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RESPONDING TO THE WILL OF THE PEOPLE: AN INTRODUCTION TO A SYMPOSIUM IN REACTION TO BARRY FRIEDMAN’S BOOK

Glen Staszewski*

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Constitutional theorists have struggled for many years with the legitimacy of allowing unelected judges to invalidate the policy decisions of elected representatives on constitutional grounds. While legal scholars have been obsessed with the countermajoritarian difficulty that is allegedly posed by judicial review in a democracy, political scientists have sought to explain what motivates judicial decision-making in the absence of meaningful legal constraints. The leading factors political scientists have identified include the partisan affiliations of the justices, their personal policy preferences, and occasional concerns about the institutional interests of the judiciary. Not only are these findings difficult to square with traditional conceptions of the rule of law, but they would appear to exacerbate the countermajoritarian difficulty given the life tenure and unelected status of federal judges.

Professor Barry Friedman’s comprehensive examination of the history of the relationship between the Supreme Court and public opinion, The Will of the People, challenges important aspects of the conventional wisdom in law and political science. Friedman contends not only that the public supports the institution of judicial review, but also that, “[o]ver time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values.” If it is true that the Court’s decisions ultimately reflect the will of the people, then the democratic legitimacy of judicial review can no longer be so easily disparaged on the grounds that the practice is “countermajoritarian.” Moreover, if the justices are compelled to reach decisions that are consistent with the will of the people, they are subject to a meaningful constraint that may dissuade them from voting based solely on partisan

* A.J. Thomas Faculty Scholar, Associate Dean for Research, and Associate Professor of Law, Michigan State University College of Law. This Symposium benefitted from the contributions of many people. I would especially like to recognize the outstanding work of Megan Hard, George Howell, Elinor Jordan, Salina Maxwell, Jeff Rector, Sally Rice, Zachary Risk, and Carrie Waggoner. I would also like to thank Barry Friedman and the rest of the Symposium participants for devoting their considerable talents, efforts, and insights to this project.

or ideological grounds, even if the law does not provide definitive answers to constitutional questions. Friedman, therefore, ultimately concludes that the “threat” of judicial review to American democracy is overstated, and that we should be more concerned about the Court’s ability to fulfill its “hope” of protecting the fundamental rights of minorities: “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.”

William Novak points out in his contribution that The Will of the People “has been widely noted and much discussed, including an enviable full-page review in the New York Times calling it both ‘authoritative’ and ‘riveting’ and praising “the detail and breadth of its historical canvas.” Moreover, in the world of legal blogs, there seems to be little question that Friedman’s work is widely considered one of the most important books of the past year. If law professors had a version of the academy awards, The Will of the People would undoubtedly be nominated for “best picture.” One thing that all of the participants in this Symposium agree upon is that the book is the product of tremendous effort, and that it is an incredibly ambitious and important contribution to the literature on the Supreme Court and the American Constitution.

As a study of the history of the relationship between the Supreme Court and public opinion, Friedman’s book is a multi-disciplinary blend of history, political science, and legal scholarship. In my view, he should be given a great deal of credit for taking on a major project that cuts across at least three disciplines. One of our primary goals in organizing this Symposium was to respond to The Will of the People from a range of disciplinary perspectives. We are fortunate to have brought together a talented group of scholars of constitutional theory, American constitutional history, comparative constitutionalism, and law and politics to react to Friedman’s book. In my view, Friedman should also be given a great deal of credit for self-consciously exposing his work to critical scrutiny from experts in each of these various disciplines. Indeed, the contributions that follow provide no shortage of critical scrutiny, as well as praise and respect for his book.

The Symposium begins with contributions from three prominent constitutional theorists. Rebecca Brown points out that most of the political efforts to control the judiciary throughout American history that Friedman so richly describes were ultimately unsuccessful. Instead of demonstrating that the American people “stand ready to pounce” if the Court “steps out of line,” Brown suggests that these events more plausibly demonstrate a public

2. Id. at 373.
commitment to judicial independence: “We believe that in the long run we as a democracy are better off having a court whose job it is to resolve foundational questions free of popular pressure, and we will sacrifice short-term victories in order to preserve the institution.” She claims that the Court’s decisions correspond with social practice over time because its “interpretive practice follows the guidance of the principled constitutional theorists in reading constitutional provisions in such a way as to incorporate judgments about what liberties and what constraints we as a people are committed to.”

