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DISCIPLINE AND METHOD: THE MAKING OF THE WILL OF THE PEOPLE

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DISCIPLINE AND METHOD: THE MAKING OF *THE WILL OF THE PEOPLE*

Barry Friedman*

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The marvelous contributions to this fine symposium on *The Will of the People* suggest that there would be some value in discussing the sort of interdisciplinary endeavor the book represents. Choosing this as my theme means I will not be able to discuss or respond to all of the symposium papers, many of which ask fine questions—some of which I address elsewhere, or which I will leave (for now at least) to others.¹ As I explain below, the book was intended to reframe a conversation, not end it. The sym-

* Jacob D. Fuchsberg Professor of Law, New York University School of Law. I am grateful for the advice and comments of Anna Harvey, John Ferejohn, Rick Hills, Dan Hulsebosch, Andrew Martin, Kevin McGuire, Bill Nelson, Bill Novak, and Larry Solum. To thank Pieter de Ganon for his research assistance is to miss the extraordinary substantive help he offered. The work was supported by the Filomen D'Agostino and Max E. Greenberg Research Fund.

1. Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232 (2010).

posium papers—both those I discuss here and those I must neglect—have already fulfilled my wildest hopes in that regard.

Several participants effectively raised questions about the value or possibility of the sort of inter-interdisciplinary or multi-disciplinary project that is so common in the academia today, and of which *The Will of the People* is a part. I say “effectively,” because this was not their apparent intent. Rather, it was implicit in how they responded to *The Will of the People*. A few authors were keen to defend their disciplinary turf, either explicitly (by suggesting there was a right and a wrong way to tackle certain questions) or implicitly (by pursuing their own approaches with methodological single-mindedness). Sometimes the result was explicit criticism of the method in *The Will of the People*, but equally often it was tacit: sure Friedman did such and such, but now I’m going to tackle that question the *right* way.

While I endeavor to respond to a variety of specific questions about *The Will of the People*, the overarching theme is that when it comes to choosing and addressing the questions of academic study, a catholic approach is in order. We should not be too sure that any one methodology holds all the answers. If our focus is on actually answering—and indeed, asking—questions of import to society, as it should be, then disciplinary hegemony may be the wrong way to go. Rather, in an admittedly tough-minded fashion, we should be open to a variety of approaches, sensitive to what each can offer to the broader intellectual project.

My points are these: (1) the fundamental goal of the academic endeavor should be to answer questions that shed some light on our lives, our world, and our aspirations; (2) we should welcome whatever approaches address these goals; (3) the overarching questions should be ones of reliability and verifiability: can we understand how the scholar went about answering the question posed, and does the methodology seem designed to give us reliable purchase on that question? Disciplinary standards are important, but they should be a matter of sound practice, not fetish. Indeed, the disciplines, and those who work within them, should constantly be asking whether their methods are meeting the questions we academics collectively are trying to address, whether they are apt to the times and whether they can be improved.

If your interest is normativity, not method, don’t quit reading now. I’ll have plenty to say in a normative vein about judicial review by the end; more, indeed, than I say in the book. One of my points, however, is that normative work must respect the methodology and results of positive scholarship. These two must work synergistically.

I. THE MAKING OF *THE WILL OF THE PEOPLE*

I get asked all the time why I began this project, and how I went about doing it. As it happens, responding to the symposium papers requires a few words on this subject. Some already know the story; to the rest, what follows may be amusing if nothing else.

The *Will of the People* (*TWOTP*) was born of a question, one that plagued me from the time I first considered joining the academy. In 1982, I had just graduated from law school and was clerking for a judge, as many do, when it became apparent for personal reasons that I would need to spend the following year in Alabama. I wasn't sure what to do professionally during that year and was delighted when the University of Alabama School of Law invited me to join the faculty as what today we would call a VAP, or Visiting Assistant Professor of Law. I vividly remember how the tip of my "Number 2" pencil broke when the Dean, by telephone, offered me the then princely-seeming sum of \$30,000 a year to teach Constitutional Law! But for that fortuity, I might never have ended up in the academy, a career path to which I'd given little serious thought.

Preparing to teach that class, I quickly found myself preoccupied by what was then *the* pressing question of constitutional theory: what to do about the countermajoritarian difficulty? As with so many of us at the time, I was captivated by Alexander Bickel's and John Hart Ely's struggle to reconcile judicial review by unelected and seemingly unaccountable judges with the American practice of democracy.² And, as with so many of us, I too wanted to solve the deep underlying problem of judicial review. (Youth is entitled to its naiveté.)

I gradually came to realize, however, that I was beset by my own difficulty: the more I considered it, the less certain I became that there even was a countermajoritarian problem to solve, at least in its typically-stated form. To provide some context, I graduated from law school in 1982, at the height of the conservative Reagan Revolution. And what I saw happening in constitutional law appeared to me, as often as not, to reflect what was going on in the broader political world.

My problem with the countermajoritarian difficulty led to what one might call my tenure piece, *Dialogue and Judicial Review*.³ In that article, I argued that judicial decisions were not as inconsistent with "majority will" as typically believed. I relied primarily on polling data to show this. I urged far greater attention to the context of alleged conflicts between the courts and the ostensible majority will, pointing out—and this is something

2. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

3. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

that many working in this area overlook—that most exercises of judicial review involved neither legislation nor high-level executive decision-making, but review of the acts of bureaucratic or low-level executive officials—including police.⁴ I also made the point that the doctrine itself frequently incorporated more majoritarian standards.⁵ Rather than judges imposing their will on an unwilling majority, I suggested that what actually occurred on many issues was a dialogue between the popular will and the judiciary about the correct answers to constitutional questions.

With all the hubris of youth, I determined to write a book on the subject. I beat out a rough draft, but I didn't like it. I found myself unable to move forward because I found myself fixated—some might say “obsessed”—by a new version of my problem: why did so many obviously brilliant people think there was a countermajoritarian problem in the first place?⁶ So instead, I put down the book for what I thought at the time would be a few weeks of looking into the academic origins of the countermajoritarian problem. The rest, as they say, is history.

My first cut at an answer to the question was a two hundred plus page double-spaced manuscript entitled *The History of the Countermajoritarian Difficulty*. (Yes, I've always had a special gift for choosing a sexy title.) Readers of the monstrosity I'd produced emphatically urged me to immerse myself in the historiography of the periods I was discussing, something any good historian would have done at the outset. I didn't know much about “doing” history back then; I don't even know that I'd have said that was what I was doing. I simply had a question, and to answer it I traced references in primary literature back as far as they would take me, mining the footnotes as I went, occasionally stopping to do some additional hunting in period newspapers, journals, and congressional debates.

Once I immersed myself in the secondary sources, and did all the other things my readers told me to do, my two hundred page manuscript blossomed into five separate articles, “*The History of the Countermajoritarian Difficulty, Parts I-V*.” (Still with the fetching moniker!) As it happens, that oeuvre answered two separate questions that I found tangled together. The first was what had been my original subject of inquiry: why did the legal

4. Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427 *passim* (1996) (noting that the bulk of judicial review is conducted by federal trial courts reviewing “administrative agencies and street-level bureaucrats” not state or federal legislatures).

5. This is a project Corinna Lain has pursued wonderfully and thoughtfully, including her submission to this symposium. Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365 (2009) (arguing that the “evolving standards” doctrine—and the concomitant polling of states’ preferences—is not limited to the Court’s Eighth Amendment jurisprudence).

6. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V*, 112 YALE L.J. 153 (2002).

academy become obsessed with the countermajoritarian difficulty when it did? But I now had purchase on what became for me the far more interesting inquiry: what was the interaction between popular political forces and judicial review?

