did reflect racist attitudes. *See id.* at 40, 78.

134. For the claim that the courts were not themselves racist, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 186 (1988). I should note that in a footnote Friedman suggests that in a prior work I pressed too hard in arguing that the Court's late nineteenth-century decisions were influenced by the racism of the justices. FRIEDMAN, *supra* note 1, at 457 n.97.

135. Scholars might well shy away from the issue for several reasons. First, it may seem indelicate to make such accusations against honored members of the nation's highest bench or unfair to impugn them on the basis of the very different moral and cultural standards that subsequent generations embraced. Second, the issue presents evidentiary problems. While there is overtly racist language in some Court opinions and substantial evidence showing that various individual justices held racist views, those facts arguably do not prove that racist attitudes "caused" the Court's decisions. Those who wish to defend the Court from such claims can usually, if not invariably, find some theory to explain those decisions on doctrinal grounds. Third, and perhaps most important, showing that some of the Court's decisions were inspired by such improper—and now dishonored—attitudes could raise a host of embarrassing questions about the continued legal authority of some basic constitutional and statutory decisions that are now woven into the fabric of American law. *E.g.*, Purcell, *supra* note 126, at 2056-59.

136. The denial of racist motivations on the Court reminds of the attitude of some white historians toward the long-standing and, until recently, long-dismissed claim that Thomas Jefferson carried on a long-term sexual relationship with his slave, Sally Hemings. Such a relationship, they seemed to believe, was flatly impossible for the simple reason that Jefferson was simply not the kind of man who could have done that sort of thing. *See* ANNETTE GORDON-REED, *THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY* (1997).

137. The literature on late nineteenth- and early twentieth-century racism is immense. *See e.g.*, THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 253-86 (1964); STOW PERSONS, *AMERICAN MINDS: A HISTORY OF IDEAS* 276-97 (1958); LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* (1998); MATTHEW FRYE

publicly on the precise ground that recognition of racial differences was necessary for the protection and well-being of the “inferior” and “uncivilized” races themselves, and those who advanced such ideas often claimed to be acting from the highest and noblest of motives.¹³⁸ Such attitudes, moreover, not only animated domestic politics but also helped shape the nation’s foreign policy and territorial expansions after the Civil War.¹³⁹ If late nineteenth-century judges were white males of their time, as all of them surely were, how could at least most of them not have shared those pervasive racial attitudes and assumptions?¹⁴⁰ And if judicial decisions are

JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998); Kornel Chang, *Circulating Race and Empire: Transnational Labor Activism and the Politics of Anti-Asian Agitation in the Anglo-American Pacific World, 1880-1910*, 96 *J. AM. HIST.* 678 (2009). Anyone doubting the extent to which racism suffused the American mind need only consider popular movies that were made from the turn of the century into the 1940s. *See, e.g.*, THOMAS CRIPPS, *SLOW FADE TO BLACK: THE NEGRO IN AMERICAN FILM, 1900-1942* (1977); SUSAN COURTNEY, *HOLLYWOOD FANTASIES AND MISCEGENATION: SPECTACULAR NARRATIVES OF GENDER AND RACE, 1903-1967* (2005); CEDRIC J. ROBINSON, *FORGERIES OF MEMORY AND MEANING: BLACKS AND THE REGIMES OF RACE IN AMERICAN THEATER AND FILM BEFORE WORLD WAR II* (2007). Indeed, as one scholar has written, “even as American propaganda castigated Axis racism [during World War II], the traditional stereotypes of the movie black failed to disappear.” DANIEL J. LEAB, *FROM SAMBO TO SUPERSPADE: THE BLACK EXPERIENCE IN MOTION PICTURES* 119 (1975). Perhaps even more indicative of the nation’s pervasive popular racism was the place and image of public racial lynchings in American culture. *See, e.g.*, AMY LOUISE WOOD, *LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890-1940* (2009).

138. In the end, [Woodrow] Wilson, like Theodore Roosevelt, shared the Anglo-Saxons’ assumption that they had the right, even responsibility, to rule and raise up the lesser peoples of the non-European world. Latin Americans, Asians, Slavs, and Africans were, as Roosevelt phrased it, in “the childhood stage of race development.” Wilson used almost the same language, saying they were “in the childhood of their political growth.” The idea of the civilizing mission and the language of uplift had progressive connotations at the time

THOMAS BENDER, *A NATION AMONG NATIONS: AMERICA’S PLACE IN WORLD HISTORY* 236-37 (2006).

139. During the war to control the Philippines, American soldiers used racial epithets regularly to describe the native population. “‘The country won’t be pacified,’ one told a reporter, ‘until the niggers are killed off like the Indians.’” WARREN ZIMMERMANN, *FIRST GREAT TRIUMPH: HOW FIVE AMERICANS MADE THEIR COUNTRY A WORLD POWER* 406 (2002); *see* PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES* (2006); AMY KAPLAN, *THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE* (2002). It is important to note that racist attitudes also strongly supported sharp limits on American territorial expansion. *See generally* ERIC T. L. LOVE, *RACE OVER EMPIRE: RACISM AND U.S. IMPERIALISM, 1865-1900* (2004).