She therefore concludes that “Friedman’s exposition of American practice over the centuries . . . serves as a dramatic refutation of” originalism. By Brown’s account, however, judges are not political actors motivated by self-interest to follow public opinion as a replacement for constitutional interpretation, but rather they are independent arbiters of the principles to which the American people have committed themselves, who wisely view public opinion as an appropriate element of principled constitutional interpretation.

Neil Siegel describes Friedman’s thesis “that the Court’s decisions on socially salient issues tend to come into alignment ‘over time’ with popular preferences,” and explains that one of the implications is that “the actual constitutional views and visions of the present members of the Court are of quite limited significance.” Siegel observes that, “[a]t bottom, The Will of the People offers a kind of Coase Theorem for constitutional theory: Regardless of the way the Court interprets the Constitution and initially assigns constitutional entitlements, Americans will eventually bargain their way toward an interpretation that reflects their considered judgment as a people.”

Siegel offers “some reasons to doubt that the substantive visions of the justices themselves are as relatively inconsequential as Friedman seems to believe.” Specifically, he points out that the Court frequently shapes public values, and many of its controversial decisions address matters that are the subject of persistent disagreement. The result is a broad range of reasonable, irreconcilable disagreement within which the justices will be relatively free to operate.” Siegel concludes that “the countermajoritarian difficulty is not a puzzle that can be solved” because “[a]s long as the Court affects final outcomes one way or another, the question of authori-
ty that the countermajoritarian difficulty raises will continue to require an answer."\(^{15}\)

Lawrence Solum identifies and evaluates the positive and normative claims of *The Will of the People*.\(^{16}\) As a positive matter, Solum suggests that the subtitle of the book might have been: "How Popular Opinion Controls the Supreme Court and Determines the Content of Constitutional Law."\(^{17}\) He points out, however, that positive legal theories generally seek to "provide causal explanations for particular legal events or general event types,"\(^{18}\) and that "*The Will of the People* is a causally committed historical narrative."\(^{19}\) Solum asks whether historical narrative can provide "good and sufficient reasons for the acceptance of causal claims,"\(^{20}\) and he concludes that although "Friedman's narrative is suggestive," it "falls short of providing good and sufficient evidence for our acceptance of his broad causal claims, because it lacks a rigorous account of causal mechanisms and empirical confirmation of their operation."\(^{21}\) As a normative matter, Solum suggests that the subtitle of the book might have been: "Why Popular Opinion Should Influence the Supreme Court and Ought to Determine the Meaning of the Constitution."\(^{22}\) He contends that Friedman implicitly makes normative claims "about the nature of a democratic people and the capacity of democratic will formulation to confer legitimacy on constitutional practice," as well as the superiority of living constitutionalism over originalism.\(^{23}\) Solum evaluates these alleged normative claims, and concludes that they are not well-supported or persuasively established by Friedman's historical narrative.\(^{24}\)

After responding to *The Will of the People* from the vantage point of constitutional theory, the Symposium provides reactions from two eminent scholars of American constitutional history. William Novak points out that Friedman's book is part of a broader explosion of constitutional history that is being produced by law schools and political science departments.\(^{25}\) As a professional historian, he suggests that it is incumbent upon all practitioners of the craft to think seriously about what they are doing and not doing, to be explicit about what they are doing and especially

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15. *Id.* at 595.
17. *Id.* at 598.
18. *Id.* at 599.
19. *Id.* at 600.
20. *Id.* at 601.
21. *Id.* at 609.
22. *Id.* at 598.
23. *Id.* at 611; see also *id.* at 610-21.
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how they are doing it, and to try to raise the bar generally for the practice of history in law.\textsuperscript{26}