The answer to the first question, as it happens, is found in the period between the early 1930s and the 1960s. It was during this time that Franklin Roosevelt fought his great battle with the Supreme Court.⁷ Many academics sided with him, explicitly or tacitly—indeed, some of them, like Felix Frankfurter, had been concerned about judicial power since the Progressive Era. Roosevelt lost the battle over the Court-packing plan but won the war. Not only did the Court switch directions jurisprudentially in the following years, but Roosevelt got to appoint most of the justices as the ones on the Court when he first took office retired or died in. Once the Court was Roosevelt's, the justices slowly began to adopt a jurisprudence of individual rights.⁸ For some of the academics who supported Roosevelt, this presented the problem of the “double standard”: how to reconcile favoring judicial enforcement of individual rights while attacking judicial enforcement of economic rights? That, plus the Legal Realist movement, which flowered in the Progressive Era, led to skepticism about the basis for judicial decision-making and the power that justified it.⁹ And thus, the academic “countermajoritarian difficulty” was born.¹⁰

The four articles that preceded the final part of the “History of the Countermajoritarian Difficulty” told a very different story, however—one of constant interaction among the body politic over the question of judicial review. Parts I-IV recounted events including the fight over judicial power following the election of 1800, struggles between Andrew Jackson and the judiciary, the reaction to *Dred Scott*, the Progressive Era, and so on.¹¹ The overarching thesis of these articles emerged as I wrote them. In general, it was that the judiciary was accountable to the popular will, that when the public and its leaders attacked the Court, the justices tended to back off. This should sound familiar to any reader of *TWOTP*, but, as I will explain in a moment, I was at this point just working through the ideas.

One doesn't engage in the writing of history for over a decade without becoming interested in the discipline itself. Ultimately, I found myself reading many of the classics on historiography and theory of history—books by E.H. Carr, Arthur Danto, Peter Novick, as well as R.G. Colling-

7. *Id.* at 176-215.

8. *Id.*

9. *Id.* at 215-56.

10. This turn of phrase was coined by Alexander Bickel, *supra* note 2, at 16.

11. The only period woefully neglected in the articles but included in the book is the Gilded Age, a crucial period for American law and one to which many constitutional scholars unfortunately fail to pay enough notice.

wood. I even ended up writing several pieces about, or rooted in, the doing of history, including one puzzling over why so many in the legal academy were turning to history.¹²

As I worked my way through the historical material, however, it was politics that really began piquing my curiosity. One cannot, I submit, study over two hundred years of judicial review and not be struck by the persistent interaction between the political domain and judging. Though much energy has been expended prying the two apart, there is an undeniable relationship between law and politics. Obviously, I'm hardly the first to note this, but for me—combing through the material as I was—the relationship was hugely striking.

So, even while I was working on the articles in the series, I gradually turned to reading the work of political scientists. At first, it was the historical institutionalists, Mark Graber, Keith Whittington, Steve Griffin and the like. As with the legal (and other) historians, these folks warmly welcomed me to their community, their conferences and their projects. Then, it was the empiricists and the formal modelers. People who worked on law and courts, and who later became collaborators, like Lee Epstein, Andrew Martin, Jeff Segal, and many others. This work plainly informed some of my pieces of the “History of the Countermajoritarian Difficulty” series, and became central to *The Will of the People*.

I was well aware that I was not approaching these disciplines as would a graduate student with a reading list; rather, I was reading any and all material that related to and shed light on my project. I had plenty of intellectual insecurity about this. Bill Nelson, my dear colleague and a doyen of American legal history, suggested to me (reassuringly) that my unusual entry into the material might cause me to see things differently (in a useful way) than those with more formal training. At the same time, he was unrelenting in holding me to the rules of the craft, for which I will be forever grateful. Lewis Kornhauser, another colleague, an economist (and lawyer) by training, gave me some advice well worth passing on. He suggested that the best way to learn the tools of a new discipline if one is already mid-career is to pursue a specific question through the discipline, learning as one goes. So I immersed myself even more.

12. Barry Friedman, *Everyone's Doing Congressional History: Where Are the Historians?*, 24 SOC. SCI. HIST. 333 (2000) (arguing for greater participation by historians in analyzing legislatures and the laws they enact); Barry Friedman & Scott B. Smith, *The Seditious Constitution*, 147 U. PA. L. REV. 1 (1998) (arguing that a non-anachronistic historical interpretation of the Constitution must rest on *all* of U.S. history, not only the history of the Founding); Barry Friedman, *The Turn to History*, 72 N.Y.U. L. REV. 928 (1997) (reviewing LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996)) (analyzing the legal academy's renewed interest, in the 1990s, in using history to interpret constitutional law).

The result of reading the political science literature was a pair of pieces for very different audiences. I was struck by how much the political scientists had to say about judging and the extent to which the legal academy was unaware, if not impervious. *The Politics of Judicial Review*—though it had its own take on the question of constitutional judging—was meant to be a survey of the political science literature, introducing legal scholars to the wealth of material on judicial decision-making that bore upon judicial review.¹³ I was disappointed that despite the wealth of learning in political science, the questions that were being asked often shed insufficient light on pressing normative questions, and equally often showed insufficient attention to the methodology of law. *Taking Law Seriously*, which was addressed to political scientists, offered suggestions in doing work in the area of law and legal institutions.¹⁴

And it was only then, some twelve years in, that I finally felt ready to start the book.¹⁵

That was when disaster struck. I quickly realized that for all my research and attention to my particular question—how popular politics influenced constitutional judging—I lacked the broader knowledge that would turn discrete contests between the judiciary and political forces into an expository narrative that also contextualized those contests. In short, I could write about *Marbury v. Madison*, about *McCardle*, and about the New Deal fight until the cows came home. But the two or three pages that set the stage, that moved the story from time A to time B, that caught readers up on events that informed the specific struggle that was my focus, these were hard to write without the training of a real historian. So it was back to the books, and with that the constant pestering of my long-suffering historian and legal historian friends for all the secondary literature on these periods that would move my narrative and fill in the holes.

Five years after I started the first chapter, and seventeen years after I decided to go on that little hunt to learn how our obsession with the counter-majoritarian difficulty had begun, I finally had a book. Why all this detail about how I got there? Because I'm not sure I'd recommend this as a method. But then again, I'm not sure I wouldn't. I had a question, and I traveled where I had to in order to answer it. It is not where I imagined my scholarship going, but it has been an interesting journey and I have no re-

13. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 261, *passim* (2005) (asserting that “normative theory about judicial review limits [itself] by failing to come to grips with what positive scholarship teaches about the political environment in which constitutional judged act and about the constraints they necessarily face.”).

14. Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261 (2006).

15. People had suggested to me all the time that the various articles should be strung to together in a book, but that never seemed quite right. I seemed always to have more reading I wanted to do. And that reading made the book a very different project.

grets. I met terrific people, and learned a great deal. I had fun. At some level I feel our highest calling as academics is to follow questions wherever they may lead, doing our best to answer them. Often that means spilling across disciplinary boundaries. Questions just won't stay put in one discipline like they used to—or maybe it is today's scholars that won't stick to their disciplinary knitting.

People have asked all sorts of probing substantive questions about *The Will of the People*, but what struck me most about some of the comments at this symposium was an explicit or implicit discomfort with the mixed disciplinary methodology of the book, and what it had to say about the turf upon which some of the scholars had long lived. It was a terrific group of scholars, from three disciplines, whose work I admire deeply. They were unfailingly generous, more than I deserve. Their questions about the thesis were both provoking and wonderful to consider; each of these papers pushed the envelope in helpful ways; I learned a lot. But what tugged at me ultimately was an apparent unease among some with answering questions in a form unfamiliar to their own disciplines. It seemed as though 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, but because of its methodology. Indeed, they would often state explicitly that they were sympathetic to the thesis . . . only to argue with how I got there, or turn in another direction entirely or building upon it.

And so, I decided to devote my response not to substantive objections, but to questions of methodology.

As must be apparent by now, my own approach to scholarship is relatively catholic. When there is a question to be answered, any tool that is useful, that sheds light, should be used. And yet, as I attend the frequent workshops and conferences that are the life of an academic, I'm often struck by how eager many people are to defend their own methodology, and to criticize others as inadequate or inapt on methodological grounds alone. Despite my profound respect for the many academics who toil lonely in front of glowing screens, in archives, and before cluttered whiteboards full of math or outlines, encountering this sort of intellectual isolationism has always confused and even saddened me. I have never understood quite what was at stake in these disciplinary battles. Isn't the goal here to learn? And shouldn't we take that learning wherever we can get it?