140. “Racism” obviously comes in a variety of forms, exists in varying degrees, and prompts varying types of policy goals. *E.g.*, LOVE, *supra* note 139 (arguing that white racism was a stronger force for limiting American overseas territorial expansion than for encouraging it). Thus, there could have been—and surely were—different types and degrees of “racism” represented on the late nineteenth-century Court. *See, e.g.*, Purcell, *supra* note 126, at 2014-28.

shaped by the personal views and values of judges¹⁴¹—as almost everyone, however grudgingly, seems to acknowledge¹⁴²—how could those racial views not in some part have animated the Court’s decisions?¹⁴³

The reason commonly advanced for denying the direct influence of racism—beyond, of course, the charge that the justices simply surrendered to public prejudices they did not share—is that the Court’s decisions followed traditional principles and established canons of construction. As a matter of history, however, that explanation is grievously inadequate. First, those “traditional” principles and established canons had meanings that were in most cases so rubbery and manipulable that the Court could have fairly interpreted them in a variety of different ways.¹⁴⁴ The justices’ interpretative discretion was broad, and their specific rulings on race were not, in fact, compelled by any authoritative legal source. Second, as a matter of historical explanation, the fact that the Court constructed doctrinal arguments supporting its conclusions is not by itself persuasive. Creating and offering doctrinal justifications is the Court’s standard method of operation, and the justices could and would have constructed such justifications for whatever decisions they made. Thus, their justifications tell us little or nothing necessarily about the driving substantive purposes and motives that led them to their decisions. Doctrinal justification is simply not historical explanation.¹⁴⁵ Third, *The Slaughter-House Cases* and other contemporane-

141. Needless to say, of course, they are also shaped by combinations of many other social, cultural, political, professional, and institutional factors, including formal “legal” sources.

142. As then-Judge Antonin Scalia acknowledged shortly before he was nominated for a place on the Supreme Court, his intellectual life was “not separate” from his religious life, and his legal views were “‘inevitably affected by moral and theological perceptions.’” Corey Robin, *Get Over It!*, LONDON REV. BOOKS, June 10, 2010, at 29, 31 (reviewing JOAN BISKUPIC, *THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA* (2009) (quoting Justice Antonin Scalia).

143. One might make a plausible, if still qualified, defense of the Court by noting that it did on some occasions attempt to counter or moderate racist policies and that, consequently, it was at least “less racist” than most other governmental institutions and white-controlled business enterprises and private associations. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Reynolds*, 235 U.S. 133 (1914); *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

144. On ambiguities in the “principles” of federalism and separation of powers, see, for example, EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* 17-37 (2007). On the meaning of the Reconstruction statutes and amendments, see, for example, MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

145. This is not to deny the shaping and channeling influence, or the sometimes decisive significance, of doctrine in the Court’s decisions. It is only to say that the actual impact of doctrine on any particular decision is a contingent historical fact that can be evaluated only in specific situations and contexts. Needless to say, the role doctrine plays in the

ous decisions¹⁴⁶ stressed the fact that the unquestioned purpose of the Fourteenth Amendment was to protect African-Americans, and it was that explicit purpose that the Court refused to enforce and then, in effect, bluntly rejected.¹⁴⁷ The justices understood full well what the Reconstruction amendments and statutes were designed to accomplish. They simply refused for the most part to effectively honor that purpose.

Finally, once Reconstruction had ended and its legal achievements had been rendered useless to African-Americans, the Court began a vigorous expansion of national legislative and judicial power. It restricted the powers of the states sharply and in a variety of ways; it broadened across the board the reach of federal statutory, judge-made, and constitutional law; and it expanded the jurisdiction and authority of the federal courts to enforce both those new limitations on the states and those new mandates of federal law.¹⁴⁸ Thus, the Court's commitment to the "traditional" constitutional principles that had supposedly compelled its earlier racial decisions suddenly withered and lost their commanding power when the Court was asked to protect national corporations rather than African-Americans. In the two areas the Court simply adopted different substantive policies, disclaiming the propriety of acting in one area while asserting it vigorously in the other.

Thus, it seems clear that it was social motives, not legal principles and doctrines, that shaped the Court's decisions in the late nineteenth century. Further, as a matter of historical understanding, it seems impossible to believe that shared racist assumptions among some or all of the justices were not integral components of those social motives. As Friedman notes, "justices are only human."¹⁴⁹

D. History and Theory

Consideration of those three historical issues confirms Friedman's basic thesis, even if it also suggests some of the complexities involved in attempting to specify the precise influence that public opinion exerted on the Court at any given time. The first issue, the significance of "federal ques-

Court's work differs from the generally more important role it plays in the work of lower courts. See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURT OF APPEALS* (2007); Donald R. Songer, Martha Humphries Ginn, & Tammy A. Sarver, *Do Judges Follow the Law When There is No Fear of Reversal?*, 24 *JUST. SYS. J.* 137 (2003).

146. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 51 (1873); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879).