He therefore evaluates Friedman's work pursuant to the standards of "three entirely different styles and methods of legal-constitutional history: 1) synthetic or narrative constitutional history; 2) the new socio-legal history; and 3) conceptual or analytical legal history."\textsuperscript{27} Novak explains that narrative synthesis is "[t]he oldest kind of constitutional history in the United States,"\textsuperscript{28} which focuses on telling the whole story rather than the parts, and is necessarily restricted to relatively prominent figures and events.\textsuperscript{29} Novak concludes that "Friedman's book succeeds admirably as a one-volume narrative history of U.S. Supreme Court judicial review."\textsuperscript{30} He claims, however, that while the limitations of narrative synthesis have led most professional historians to abandon this style or method, "legal scholars and political scientists have pushed forward with narrative syntheses of United States constitutional history with increasing abandon."\textsuperscript{31} Novak describes the new socio-legal history that is currently favored by professional historians and the conceptual or analytical legal history that likely reflects the wave of the future, and he opines that the Will of the People is markedly less successful when evaluated pursuant to those standards.\textsuperscript{32} Indeed, Novak concludes his contribution by expressing a concern that

traditional narrative syntheses not only do not help unpack and scrutinize the diverse historical practices and social contexts and processes that give meaning to ideas like popular sovereignty and democracy as they develop over historical time, but that they actually work to continue to obscure them, thus giving comfort to their enemies.\textsuperscript{33}

This leads Novak to convert his "simple book review" into a more general critique of "a rising tide of whig history if not constitutional theology in American public law," which produces stories that involve "not so much the critical scrutiny of the past but 'the ratification if not the glorification of the present’ constitutional order of things."\textsuperscript{34}
Edward Purcell points out that *The Will of the People* differs from most traditional constitutional law scholarship because instead of focusing on the justices, theories of jurisprudence or constitutional interpretation, or for that matter, the text of the Constitution or legal doctrine, Friedman relies on the methods and insights of history and political science to develop "an honest understanding of the evolving de facto relationship between public opinion and the Supreme Court’s distinctive practice of judicial review." Purcell distinguishes Friedman’s book from Charles Warren’s classic study, *The Supreme Court in United States History*, on the grounds that Friedman heralds the views and values of the American people, rather than the justices, “as the ultimate constitutional authority and the key to the proper operation of the nation’s constitutional system.” Purcell concludes that Friedman’s view is “more acute and challenging,” and he identifies some of the lessons that follow from Friedman’s analysis of the relationship between the Court and public opinion, including the historical inaccuracy of originalism and the limitations of theories of regime politics, before considering other fundamental questions that Friedman’s book raises about American constitutionalism. For example, Purcell suggests that Friedman’s theory of constitutional dialogue could be understood “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.” Finally, Purcell discusses three specific issues that confronted the Court during the late-nineteenth and early-twentieth centuries, and concludes that they confirm Friedman’s basic thesis, even if they also suggest “some of the complexities involved in attempting to specify the precise influence that public opinion exerted on the Court at any given time.”

Because the United States is not the only contemporary democracy with a high court that engages in judicial review, the Symposium also responds to *The Will of the People* from a comparative constitutional perspective. Cliff Carrubba utilizes “a general theory of judicial influence first developed in the comparative courts context to evaluate the role of the Supreme Court in the 1800s.” In particular, he suggests that sovereign na-


36. *Id.* at 664.

37. *Id.* at 666.

38. *See id.* at 666-79.

39. *Id.* at 679.

40. *Id.* at 693; *see also id.* at 679-94.

tions “have the strongest incentive to create a common regulatory regime when the policies they wish to enact entail a collective action dilemma” for their constituent parts (such as the American states). Carrubba explains that the establishment of the American Constitution was consistent with this incentive structure, but that more is required to explain the creation of a federal judiciary with the power of judicial review. In addition to helping ensure that the states comply with federal law, Carrubba contends that “the Court plays a critical role by acting as a fire alarm and information clearinghouse,” which allows the states to achieve an optimal level of compliance with the rules of the regulatory regime. He claims, however, that “the influence of a court in this system is very selective” because it can only facilitate compliance with a common regulatory regime when the state governments want the regime’s rules to be followed. Carrubba examines Friedman’s discussion of the Supreme Court’s decisions from the founding through the Gilded Age to evaluate the plausibility of these claims, and he concludes that the Court’s performance is consistent with his predictions because most of its successes “were in helping resolve inter-state collective action problems,” whereas its efforts to exert influence in other areas with clear winners and losers were largely unsuccessful. Carrubba concludes that Friedman’s historical narrative contains parallels to the more recent experience of the European Court of Justice, which Carrubba has examined in other work.