To reiterate, there are good and bad ways to do anything. Try opening a tin can of sardines with a screwdriver and a hammer and you'll see what I mean. You can do it, but the sardines are going to be mush, and even that much success is hardly guaranteed. As academics, we should be tough when it comes to standards. But tough is asking whether the means used actually help get the job done, whether the answers are reliable. Too often, it seems to me, disciplinary turf wars cloud our judgment as to what precise-

ly any given method contributes to the ultimate question. Why can't we be friends?

I'm sure these longstanding concerns of mine overly influenced how I heard and read the papers at this wonderful and wonderfully engaging symposium. But when it came time to write, to respond, I found I wanted to move method to the forefront. I wanted to engage with questions that were asked of me about method. My own response, as often as not, was: are you so sure we don't learn something important by doing it in this different (even odd) way?

II. THE WAYS OF HISTORY

I'll begin with history, because at bottom *The Will of the People* is a historical narrative, albeit informed by political science and aimed at answering a question critical to both law and politics. Since publishing the book I've lived in dread of someone pointing out that I have the basic facts wrong. So far, so good. To that I owe the tireless attention of my many colleagues who vetted the manuscript and helped me fix what was wrong.

But William Novak did go after me about the historical methodology of *The Will of the People*. And "go after" is exactly the right way to put it. It is apparent from reading Novak's piece that he has at least one major axe to grind. I'm not sure it is really about my book *per se*. It's not clear Novak puts his finger on *anything* that is wrong in *The Will of the People*. It's not the book he'd have written, that much is apparent, but he doesn't really grapple with the thesis or the evidence that supports that thesis. Still, after reading his review I felt like I ended up with his axe in my head. I'd like to pull it out and examine it.

Novak claims to embrace the entry of lay historians into the discipline of history. "One of the things I admire about the profession of history," writes Novak, "is that there are no admission requirements."¹⁶ By the end, it is plain that this is irony; he admires no such thing. Rare is it to see such a virulent defense of disciplinary boundaries. Indeed, once he's through, it is unclear that even historians can live up to Novak's stringent standards. While I'm not sure I disagree with these as aspirations, and while I know full well from personal experience that he imposes them first and foremost on himself, Novak nonetheless is—in my view—far too quick to dismiss valuable methods that have important things to teach.

Stripped to its core, Novak seems to have three complaints about my methodology. I discuss each of them in turn.

16. William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623, 624.

A. The Sources and Questions of History

Novak's primary methodological complaint seems to be about how lay historians come to their sources, and what sources they use. In particular, as Novak tells it, one should not write history until one has spent years immersed in the primary sources, emerging only then to say something of broader generality. One should apparently never mine secondary sources for primary references. One should not perhaps even use research assistants.¹⁷

Tethered to this methodological complaint is a disagreement about the sorts of questions one asks. Apparently, the only "true" historical thesis is one generated solely from primary materials. Here is Novak:

Rather than working aimlessly (and for ridiculously long periods of time) in the raw material of the primary sources in order to figure out from the bottom-up what is going on at a particular moment (so as to generate a hypothesis to be further investigated and turned into a true historical thesis), recent constitutional histories often seem to work from the top-down, starting with a strong thesis then scouring the past for evidence specifically selected to bolster an original position.¹⁸

I beg to differ as to the questions, the origins of those questions, and how one obtains the sources to answer them.

I believe many scholars begin their projects by looking into something that tickles or troubles them about the world. In fact, I find Novak's notion of just randomly digging into primary materials to find a question to ask to

17. Novak aims some of this specifically at *TWOTP*, but some of it is simply inuendo.

[T]he key question is whether these references come from independent, bottom-up primary historical research or whether they themselves come top-down via previous references in other secondary histories. Given the scale and scope of Friedman's project, it is unlikely that he constructed his history by reading most of the historic New York Times (let alone the San Diego Union-Tribune) or scanning all of the debates of the Founding Fathers or even reading all of Lincoln's speeches or Frankfurter's letters. More likely than not, his primary citations and examples come from previous secondary references. Indeed, some influential constitutional synthesizers have been known to use research assistants precisely for the task of tracking down correct original footnote citations to the primary documents that they have already cited via the secondary literature—i.e., citing a primary documents with which they may not have ever come into actual physical contact for an argument that has already been made. From the perspective of professional socio-legal history, the dangers of this once-removed approach to building historical synthesis are readily apparent.

Id. at 17. For what it's worth, he's partly right and partly wrong. As the narrative in Part I makes clear, this isn't how I started or pursued the project, which initially was done almost entirely with primary sources—albeit traced back through the footnotes of other primary sources, along with additional research. But along the way I also mined secondary sources to find additional primary sources. As I explain *infra*, I disagree that this is conceptually problematic: it depends what one is looking for.

18. *Id.* at 9.

be bizarre. I strongly suspect, to the contrary, that one—during the course of one's education—reads sources both primary and secondary, and eventually comes upon questions that seem apt or interesting. But even if I bought Novak's notion that one simply picks up their spade and starts digging, how does one decide where to start one's hole, be it nineteenth century America versus seventeenth century Great Britain—or in China or Africa for that matter? Why the history of New York's merchants as opposed to Long Island's Native American tribes?

One important—perhaps essential—aspect of being an academic is having a good question or set of questions. When a question is good, it will linger in the academic literature. It will be something people seem to think we should know, but no one has done the hard work yet to know it, or try to understand it.

Even better if the question is germane. As welcoming as the legal academy has been to various disciplines, historians seem to have a hard go at it when it comes to law school hiring, a curious fact given that—as Novak observes—the legal academy at times seems history-obsessed. There is a reason: because as interdisciplinary as the legal academy tries to be, it (more or less) continues to insist that members of that academy pursue questions germane to law and society. As broad as that net can be, and from where I sit it is indeed quite broad, historians coming to law from history often appear to be lost in questions of history that bear only a tenuous connection to the broader world. As fascinating as those questions can be, they often have no apparent relationship to law. Not that every historian should be a legal historian, that's for certain, but many historians, I have to believe, are asking questions that emerge from something other than a random stab at primary sources, and that have some connection to the world they inhabit. I sometimes think it would be useful if historians made these connections more explicitly, and I think this can be done without being a presentist.

What is odd about Novak's criticism, however, is that he knows this too, and as between practitioners of the art, he's *firmly* in my camp. Novak is an historian, without a JD degree, who has a faculty position at one of the most prominent law schools in the country. Without knowing any inside baseball, I assume he got there because he wrote a terrific book, with a clear, important and germane argument. To wit: *The People's Welfare: Law and Regulation in Nineteenth-Century America*.¹⁹ Meticulously researched, *The People's Welfare* writes against the “myths” “in which liberty against government serves as the fulcrum of a constant and distinctively American liberal-constitutional tradition.”²⁰ Published in 1996, Novak had clearly lived through the “Reagan revolution,” one of the greatest, but not

19. WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

20. *Id.* at 7.

latest, tirades against big government. Novak explicitly situates his book against the longstanding myths—in the primary and secondary literature—that go into this anti-government strain of American liberalism. And Novak is deliberate in what he is doing. The opening page of *The People's Welfare* is worth reproducing:

Every history bears the impress of its times. This book is no exception. At the close of the twentieth century, one cannot help but be provoked by the changes and problems greeting the new millennium. Of particular concern for this book is a set of challenges bound up in what some scholars have called the three crises or malaises of modernity. . . . One response to the present crisis is a rush to the past.²¹

It is apparent from his review of my book that Novak has plenty of ideological commitments, and as it happens *The People's Welfare* plainly speaks to them.²² From the face of it, it looks like Novak did what many good scholars do. There was an issue of great moment. He located the intellectual strains of it in American history. He then set out with spade and pitchfork to show how inapt they were. And what a crushingly good job he did! The book is wonderful. I could be wrong about how he came to write *The People's Welfare*, but assuming I'm correct, there is nothing wrong with that approach. To the contrary, it strikes me as a perfectly sensible way to be a top-notch scholar. To live in this world. To ask questions about it. To situate those questions in existing scholarship. And then, to start digging to see if existing narratives have it right. Bravo.