147. The Court began hinting at a different and broader application of the amendment in, for example, *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886), and *Mugler v. Kansas*, 123 U.S. 623 (1887), and it began using the amendment to protect corporations from state economic regulation in 1890. *Chicago v. Minnesota*, 134 U.S. 418 (1890).

148. See Purcell, *supra* note 97, at 942-60.

149. FRIEDMAN, *supra* note 1, at 374.

tion” jurisdiction, highlights the fact that social and political changes drive the Court to reshape the law to meet new political demands that arise out of changing social conditions. The second issue, the Court’s instrumentalism, downplays the role of formal doctrine and highlights the centrality of substantive policy choices in determining its decisions and shaping its doctrines. The third, the impact of racist attitudes and economic interests, illustrates the force of both popular and elite opinion in guiding those judicial policy choices. Each issue illustrates the fact that the Court is rooted in a complex and changing social context, and each suggests that public opinion has been and remains a pervasive—if vague, varied, and volatile—force in shaping its decisions and channeling the course of American constitutional law.

CONCLUSION

Given the argument and conclusions of *The Will of the People*, Professor Friedman may well find himself subject to criticism from those who advance some form of ideological originalism¹⁵⁰ or insist that the Constitution’s meaning is clear and unchanging.¹⁵¹ He may, too, be called a “relativ-

150. By “ideological” originalism, I mean those forms of originalism that purport to find relatively clear and specifically directive answers for contemporary constitutional questions, utilize highly selective or artificially narrow methodologies, ignore the complexities and uncertainties of human behavior and the inadequacies of the historical record, and draw conclusions that are for the most part at least compatible with their authors’ substantive policy views. The strength of such originalism lies in its claim of simplicity and authenticity and its pose of objectivity and deference, qualities that make it highly useful in arenas of sound-byte politics. An “originalist defense” is “easily digested by the public.” David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 801 (2008). See generally, Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009).

151. The late eighteenth century, the age of the Founding, Bernard Bailyn wrote, is a “lost, remote world.” BERNARD BAILYN, *TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS* 6 (2003). Most—perhaps almost all—scholars and judges (myself and, I am confident, Professor Friedman included) are “originalists” in the sense that they accept the idea that the Constitution’s text is the essential starting point for analysis and that the writings of the framers and ratifiers are valuable sources that can aid in understanding, interpreting, and applying the Constitution. Most, however, also believe that those sources are usually of limited utility—especially in dealing with modern problems and most disputed issues involving the systemic relations between the levels and branches of American government—and that other considerations (such as judicial precedents, historical practices, structural considerations, changing social conditions, the needs of practical efficacy, and prevailing moral and ethical ideals) may be equally or more important in any particular interpretative task. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). The relative *de facto* significance and utility of textual and “originalist” sources is a matter that can only be determined on an issue-by-issue basis and only by careful, comprehensive, and broadly-informed historical study that recognizes both the complexity and difference of earlier periods from the present as well as the impact and significance of changes that have reshaped the nation and its government over time.

ist," a "nihilist," or perhaps even a constitutional apostate, one who rejects the very concept of limited government under a written constitution.¹⁵²

None of those charges would be true, of course, for Friedman is a committed moralist, a committed democrat, a committed legalist, and a committed constitutionalist. His project is simply—I should, of course, say "complexly"—to understand exactly how American constitutionalism functions, to explore its underlying dynamics, and to identify and probe its fundamental strengths and weaknesses. *The Will of the People* advances that most challenging project by illuminating the nature and operation of judicial review in American government, clarifying the complex and changing relationship between the Court and popular opinion, and advancing a provocative hypothesis about the working compromise on judicial review that Americans have seemingly hammered out over the course of more than two hundred years of self-government.

Perhaps most important, *The Will of the People* throws into sharp relief one overriding fact: No form of judicial idolatry, ideological originalism, or constitutional fundamentalism can capture the true values and dynamics of American constitutionalism. For well or ill, the future of both our nation and our Constitution lies not with pretend certainties or filio-pietistic myths but with the commitment and determination of "ourselves and our Posterity" to maintain a free, just, tolerant, well-ordered, and self-governing society.¹⁵³ And, if Americans today do not properly nourish, protect, and educate that Posterity—and bequeath to it a safe, secure, and hopeful future—we will not have fulfilled the trust imposed on us to preserve and pass on our invaluable but fragile experiment in constitutional self-government. *The Will of the People* teaches a fundamental lesson, that the future of our constitutional system as well as our national life lies "not in our stars but in ourselves."¹⁵⁴ It is a sobering, perhaps unnerving, lesson, but we should be deeply grateful to Professor Friedman for teaching it so effectively.

152. See, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1586-90 (2004) (criticizing views similar to Friedman's put forth in Robert Post, *Foreward: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4 (2003). "Post's jurisprudence of constitutional culture is a jurisprudence of extreme constitutional relativism. . . . [W]e think [Post's view] represents the repudiation of law as a concept distinct from politics." *Id.* at 1590.

153. U.S. CONST. pmbl.

154. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR*, act 1 sc. 2, ll. 147-48 (Folger Shakespeare Library 1992).