Georg Vanberg points out that the flipside of Friedman’s claim that public opinion constrains the Supreme Court is that “public support for the Court also provides the Justices with leverage,” because it is politically costly for other branches to challenge or resist the Court’s pronouncements. Vanberg explains that “[a] comparative perspective readily suggests that this central point is not particular to the United States, but captures a more general feature of constitutional democracies,” and he proceeds to ask how high courts “achieve public recognition and a position of influence in the first place . . . ?” His answer is, in a word, “federalism.” Specifically, Vanberg claims that federalism “almost always ensures that there are parties who have an incentive to call on the constitutional

42. Id. at 702.
43. See id. at 703-04.
44. Id. at 705.
45. See id. at 707.
46. Id. at 712; see also id. at 707-12.
47. See id. at 713-15.
49. Id. at 718-19.
50. Id. at 718.
51. Id. at 721.
court to resolve (certain) constitutional questions. State governments attempting to assert themselves vis-à-vis the national government” and vice versa.\footnote{52} If neither side has the power to achieve dominance over the court, “each will prefer the more modest goal of keeping the court independent of the influence of other actors, that is, to defend the court’s institutional position in the face of attempts by other actors to bring it to heel.”\footnote{53} Vanberg contends that “given the right configuration of competing interests in a federal hierarchy—most obviously, opposition among state governments and the national government—the political struggles among other institutions is likely to provide a constitutional court with an environment in which it can—at least on occasion—assert its powers.”\footnote{54} He goes on to explain that “[t]he American and German experiences suggest that these struggles may be sufficient to get a constitutional court ‘off the ground’ even in the absence of widespread public support or attention.”\footnote{55} In the process, Vanberg shows how the tensions that arose out of political competition between the state and national governments helped to establish the authority of the constitutional court in Germany and the Supreme Court in the United States.\footnote{56}

The Symposium continues with contributions from several scholars who are interested in the intersection of law and politics, beginning with reactions to Friedman’s book from a couple of the leading political scientists on judicial politics. Anna Harvey points out that the historical narrative of The Will of the People strongly suggests that “the Supreme Court is extraordinarily responsive to the preferences of political majorities.”\footnote{57} She explains, however, that “Friedman’s narrative . . . leaves open the question of the source of this responsiveness.”\footnote{58} She conducts an independent analysis of “the Court’s decisions in cases involving the constitutional review of federal statutes from the Warren through the Rehnquist Courts” and reports that her analysis “does not support the claim that the Court responds to public opinion per se, independently of congressional preferences.”\footnote{59} Rather, Harvey reports that “the evidence supports the hypothesis that the Court responds to the institutional incentives created by congressional leverage over the Court.”\footnote{60} She therefore concludes that “[t]hese results should redirect our attention to the importance of institutional rules for incentivizing judges into responsiveness to majoritarian preferences.”\footnote{61}

\begin{itemize}
\item \footnote{52} Id. at 722.
\item \footnote{53} Id.
\item \footnote{54} Id.
\item \footnote{55} Id. at 722-23; see also id. at 723-27.
\item \footnote{56} See id. at 723-27.
\item \footnote{58} Id. at 729; see also id. at 730-31.
\item \footnote{59} Id. at 729; see also id. at 731-37.
\item \footnote{60} Id. at 729; see also id. at 731-38.
\item \footnote{61} Id. at 729, 732; see also id. at 737-38.
\end{itemize}
Kevin McGuire expresses his general admiration for The Will of the People, but he articulates several concerns with Friedman’s approach from the perspective of a political scientist. First, McGuire points out that the widespread conception of the United States as a popular democracy (as opposed to a republican form of government) is a relatively new phenomenon, and he suggests that differences in the prevailing understanding of the American government over time are relevant in evaluating Friedman’s analysis of the Court’s early years: “If the justices did not conceive of themselves as operating within the context of a democratic government, then one wonders just what would motivate the justices to consider mass opinion.” Second, McGuire describes the difficulties associated with Friedman’s effort to identify a coherent national opinion, particularly during this early period, and he claims that what Friedman documents primarily from newspaper coverage “could just as easily be interpreted as the Supreme Court’s interplay with elite opinion, which—depending upon the era or the specific legal issue—may not at all have aligned with the preferences of citizens more generally.” Third, McGuire discusses the shortcomings of Friedman’s method of focusing on specific cases “to draw more general inferences about the influence of mass opinion on the Court,” and he points out that most political scientists have eschewed this approach in favor of aggregating the justices’ decisions over time and testing “the impact of changing public preferences on the movements in the broad ideological output of the Court.” Finally, McGuire criticizes Friedman’s book for failing to specify “the precise causal mechanism by which public opinion constrains the judgments of the justices,” and McGuire offers “a number of ways in which to think about how public opinion may affect the Court, each of which requires a unique set of assumptions about the structure of governmental institutions and the motives of relevant actors.”