I also have a difficult time seeing what is wrong with mining the footnotes of what has already been written. This isn't all one should do, of course, but one has to start somewhere. First, one has to figure out where the mother-lode of sources rests on which to build one's edifice. One hits and misses, and occasionally one strikes gold. Second, I find it very hard to believe that good historians routinely ignore the source materials of those who have come before, particularly those against whom they are writing.²³

21. *Id.* at ix.

22. Novak's bugbear seems to be neo-liberalism, or rather its champions. These people idolize the free and unfettered market and the minimalist state, and too often do so by reference to a halcyon age of statelessness and laissez-faire—an age that, Novak persuasively argues, never actually existed. *Id.* Yet for all of Novak's rhetoric about the "history of the future," his own argument is not entirely novel: as early as 1948 Louis Hartz made much the same argument in his masterful *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948).

23. For what it is worth, mining footnotes hardly begins to describe what I did to produce *TWOTP*, a point that should be obvious from even a cursory scan of the two-hundred pages of endnotes that support the narrative. I suppose that one could (uncharitably) think all those primary sources came from someone else's work. Or even, as Novak hints, that I didn't read them. But if one studies my fat footnotes with any care, one would see that when I quote a primary source that I didn't have my hands on and had not read in full, I explicitly say "quoted in"—not only to signal this very fact, but also because credit is due where it is due, to the hard-working scholars who preceded me. And, in fact, the reason the

The crescendo of this seeming difference between us (seeming, because, again, *The People's Welfare* seems a paradigmatic example of what Novak is criticizing) is Novak's fixation on one line in *TWOTP*. I quote James Iredell, who writes in a letter home to his wife that the last session of the North Carolina Legislature produced "the vilest collection of trash ever formed by a legislative body."²⁴ Novak, being—in his own words—a "professionally-trained historian who has worked extensively in the primary sources of a particular period can . . . 'sense' when something is not quite right in a given historical narrative."²⁵ Novak teases out the Iredell quote, ultimately suggesting I'd gotten it from Gordon Wood's magisterial *The Creation of the American Republic* (correct!) and that I'd not read the original (incorrect!). Novak recounts with great flair Iredell's facetious and road-weary letter, zoning in on the fact that Iredell told his wife that he reached his judgment about North Carolina's legislature after "skimming over the laws, *so far as a very few minutes would permit me*" (emphasis by Novak).²⁶ Novak goes on to defend the North Carolina legislature—"harried," and "working during a difficult time in the war, with a governor in whom they lost faith, and in severe economic crisis and turmoil."²⁷

Novak's point seems to be that I'd missed the boat on Iredell by hastily and irresponsibly supporting my argument—as he feels law professors are wont to do—with whatever source was at hand, rather than adhering to the "different evidentiary standards of different approaches to reconstructing the American legal past."²⁸ But is Novak right on his own terms? Or has he simply missed the point of the endeavor, in his haste to condemn the sort of interdisciplinary endeavor that he apparently believes is shoddy if not altogether misguided?

In truth, Iredell is used precisely and correctly in *TWOTP*, if one keeps in mind the question that is being asked, and that the section incorporating the quote is purporting to answer. I have no dog in the fight between Iredell and the North Carolina legislature, though Novak may: he wrote the book defending the American tradition of active government. I was simply trying

endnotes of *TWOTP* are so obscenely long, much to my publisher's dismay but ultimate intellectual graciousness, is that I wanted the scholars who read them to have the advantage of easily locating the materials I had relied upon—to continue the project, do their own work, or perhaps most important, to challenge my reading of them.

24. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 24 (2009). Novak, unfairly, says the Iredell quote gets used three times, implying that it is such a crucial piece of evidence that I keep reusing it. *TWOTP* employs pull quotes from each section for section headings. So, Iredell is quoted. *Id.* He is then "pull-quoted" for a section heading (it was, after all, a catchy phrase!), *id.* at 23, and then I later refer back to his comment, *id.* at 28.

25. Novak, *supra* note 16, at 643.

26. *Id.* at 645.

27. *Id.* at 646.

28. *Id.*

to recount the origins of judicial review. My point in citing Iredell was to provide the reasons that some people had, or claimed to have had, for turning to judicial review. Iredell was unquestionably one of the key figures in the development of American judicial review, and there can be no doubt but that he thought the institution was essential to defend against legislative excess.²⁹ I simply don't see how Novak can possibly deny this, nor does anything in his extended "professionally-trained historian's" take on Iredell suggest otherwise. As Novak himself notes, Gordon Wood "spends a couple hundred pages on 'The People Against the Legislatures,'" and though Novak quite correctly says that Wood paints "an intensely complicated legal-political struggle between popular sovereignty and the rule of law," nowhere does Novak deny that Americans, many of them important elites who exercised real power, feared the democratic legislative power they were observing and seized on judicial review as one response.³⁰ Is Novak saying Iredell did not have these concerns? That would be news. And, in fact, Novak's own magnifying-glass examination of Iredell's letter seems to miss its own point. Dripping with disdain, and with ironic humor, I suspect that Iredell (the Attorney General, after all) is letting his wife know that he did not need more than a "skimming" and a few "minutes" to reach his conclusion about the North Carolina legislature's work product, rightly or wrongly felt. He didn't like it. And he became an ardent defender of judicial review.

I want to return to where this section began: to what I believe ought to motivate historical inquiry, at least in the world of legal history. What Novak loses sight of in his review, and what I think is so very important, is that there was a *question* being asked in *TWOTP*. Repeatedly Novak challenges what isn't in the book. No *Dartmouth College* case, not enough text devoted to the interwar period, and certainly not enough Iredell! What Novak seems to miss is that my book was never intended as—his words again—an "entry-level, one-volume introduction to the history of the Court," or even "a one-volume narrative history of U.S. Supreme Court judicial review."³¹ It's great if it does those things even half-adequately, and I'm certainly happy to sell as many copies as I can. At the end of the day, however, *TWOTP* was intended to explore the interaction between the Supreme Court's exercise of its power of judicial review, and the political forces that opposed it. I don't claim to have hit every possible node of this subject, but if something wasn't germane to this, it didn't have a chance of appearing in an already long book—or a reason for being there.

29. James Iredell, *To the Public*, Aug. 17, 1786, reprinted in 2 GRIFFITH J. MCREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 145-49 (1857); Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review*, 81 CHI.-KENT L. REV. 867 (2006).

30. Novak, *supra* note 16, at 644.

31. *Id.* at 634.

In short, I fear Novak raises the barriers to doing history too high at some points, and lowers them too low in others. For my taste, history is best if it has some apparent motivation, if I can understand *why* I ought to be interested in a particular question or period. On the other hand, I'd not want to discourage young scholars—professionally-trained or not—who have pressing historical questions from trying to answer them, as I fear Novak's review will. Yes, they must adhere to standards—standards regarding how they search, what claims they make, on what evidence, and to what end. But the standards we impose should have reasons that support them.