The final set of contributions to the Symposium involves efforts by legal scholars who are interested in the intersection of law and politics to build on Friedman’s work in a variety of ways. Amanda Frost accepts Friedman’s thesis “that the U.S. Supreme Court and the American people have reached a tacit agreement under which the Court may engage in judicial review as long as it never strays too far from mainstream public opinion,” and she asks “how to justify the continued existence of the Supreme

63. Id. at 744; see also id. at 743-47.
64. Id. at 747-49.
65. Id. at 749.
66. Id. at 750.
67. Id. at 752.
68. Id. at 752; see id. at 751-56.
Court in light of its evolution from ‘an institution intended to check the popular will to one that frequently confirms it.’ Frost seeks to gain purchase on this question and test Friedman’s dialogic theory of judicial review “by contrasting the constitutional decisions of the appointed, life-tenured judges of the federal courts with those of elected state court judges.” She briefly describes the empirical literature on this topic and reports that insulated judges “have greater leeway to flout majority preferences than those subject to periodic elections,” and while “federal courts have a long history of expounding on the meaning of the U.S. Constitution, state court judges are almost pathologically unwilling to engage in constitutional discourse, preferring instead to defer to the federal judiciary’s interpretation of the Constitution.” Frost suggests that the systemic differences between appointed and elected judges can potentially be explained by the fact that “even though federal judges are influenced by broadly held and sustained public sentiment, they are insulated from electoral politics and all the distortions of majority preferences that accompany elections.”

Corinna Barrett Lain points out that Friedman’s thesis is based largely on an external account of law that is independent of legal doctrine. Lain suggests that this thesis could be strengthened by explicitly recognizing that “sometimes—the relationship between the Supreme Court and majority will is so strong that it seeps into the doctrinal fibers of the law itself.” To this end, Lain canvasses a wide variety of areas where the Court explicitly relies on the position of a majority of state legislatures to determine the contours of constitutional law. She considers why the justices might find explicitly majoritarian doctrine attractive, and she suggests that the majority position

70. Id. at 758.
71. Id. at 759; see also id. at 760-64.
72. Id. at 764; see also id. at 764-68.
73. Id. at 773; see also id. at 768-69.
74. Id. at 759-60.
76. Id. at 776.
77. See id. at 777-86.
of the states provides a relatively objective and contemporary measure to
guide the Court’s discretionary judgment. Finally, Lain explains that
“even when the doctrine tells the Court to follow the majority position of
the states, the Justices’ view of what that position is may nevertheless be
affected by larger, nondoctrinal, social and political currents.” Accordingly,
she concludes that “in the end, it is still the case that the justices decide
questions of constitutional law the way they want to—and majoritarian
forces outside the law can affect how they want to rule.”

Lori Ringhand recognizes that “in contrast to most of the decisions is-
sued by the Court, a majority of Americans are aware of and have opinions
about the men and women who are nominated to sit on it,” and “public opi-
nion about the nominee has a strong influence on a senator’s vote for or
against the candidate.” She claims that “the confirmation process—or,
more precisely the confirmation process of nominees perceived as racial
outsiders—matters in part because such confirmations provide a high profile
arena in which we as Americans fight to constitute our national identity.”