B. The Types of History

Ultimately what Novak disapproves of is the type of history he thinks *TWOTP* represents. Although “[t]he house of history has many mansions,” Novak's actually only has three: narrative synthesis, socio-legal history, and conceptual history—of which, Novak believes, only two really qualify as mansions.³²

Conceptual history is the mansion of the future, if we can only figure out how to design it. To this, Novak believes we should all aspire. It is a history of ideas that takes account of the broad learning in all the many disciplines that might apply. Socio-legal history, on the other hand, is today's rambling abode of many rooms, built from the bottom up, and dealing with a variety of subjects—on some occasions, unfortunately, the seemingly more arcane the better. Synthetic history, for its part, is the now drafty and decrepit palace of the past, where only seasoned historians would aspire to live, after they'd constructed more humble edifices in the archives. The palace of synthetic history appears drafty because badly built, a place with sentences constructed of “a noun, a verb, a great case, famous person, a major event, and a president.”³³

Novak doesn't begin to cover the waterfront on types of history, even the “legal-constitutional history” to which he sometimes narrows his sights, and it would be a sad world if he had. The endeavor of history might include the sort of conceptual history to which Novak aspires, or call for the sort of bottom-up fine-grained socio-legal history he equally admires, but it might also just be, well, plain old history history. You know, the kind where there is a question, some evidence, and a stab at an answer. The sort of history that it seems many folks are writing, none of which falls easily or comfortably into one of Novak's three categories.

For what it's worth, if I had to squeeze my corpus through the door of one of Novak's dwellings, it would have been his third, conceptual history.

32. *Id.* at 624.

33. *Id.* at 631.

Novak obviously believes *TWOTP* was a spectacular failure at this genre, but I'm not sure Novak sets the terms right. For example, Novak believes I failed to do an adequate job of my overly-ambitious attempt to capture the concept of popular sovereignty.³⁴ But that wasn't my goal at all. I was trying to write the history of an idea, or more accurately of a claim—that judicial review is inconsistent with popular governance.

More importantly, Novak's admiring description of the genre of conceptual history is more than a little anxiety-provoking, because it is unclear that virtually anyone is going to be able to pull off what he demands. Aspirations are great, but there is something to be said for a decent number of folks being able to get over the bar. According to Novak, they don't.

Meanwhile, here's a plug for synthetic history. Sure, it's out of fashion to write "The Story of America" or "Our Story!" and much more in fashion to write "The Story of This Group in This Place at This Time." But why must it be one or the other? There are historically contingent reasons why we tend to write one genre of history or another at particular times. It does not take a rocket scientist (or rocket historian) to understand that during the World Wars, in the aftermath of the Civil War, and amidst the turmoil of the Gilded Age there was a preference for nation-building histories. Similarly, it is difficult to miss the fact that the fetish for socio-historical narratives comes at a time when we are drenched in conversation about group identity. And while one might be properly cautious of over-doing the trendy, it is easy to see why trends developed when they did.

Novak is similarly derisive of "conventional history," which he recites as a repeated sin of *TWOTP*. The complaint seems a little odd, given that Novak says "no one will argue with the originality and provocativeness of Friedman's overarching thesis."³⁵ But Novak's complaint is that "there is simply not enough room for novelty or revelation in narrative synthesis when it comes to particular eras or subthemes."³⁶ One can't do everything fair enough. Still, the actual problem here is that Novak may not be reading closely, not that the novelty is not there. For example, Novak's criticisms to the contrary notwithstanding, the take in *TWOTP* on the New Deal Court-packing plan is hardly conventional. I do not simply adopt the "conventional" story that the Court switched; rather, I say that observers saw a switch, and had they not, the Court would likely have been disciplined.³⁷ I likewise believe I've given a more nuanced (and correct) reading of Lincoln's views on judicial supremacy; the typical take is that he went after it, but I challenge this notion in *TWOTP*.³⁸ Similarly, as between the conventional and

34. *Id.* at 653-56.

35. *Id.* at 635.

36. *Id.*

37. FRIEDMAN, *supra* note 24, at 229-34.

38. *Id.* at 117-18, 121-24.

“revisionist” readings of the *Lochner* era, I have long taken the view that there is truth to both, and that regardless of whether the *Lochner* revisionists are right, the fact is that people at the time did not buy the story about doctrinal consistency.³⁹

More to the point, though, what necessarily *is* the problem with convention? I get bored as quickly as the next person, but it never would have occurred to me that history had to change to sate my appetite for novelty. Convention is often convention for a reason. That doesn’t mean we should keep telling the tale. That’s not scholarship, and for what it’s worth that’s hardly *TWOTP*. But building on convention does not make something wrong.

It seems to me, ultimately, that 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. Categories are fine, unless and until we insist there are only three pigeonholes (and then, apparently, discourage the pigeons from at least one of these). I’m not sure we need to go building these pigeonholes anyway; best I can tell, the pigeons can figure out all by themselves where to roost.

C. The Will of the *People*

Novak also raises a question, asked by others, about the construction of the “People” in *TWOTP*.⁴⁰ Although I tackle substantive objections at the end of this response, this particular question lies on the line between substance and methodology. It particularly troubles historians, and particularly in this era of socio-legal history, because if anything is clear it is that there is not just one American people. So what was I doing to be speaking about the American people as if there were such a singular entity, let alone speaking for them? This, at root, is what seems to grate Novak about synthetic history.

Of course we are not all one single people; a point that seems so obvious as to be banal. Sufficiently banal, in fact, that it is worth thinking past its obviousness a bit, to figure out why talking about a constructed people might nonetheless make sense.

As much as we may want to be our individual selves, or part of a specific group of our choosing, the truth is that are always putting us into other groups. These constructs play an important role. Like it or not, there is a “people” of the United States of America, and how that people is constructed matters. Sometimes it matters for what rights we get; sometimes it

39. *Id.* at 187-91.

40. Novak, *supra* note 16, at 656-59; Kevin T. McGuire, *Theory and Causation in Barry Friedman’s The Will of the People*, 2010 MICH. ST. L. REV. 741, 747-49.

matters for what claims we want to make vis-à-vis others. It certainly matters come election time.

It would seem, then, that the right question is not whether one can or cannot construct a “people” of the United States, but how it has been done, and why. To understand this in the context of *The Will of the People*, it is only necessary to return to the question the book is trying to answer. *TWOTP* is a narrative about the juxtaposition of judicial review with the popular will. Why? Because the claim against which I wrote it is what is frequently called “the countermajoritarian difficulty”—that judicial review trumps the will of the majority! Analytically, the notion of the “popular majority” in this very common denunciation of judicial power is replete with problems: who is the majority and how does its will get assessed? By legislation, by polls, what? But it *is* the common complaint about judicial review, and I believe it requires some response.

From the outset of this project, some have questioned whether it is possible to talk about the popular will. Sometimes we have to be able to, or the concept of democracy itself goes down the toilet, does it not? But I understand the concern. Indeed, as Novak notes, I say it at the very outset of the book (maybe putting it in bold this time will help make clear I not only said it, I believe it): **“there is no single American voice. Public opinion is a collage of ever-shifting views.”**⁴¹

More importantly, though the book does in fact talk about the popular will, I would have thought it apparent that, if anything, *TWOTP* is somewhat of a chronology of the many changing ways we have constituted ourselves as a people over time, from deference to elites, to nascent or proto-democrats, shifting then to a particular focus on states as organizing units. Corporations and wealth steal the show for a while (some believe they still have it). The reason that 1937 matters so much to the story is that Roosevelt forged a broad enough coalition—which included the recently enfranchised—that his Administration arguably represented the first instance in United States history that we had a government of (mostly) all the people.

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. I’m taking their argument on its own terms and showing that it is at best arguable and often wrong. 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 thereof, as has been claimed. For example, during the 1820s and

41. FRIEDMAN, *supra* note 24, at 17.

1830s, versions of the countermajoritarian claim typically referred to the “people” of the states. In fact, though, while some majority within a state may have opposed judicial review at any given time, when one state faced down the Court, the people of many others—including states that would have or had their own time in the anti-Court sun—shouted them down. Volubly.

If anything, I’d have thought it would leap out that the “countermajoritarian” 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. For example, in the 1830s, the Court was trumping state’s rights. In the 1960s, it was legislatures (and the Court was rushing ahead of the legislatures with societal reforms, as much as it was striking down legislative agendas). 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.

As I’ve conceded in many gracious sessions of New York University’s Legal History Colloquium, it would undoubtedly have been more accurate if I’d said “the thing” instead of “the popular will.” Or maybe, “the ever-changing and shifting thing against which judicial review is juxtaposed.” Or maybe, “The Will of the People Who Others Claim Oppose Judicial Review.” Whether anyone would have published the book is a different question.

Nonetheless, I adhere to the one claim I make at the outset of *TWOTP* on the subject of constructing a public. I’m looking backward; that is my luxury. I can see the struggles that this nation, however constituted at any given time, has endured. I can see what the battle lines were. And I can see who, at least temporarily, won and lost. I give those battle lines lots of names besides the “popular will” or “popular opinion,” and yes, I sometimes call it “the American people.”

But then, Novak is the author of “*The People’s Welfare*.” I understand the argument that he often was not actually speaking about the real people-constructed-how-they-want-to-be-people, but about the interests in whose name legislatures were claiming to regulate.⁴² You’d think he’d have understood the extent to which I was doing the same. He is certainly right that by the end of the book, in the Conclusion, I’m constructing the same people. Still, I was responding to the primary claim against judicial review, and I tried to make clear that speaking in the name of the people only works when in fact the people’s will ultimately supports those claims.

42. NOVAK, *supra* note 19, at 9.

Sometimes it is hard to conclude anything about anything, unless one is willing to ascribe some identity to some group of people. That is a lesson worth remembering—for historians, as well as for the rest of us.

III. CAUSATION AND THE WAYS OF POLITICAL SCIENCE

One methodological aspect of *TWOTP* that has bothered some people relates to the question of causation. Political scientists—at least the empirically-oriented among them—are in the vanguard here. They are anxious to know the “causal mechanism” that motivates the claims in *TWOTP*, and are skeptical that it is “the people” who are influencing individual Supreme Court decisions. The fine-grained, if untidy, scrutiny of the historical method is particularly uncomfortable to quantitative empiricists, who prefer testing hypotheses with large datasets.

A. What History Teaches

Let’s start with the fact that *TWOTP* is an upside-down book. For most academic books of this sort—and let’s face it, despite my desire to draw in a few more readers, *TWOTP* is no pulp fiction joyride—the “theory” comes at the end. I give “theory” a capacious definition here; I’m referring to the typical chapter in an academic book that situates the project, and describes the way in which it will proceed.

As I’ve explained above, *TWOTP* is a work of history very much informed by political science. In the ordinary course, I’d have presented all that political science—the causal mechanisms—at the outset, and then proceeded to prove their worth with historical detail.

The difficulty with this is that I didn’t write *TWOTP* to identify the causal mechanism. I wrote it to respond to the claim that judicial review is countermajoritarian. My response is that, over time, judicial decisions tend to come into line with popular opinion. (More on the claim in Part IV.) Having established this claim, I introduced some hypotheses about the causal mechanism, inviting further research.

TWOTP is upside-down because some wise early readers suggested to me that it wasn’t working right side up. Every time I presented the theory on its own I ran into trouble. Not only were my claims controversial—highlighting why we’ve lived with the countermajoritarian difficulty for so long—but the theory was messy. There were several causal mechanisms not just one. So when these readers suggested I get the theory out of the way and let the story speak for itself, I breathed a sigh of relief. I almost left the theory out altogether until another wise reader told me what I also knew, saying, “look, you have to weigh in how this whole thing works.” Upside down, the book works better. Note how many contributors to this symposium—as elsewhere—say they agree with the basic overarching

claim. Once one is familiar with the history, the theory underlying it makes much more sense; it seems and appears far less controversial.

Still, the title of the final chapter—What History Teaches—has ruffled some, and not just historians. I understand this. History doesn't *teach* anything does it? It surely doesn't tell us what to do. That would be presentism. (Gasp!) In the cold light of post-publication reality, if I had it to do all over, I'd have called it "What History Suggests."

Still, I want to challenge the claim that history can't teach, a claim that seems implicit in the critiques of several including Kevin McGuire and Lawrence Solum. (More on what it teaches in a moment.) To the contrary, I want to stake the claim that often history can better capture the past than the sort of quantitative empiricism favored by some of the political scientists writing here. After all, history at bottom *is* empirical. And, having captured the past, I think we can learn a thing or two from it. I fully appreciate quantitative empiricism—I've done some of it myself and am doing more.⁴³ It has its place, but history has its place too, and quantitative empiricists can be too skeptical of history's value. Not to sound like a broken record, but the trick is to understand the strengths and limitations of any given method vis-à-vis the question one is trying to answer.

Empiricism rests on models of how the world is, or was, and models are just that: representations.⁴⁴ They capture some of the world as we know it, but they are always simplified to make them tractable. Good formal modelers know this; many empiricists forget it. The more the data, the more likely we are to see patterns. But looking for significant variables in all this data runs the risk of obscuring the nuance that is driving the show.

What history loses in traction, it more than makes up for in nuance. History can help us see the pull and tug of contending forces, the very level of detail that motivates parts of Novak's critique. Yes, it looks like Congress is wailing on the Court, and we can run some statistical tests to show the influence of congressional ideology, but what is it that is driving Congress? Is it what members of Congress would be doing if left to their own

43. Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court's Agenda*, 71 J. POL. 574 (2009); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533 (2006); Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003); Lee Epstein, Barry Friedman & Nancy Staudt, *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299 (2008); Nancy Staudt, Barry Friedman & Lee Epstein, *On the Role of Ideological Homogeneity in Generating Consequential Constitutional Decisions*, 10 U. PA. J. CONST. L. 361 (2008); Cliff Carrubba, Barry Friedman, Andrew Martin & Georg Vanberg, *Does the Median Justice Control the Content of Supreme Court Opinions?* (forthcoming).

44. Barry Friedman & Andrew D. Martin, *Looking for Law in All the Wrong Places: Some Suggestions for Modeling Legal Decisionmaking*, in WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO AND WHY IT MATTERS (Charles Geyh ed., forthcoming 2011).

devices, or is it what the constituents want? All the constituents (unlikely) or just some of them? Who? Why?

Now, just because it is history and not hard empiricism, doesn't mean you can't see and learn from patterns. If, time after time, people scream when the Court steps on their toes, then the screaming doesn't come as such a surprise the next time. That doesn't mean they necessarily will scream. That is why people are leery of treating history as providing "lessons" because things are, of course, always different. But if people usually scream at the Court for its decisions, and they don't in a case where such a reaction is to be expected, it is worth asking why not, and seeing what we can learn. Maybe the Court isn't actually stepping on many toes. Maybe judicial supremacy is taking hold in a way that causes people to censor themselves. Similarly, if it turns out that when certain people scream in certain ways, the Court backs off, one begins to anticipate the Court backing off under certain circumstances. And so on. That is the way history teaches. Again, we can't be sure today will be yesterday. But we can learn something from the patterns, and in doing so we might learn something that helps change the unhealthy or unhelpful patterns into better ones.

Having said that, I offered up the Conclusion of *TWOTP* with one big caveat. Although in reflection I might have made this fact clearer, I still think it is pretty clear. Careful readers have understood that when I talked about "what history teaches," my suggestions were highly contingent. The Conclusion doesn't discuss *one* causal mechanism; it raises the possibility of several of them. I don't have comparative statistics on them, because they are hard to come by. I try to suggest, by way of hedging words like "may" and "might," that these are all testable hypotheses one might pursue. I said, as plainly as I could, "What we know is tentative; it may amount to little other than an agenda for further research."⁴⁵ I meant that.

The most insidious problem with the countermajoritarian difficulty is that over time it became an oft-invoked mantra substituting for actual analysis of the relationship between judicial review and the popular will. It continues to be intoned as though it is true in many cases in which it palpably is not. Sometimes it may be true, a point I'll return to in a moment, but there is a real need to understand how judicial review actually operates, and to stop simply saying trite things about it. As silly as it may sound for a project seventeen years in the making, *TWOTP* is nothing but a first cut at that question of causation. Further research, directed to the right questions, is needed.