Ringhand provides a detailed examination of the confirmation of Felix
Frankfurter, which involved the “first truly modern confirmation hearing,”
in addition to “a nominee who was perceived at the time as a racial outsid-
er.” She focuses on “the stories of the Americans who showed up at the
Senate Judiciary Committee hearing in 1939 to protest Frankfurter’s con-
firmation,” who believed that they were “fighting for the very soul of their
country,” and did so to a significant extent “in the language of race.”

Ringhand concludes that these stories illustrate “how constitutive of na-
tional identity the modern confirmation process has been since its very incep-
tion.” She then turns to more recent confirmations involving candidates
who were perceived as racial outsiders and shows “how the confirmation
battles that ensnared these nominees in many ways echoed, and in some
ways amplified, the debates about race and identity that were on such vivid
display in the Frankfurter confirmation.” She concludes with some

78. See id. at 786-89.
79. Id. at 789; see also id. at 789-93.
80. Id. at 793.
81. Lori A. Ringhand, Aliens on the Bench: Lessons in Identity, Race and Politics
from the First “Modern” Supreme Court Confirmation Hearing to Today, 2010 Mich. St. L.
Rev. 795, 796.
82. Id.
83. Id.
84. Id. at 797; see also id. at 797-825.
85. Id. at 797.
86. See id. at 825-33.
87. Id. at 797.
thoughts on “what the similarities—and differences—among these hearings
tell us about the role of such confirmations in our national discourse.”88

My contribution describes some of the conceptual difficulties and
measurement problems associated with the idea of “the will of the people.”89
I suggest that Friedman’s story could be reconstructed to stand for the prop-
osition that “the Court needs the support of powerful friends or allies” to
make bold or controversial decisions.90 I explain that “if the will of the
people cannot accurately be measured, and the Court needs the support of
powerful friends or allies, then the role of elected officials and other public
institutions in influencing constitutional meaning necessarily takes on in-
creased importance.”91 I describe recent scholarship by Bill Eskridge, John
Ferejohn, and others, which recognizes “that legislation and administrative
law perform important constitutional functions in the modern regulatory
state,”92 and that the Constitution and the institutions and norms established
by statutes and regulations have a reciprocal relationship.93 I claim that by
integrating “Friedman’s theory of constitutional dialogue with the lessons of
‘administrative constitutionalism,’ we can develop a better understanding of
the entire process of constitutional change.”94 After articulating the frame-
work for understanding the process of American constitutional change that
emerges from this exercise, I conclude by identifying the key questions that
are raised by this framework and discussing a few of its most important
implications.95

While the foregoing contributions are both rich and diverse, a number
of prominent themes emerged from the papers. For example, several partic-
ipants recognized the theoretical and practical difficulties of defining “the
people” and accurately measuring their will on the complex legal and policy
questions that are typically confronted by the Supreme Court. Several par-
ticipants wondered precisely what makes the Court follow the will of the
people and claimed that Friedman’s narrative did not (and perhaps could
not) establish the operative causal mechanisms. Given the Court’s leeway
to decide difficult constitutional questions in various ways, some particip-
ants doubted that Friedman has solved (or could solve) the countermajori-
tarian difficulty. Nonetheless, there was broad sympathy for the notion that
judicial review involves some form of dialogue between the Court and other
members of society. Moreover, several contributors agreed that Friedman’s

88. Id.; see also id. at 834-35.
89. See Glen Staszewski, Constitutional Dialogue in a Republic of Statutes, 2010
90. See id. at 847-52.
91. See id. at 851-52.
92. Id. at 852.
93. See id. at 852-67.
94. See id. at 867-70.
95. See id. at 870-75.
narrative powerfully demonstrates the inadequacies of originalism—at least as a description of how the Court has interpreted the Constitution over the course of our nation’s history. Most of the contributors were convinced by Friedman’s claim that the Court both reflects and shapes our evolving beliefs and attitudes about some of the most fundamental issues facing our society. Finally, and in a sense most fundamentally, the contributions to this Symposium illustrate the benefits and challenges of multi-disciplinary work and the importance of facilitating and maintaining a dialogue among scholars with different ways of studying our common interests and problems.