What I just said ought to answer one of Lawrence Solum's chief objections, writ large and writ small. His argument is that history implies causation implies some theory of causation implies use of counter-factuals as

45. FRIEDMAN, *supra* note 24, at 373-74.

proof. There is, he points out, “selection bias” in the “construction of narratives.”⁴⁶ And he not-so-vaguely hints that I’ve got some hidden commitments that drive my analysis.⁴⁷

I’ll come to the normative commitments of *TWOTP* in a moment, but for now let’s concede Solum’s well-argued point: every story omits something; that is what gives the story its shape. But for Solum’s point to carry any weight, he would need to specify what, exactly, I omitted that bears on my claims—what, in other words, would have led to a different conclusion had it been included. Despite his analytic complaint, Solum doesn’t really point to anything, probably because he by-and-large accepts the positive claim made in *TWOTP*.⁴⁸

In sum, *TWOTP* offers a variety of causal mechanisms, each of which might teach us something about judicial review. It *would* be nice to have clearer knowledge about each of them. That is precisely where quantitative empiricism comes in.

B. Theory and Empiricism

Far more than history, quantitative empiricism requires a testable theory of how things work. Like the historian who believes that you just drop your spade into any terrain that looks fertile, there undoubtedly are some empiricists who believe their job is just to examine data to answer interesting puzzles. But, as with history, there usually is a reason that empi-

46. Lawrence B. Solum, *Narrative, Normativity, and Causation*, 2010 MICH. ST. L. REV. 597, 602 (2011).

47. *Id.* at 601-02.

48. Solum’s example hardly makes his case. He picks on my dismissal of the appointments process as the primary causal mechanism. I wrote:

Undoubtedly, the fact that Presidents select Supreme Court justices and the Senate confirms them plays some role in ensuring that the Court heeds the cry of public opinion. But it probably does not explain nearly as much as one would think. Contrary to folk wisdom, Presidents can usually get the sort of justice they want; however, they rarely are driven to appoint justices who capture the mainstream of popular thought. Only recently have Presidents become so single-mindedly focused on the ideology of their appointees, and in doing so they often have proven beholden to extremists in their own party.

FRIEDMAN, *supra* note 24, at 374. Quoting my language, Solum says, “[t]his passage is remarkable for combining bold and controversial empirical claims with almost nothing in the way of evidence or explanation.” Solum, *supra* note 46, at 605. Solum then goes on to talk about what a fully blown theory of the appointments process would look like, including Senate vetoes and filibusters. *Id.* at 605-06. I know—reviewers have to pick nits. But Solum omits the three footnotes from the quote above, which include sources supporting virtually all of it, including the theory Solum goes on to discuss. Sure, I could have cited more and talked about the subject more. I agree a whole book could be written on the subject. I was busy writing this one though!

ricists pursue the particular empirical puzzles they do; they have a testable hypothesis about the answer that rests in some broader theory about how the world works.

Anna Harvey and Kevin McGuire have their own, somewhat different, theories about what is going on in the never-ending struggle over judicial review. But each in its own way demonstrates the problems that quantitative empiricism can run into, particularly when the work is too remote from historical experience. Too often, quantitative empirical work tends to lead to data-driven hypotheses, the maintenance of which requires blocking out the messiness of the real world. Again, this is okay: models are representations. But it is important not to lose track of the fact that the things we learn from quantitative analysis yield but bits and pieces of what is undoubtedly a larger story.

Anna Harvey has written a number of articles arguing that the one mechanism that best explains the interaction between judicial review and the popular will is what often is referred to, in the political science literature, as the “separation of powers” story. In that story Congress—or at least the political branches—are in the driver’s seat, and if the Court gets out of line—whammy! The justices know this and are sensitive to the ideology of those in power. They pay heed. They don’t go striking laws when they are likely to evoke a counter-reaction. Thus, for Harvey, if you want to know when the Court will be active in striking laws, look to the ideological composition of Congress vis-à-vis that of the Court.

I like a lot about this story. In fact, I like it so much that when I’m not busy responding to her work, I’m sometimes Harvey’s co-author. We’ve written a couple of empirical pieces strongly suggesting that the justices “pull their punches” when dealing with an ideologically hostile Congress.⁴⁹ This was distinctly *not* the conventional wisdom among quantitative empiricists who preceded us, who were skeptical that Congress constrained the Court, and who tended to view the Court as independent. Of late—and I obviously think correctly—these conclusions are shifting.⁵⁰ Common wisdom is moving our way.

49. Anna Harvey & Barry Friedman, *Ducking Trouble: Congressionally Induced Selection Bias in the Supreme Court’s Agenda*, 71 J. POL. 574 (2009); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court’s Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533 (2006); Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003).

50. Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011) (finding that the Court, while not constrained by expectation of congressional override, hesitates to “strick[e] laws when it is ideologically distant from Congress”); Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 610 (2001) (arguing that justices will only “vote their sincere preferences when they hold preferences similar to those of the members of the other branches of government”).

Where I differ with Harvey is that I believe there are a variety of causal mechanisms that operate here, not only the congressional story. More important, her data is, in my view, both over- and under-inclusive in ways that suggest the congressional constraint account may be missing some of the story. This is true even if one is talking only about the Supreme Court and not the entire judiciary. It is under-inclusive in that her database only contains cases in which a federal statute is challenged. It is over-inclusive in that it contains all such cases. Why do these matter?

Over-inclusiveness matters because there are plenty of contested federal statutes about which no one gives a brass farthing, and the inclusion of them in her database may well affect her results. Some statutes are out of date by the time they are struck down; some have proven unworkable. The way Harvey conducts her quantitative test, she measures whether justices are voting to strike statutes adopted by a Congress of a different ideology. Putting aside how ideology is measured—this is a hard task, and Harvey is rigorous in using top-of-the-line methodology—the theory still imputes to a statute the ideology of those who enact it. The basic idea of the separation of powers model is that Congress will discipline the Court if the Court strikes statutes Congress cares about. But for many statutes, “ideology” is a generous word to attach. Sure, some statutes are deeply ideological. But many are house-keeping provisions that keep the government up and running. One is skeptical that Congress is willing to go to war over many of the statutes struck by the Court in Harvey’s database, something the justices presumably know if they can play the separation of powers game at all.⁵¹ Now it could be that taking the unimportant statutes out of Harvey’s database would only serve to increase the effect she finds, but we don’t know: it might leave her without enough data points to conclude anything, and the inclusion of these statutes may simply be confounding the matter.

Far trickier for Harvey’s conclusion regarding the importance of Congress vis-à-vis public opinion is the problem of under-inclusiveness in her data—the fact that she deals *only* with cases in which the Supreme Court struck down congressional statutes. It is demonstrably the case that many fights about judicial authority were provoked not by the invalidation of federal statutes, but occurred when the Court struck down state and local laws—or even just invalidated policies not written into statutory law. *Roe v. Wade*. *Brown v. Board of Education*. *Lochner v. New York*. *Miranda v. Arizona*. *Marbury v. Madison* for that matter (and don’t tell me that the

51. It is also the case that Harvey’s data deals only with a limited period of American history. The longitudinal scope of Harvey’s work may or may not matter. My guess is that the composition of Congress has always made a difference to what the Court did in some subset of cases. Still, I suspect at some times the Congress was more alert to the Supreme Court, and at others it was less so, such as during the 1820s and 1830s, when the Court was the *bête noir* of the states, not Congress.

case was about a congressional statute—or at least not the one the Court ruled unconstitutional). It could be that even when state and local laws are at issue, the composition of Congress carries substantial weight with the Court. But there is plenty of reason to be skeptical, not least of which is that members of Congress may not mirror state and local preferences, and still there may be an enormous public backlash about the Court.