Barry Friedman’s response performs this task in a particularly trenchant fashion by addressing the strongest criticisms that are levied against his book by the contributions to this Symposium. He therefore focuses on “the sort of interdisciplinary endeavor the book represents” and claims that “when it comes to choosing and addressing the questions of academic study, a catholic approach is in order.” Rather than adhering to a single disciplinary approach or methodology, Friedman suggests that “we should be open to a variety of approaches, sensitive to what each can actually offer to the broader intellectual project.” Similarly, he claims that “normative work must respect the methodology and results of positive scholarship” and that normative and positive scholarship “must work synergistically as well.”

Friedman begins his response by describing “the making of The Will of the People” in some detail, and he observes that “our highest calling as academics is to follow the questions we encounter where they lead, doing our best to answer them,” which often means “spilling across disciplinary boundaries.” He proceeds to discuss “the ways of history,” because “The Will of the People is a historical narrative, albeit informed by political science, and aimed at answering a question critical in both law and poli-

97. Id. at 877-78. Friedman claims that “a few of the participants resisted the conclusions or implications of The Will of the People not on the basis of its argument or evidence there, but because of its methodology,” and explains that he therefore “decided to devote [his] remarks in response not to substantive objections, but to questions of methodology.” Id. at 884.
98. Id. at 878.
99. Id.
100. See id. at 879-85. By his account, Friedman started working on The Will of the People seventeen years ago. That means that he began working on the book in 1993, my first year as a student at Vanderbilt University Law School. Friedman was one of my professors at Vanderbilt (along with Rebecca Brown); and, indeed, I served as one of his early research assistants on (what ultimately became) this project. It gives me great pleasure to be able to say that I was there at both the beginning and the end of his work on this book.
101. Id. at 884.
In response to Professor Novak, Friedman expresses his thoughts on the sources and questions of history and the types of historical inquiry that have value, and he contends that, ultimately, "the test of history is whether it asks a meaningful question, and whether it employs the tools that address the question being asked in a way calculated to teach us something." Friedman also clarifies and defends his method of constructing "the will of the people." Specifically, he reiterates that "[p]ublic opinion is a collage of ever-shifting views," points out that the book provides "somewhat of a chronology of the many changing ways we have constituted ourselves as people over time," and explains the connection between his construction of "the people" and the history of the countermajoritarian difficulty as follows:

But here's the crucial point that critics of my construction of "the people" seem to miss (drum-roll please): those who leveled the countermajoritarian criticism of judicial review themselves constructed "the people" in all these different ways throughout time. And, as I discuss events and periods, my "People" are the very ones that the opponents of judicial review sought to construct. . . . The book has a variety of messages, but undoubtedly a prominent one is that the constructed "people" didn't always or actually oppose either the institution of judicial review, or the results, as has been claimed.

* * *

If anything, I'd have thought it would leap out that the "counter-majoritarian" difficulty is itself historically contingent in just these ways. As I hope TWOTP documents well, the claims against judicial review were products of their time. . . . Indeed, opponents of judicial review, rather predictably, constructed the "people" in opposition to the Court in ways that suited them best. What I try to show is that the "countermajoritarian" claim about judicial review was itself often overstated, either by questioning the construction of the "people," or by trying to measure popular views more accurately.

Friedman humorously suggests that instead of referring throughout his book to "the popular will," it may have been more accurate to refer to "the thing," or "the ever-changing and shifting thing against which judicial review is juxtaposed," or perhaps "[t]he Will of the People Who Others Claim Oppose Judicial Review," but he recognizes that these alternatives would have severely undermined the elegance of his narrative.

Friedman goes on to respond to the concerns raised by political scientists and others regarding the "causal mechanism" that motivates the claims

102. Id. at 885; see also id. at 885-96.
103. Id. at 893.
104. See id. at 893-96.
105. Id. at 894 (emphasis omitted) (quoting Friedman, supra note 1, at 17).
106. Id.
107. Id. at 894-95.
108. Id. at 895.
in The Will of the People and their skepticism that it is “the people” who are influencing individual Supreme Court decisions. Friedman explains that the book’s conclusion “doesn’t discuss one causal mechanism; it raises the possibility of several of them.” Given the limitations in our empirical knowledge, he reiterates that “[w]hat we know is tentative; it may amount to little more than an agenda for future research.” Friedman is adamant, however, that “there is a real need to understand how judicial review actually operates, and to stop simply saying trite things about it.” At the same time, Friedman contends that “[t]oo often, quantitative empirical work tends to lead to data-driven hypotheses, the maintenance of which requires blocking out the message of the real world.” For example, even in the absence of irrefutable empirical support, Friedman believes that “[t]he most likely causal stories about Court-politics interaction involve immediate reaction to individual Supreme Court decisions.” After all, his book “tells story after story in which it is the individual case, and the public reaction to it, that later affects decisions in the same area.” Once again, Friedman’s larger point is that history and quantitative empiricism both have their places—“the trick is to understand the strengths and limitations of any given method vis a vis the question one is trying to answer.” In short, history can help us to generate the most realistic or plausible hypotheses, while quantitative empiricism can help us to confirm or refute them.

Friedman goes on to explain that his book “was intended largely as a descriptive and positive project, one designed to call into question predominant understandings of how judicial review actually operates in the real world.” In particular, his two primary positive claims were that “over time the American people have acclimated themselves to the idea of judicial review” and that “the Court’s decisions on salient issues have tended to come into line over time with popular preferences.” Friedman acknowledges, however, that the book’s conclusion “offers a normative take on judicial review,” which is that its most important function “is to foster dialogue among the public about our constitutional commitments” and to rafify the consensus that ultimately emerges. Although the book endorses

109. See id. at 896-905.
110. Id. at 898.
111. Id. (quoting FRIEDMAN, supra note 1, at 373).
112. Id.
113. Id. at 900.
114. Id. at 903.
115. Id. at 904.
116. Id. at 897.
117. Id. at 905.
118. Id.
119. Id. at 906 (emphasis supplied) (quoting Siegel, supra note 9, at 594).
120. Id.
this function for judicial review, Friedman maintains that "the normative take in the Conclusion of TWOTP is hardly unfailingly rosy." \(^{121}\) Rather, Friedman explains that the book "seeks to place responsibility for the institution where . . . it ultimately rests, as must all institutions in a democracy: in the hands of that ineffable 'people.'" \(^{122}\) He also suggests that his conclusion "offers the beginning of . . . a far sounder critique of the institution of judicial review than the often unsubstantiated claims about the countermajoritarian difficulty; it points toward possible market failures, where the Court is still countermajoritarian in troubling ways." \(^{123}\)

After responding to a number of the points raised by the constitutional theorists, \(^{124}\) Friedman returns to William Novak’s concern that The Will of the People may serve as an apology for the existing status quo. \(^{125}\) In seeking to refute this criticism, Friedman distinguishes between the descriptive and the normative aspects of his narrative, and he reiterates the precise nature of his project and claims:

To return to where this response began, I was writing against a claim, omnipresent throughout American constitutional history, that the institution of judicial review was inconsistent with the popular will. What I set out to show—indeed, what I think I did show—is that over time public opinion, revealed by polls, and by events just like those highlighted by Rebecca Brown, have supported the institution. And, when there was serious opposition to those opinions in the court of public opinion, the decisions were in fact reversed by the Court. Not always immediately (see above). Often at cost (see above). But over time, on the salient issues, the American people have generally had their way.

Indeed, contrary to the book Novak seems to have read, the point of TWOTP was to empower democracy . . . [by placing] responsibility for our Constitution squarely where it belongs, on our own shoulders. . . . What TWOTP was all about was taking this juxtaposition of People v. Court, in which the Court somehow is said to always defeat the People, and suggest a counter-narrative: ultimately it is the People that must decide among and for themselves. \(^{126}\)

Regardless of the merits of the foregoing debates, I know that one of Professor Friedman’s goals in his recent work, and in writing The Will of the People in particular, was to bring scholars with similar interests and different perspectives together so that we could all learn from each other. This Symposium should guarantee that his book is a success on that level, as well as on many others. I have already learned a lot from Barry Friedman, \(^{127}\) and I have learned even more about our common interest in constitutionalism from all of the participants in this Symposium. I am grateful to all

\(^{121}\) Id.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) See id. at 907-16.
\(^{125}\) See id. at 916-20.
\(^{126}\) Id. at 919.
\(^{127}\) See supra note 100.
of them for contributing to this project, and I look forward to an ongoing constitutional dialogue.