Most important to the broader point here, even if it is Congress that plays the primary role in keeping the Court in check—and Congress certainly wields the big stick as far as disciplining the Court is concerned—an institutional story like Harvey's does not provide enough fine-grained detail to understand the big picture. When, for instance, is Congress likely to go after the Court? Her measures tell us nothing about this if the impetus for anti-Court action is the striking of state laws. As should be clear from *TWOTP*, Congress faces its own pressures in the form of constituents and other political supporters. It is important to understand when the constituents will motivate their representatives to attack the Court, when they won't and what form those challenges will take.⁵²

Political scientists are wont to tell an institutional story; their typical concern with *TWOTP* is that should have been titled something like *The Will of the Congress*. But the events of 1937 surely show the danger of focusing on institutions alone. Looking only at the composition of Congress, one might have assumed that Roosevelt would have had his way with the Court in 1937. As the historical detail reveals, however, many members of Congress delayed coming down on the merits of FDR's proposal until their constituents made up their minds. This is why the work of Richard Bensele or Elizabeth Sanders is so valuable; these are social scientists who study politics, including congressional politics, by looking closely at precinct or state voting and party platforms to see why the parties and Congress act as they do.⁵³ And even this sort of analysis may not be micro enough: the New Deal fight, at the individual voter level, was about more than partisanship. Plenty of Roosevelt voters turned against the plan. For questions like these, we require a methodology that gets at the problem.

McGuire, for his part, is content to discuss the public rather than institutions like Congress, but he wants to do so by aggregating empirical measures of public "mood" and comparing that to aggregated measures of the

52. Besides, caring only about when attacks occur is still a second-order inquiry to the question that really should concern us: what will all this say about the content of the law handed down by the Court? It is undeniable that *Roe v. Wade* and its aftermath have had an enormous impact on constitutional law in many ways, not the least of which was its impact on the appointments process.

53. RICHARD FRANKLIN BENSEL, *THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY* (2004); RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900* (2000); ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917* (1999).

overall liberalism or conservatism of the Supreme Court's decisions each term. McGuire's work falls within a literature that claims that the Court follows public opinion, but only in the aggregate of its decisions. McGuire criticizes *TWOTP* for looking at "case level" data rather than data in the aggregate, *i.e.*, looking to see how public opinion affects individual decisions. McGuire writes: "most regard it as implausible to think that the justices are so attentive to public opinion that it can exercise a measurable and significant effect in individual cases."⁵⁴

I'm not sure who the "most" are that McGuire invokes in support of his theory that overall public mood matters more than public reaction to individual cases, but whoever they are I'm pretty certain they are wrong. (For what it is worth, I'm not sure McGuire's fellow travelers in the public mood literature would all agree with him that there aren't individual case effects.) Indeed, I have real trouble believing the theory that explains how overall swings in public ideology would necessarily affect the term-by-term range of Supreme Court decisions. They might, but one requires a story to connect the two and I'm not sure why that same story doesn't operate just as well if not much better at retail than wholesale. The best theory I have read—and one that has been tested with some success—is the theory that public mood over time affects politics, which affects the appointments process, which affects who is on the Court, which affects the run of Supreme Court decisions.⁵⁵ That might work, but that's quite a lag; most Court-politics interaction is more immediate and more easily observable.

The most likely causal stories about Court-politics interaction involve immediate reaction to individual Supreme Court decisions. McGuire must know this is true. McGuire says that "[i]n the absence of a carefully specified model of influence, *The Will of the People* stymies the reader, who is left to speculate about causal pathways."⁵⁶ But that's just false. The very causal pathways McGuire explores at the end of his paper are for the most part precisely the ones discussed in the Conclusion of *TWOTP*. And in most of the causal pathways McGuire and I discuss, pushback the Court necessarily plays a major role. It affects separation of powers fights, it influences what McGuire calls "legitimacy"—or what I might characterize, seeking more careful causal specification, as "diffuse support"—it even matters in theories involving the psychological makeup of the justices and their reactions to their various publics.

In every one of these causal stories, what would seem to matter most is pushback by members of the public, or by their representatives, in the

54. McGuire, *supra* note 40, at 750.

55. William Mishler & Reginald S. Sheehan, *The Supreme Court as a Coutermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

56. McGuire, *supra* note 40, at 752.

context of specific cases and issues. Sure, sometimes there is concern about the rightward or leftward trend of the Court's decisions. But this sort of concern is not typically what pushes people into the streets. Rather, people are motivated when they believe that the Court has taken a terribly wrong turn on a specific issue that they care about. Abortion. The Death Penalty. Government Power over the Economy. Slavery. Property Rights. And most recently: Campaign Financing.⁵⁷ If these are in fact the things that motivate people—and that seems to me what emerges from *TWOTP*—then what we should see are specific case effects.

TWOTP tells story after story in which it is the individual case, and public reaction to it, that later affects decisions in the same area: *Roe v. Wade*, *Furman v. Georgia*, gay rights, and affirmative action. Given how little salience most Supreme Court decisions have, if the public cares about trends it most likely is because of trends they are told about by pundits. Yet the pundits, too, seem driven by the blockbuster decisions, not the myriad less-salient ones.⁵⁸

For what it's worth, in a study responsive to both Harvey and McGuire both, Lee Epstein and Andrew Martin regress individual justices' votes in individual cases, rather than the general liberalism or conservatism of the Court's direction, on public mood.⁵⁹ Their study includes all the Court's decisions, not just those involving federal statutes. In many areas, they find a significant relationship between public mood and the Court's case-by-case decision making. Their project leaves much more to be done. I still am somewhat skeptical that measures of public mood, in general, influence the Court's work in specific cases, absent something like the lag for judicial appointments. And Epstein and Martin are right to suggest we need more attention to which Supreme Court decisions matter; it surely is not all of them.

The broader point, however, is this: Quantitative empirical studies can teach us a great deal. Given the scope of the data they can often confirm large trends and significant variables in ways other approaches, like history, cannot. The value of separation of powers studies, for example, is that they provide strong evidence that the justices are sensitive to possible reactions by Congress. But rather than preferring this (or any other) methodology absolutely, the question is how different methodological approaches can work synergistically to help us get real purchase on what it is we want to

57. See generally *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876 (2010).

58. Barry Friedman & Dahlia Lithwick, *Watch as We Make This Law Disappear: How the Roberts Court Disguises its Conservatism*, SLATE (Oct. 4, 2010, 6:41 AM), <http://www.slate.com/id/2269715/>.

59. Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, ___ U. PA. J. CONST. L. ___ (forthcoming 2011).

know. Good quantitative empirical studies often are motivated in the first place by finer-grained work suggestive of what the important variables are. And the broad brush conclusions of quantitative empirical work can be a guide for more nuanced work of a different sort.

IV. NORMATIVITY AND LAW

Legal scholarship tends to be normative. As befits this focus, some commentators were concerned not so much with my method as with my conclusions. There were anxious expressions about what *TWOTP* would mean, if accepted, for the actual practice of judicial review.

The downside of law's normativity is that sometimes it fails to come to grips with the facts on the ground. Normativity is incredibly important; if anything, the "bite" or real world significance of some social science projects seems at times a bit too obscure. But, by the same token, normativity without sufficient attention to reality is nothing but imagining. While there is a lot to be said for imagining, especially when it comes to imagining a better world, still there must be some reason to think that the object of normative criticism is our actual here-and-now world, or that the improvements proposed can be achieved. Think about it this way: there's little point in imagining a fuel-efficient car that requires a zero-gravity environment, unless one thinks either that we will be living in a zero-gravity world, or that thinking about it will lead to some advance being made that can carry over into our inescapably gravity-laden world. So too for theories about social change and justice.

TWOTP was intended largely as a descriptive and positive project, one designed to call into question predominant understandings of how judicial review operates in the real world. Only at its very end does *TWOTP* turn remotely normative, and even then the conclusions are hedged and tentative. In a sense, this is a metaphor for my own study of the subject, during which I spent relentless years defying the normative norms of the legal academy, determined to try to understand the institution of judicial review before settling on a normative take about it.

TWOTP was intended to call into question the broad, often undifferentiated, claim that judicial review is countermajoritarian. As such, *TWOTP* advances two primary claims. First, over time the American people have acclimated themselves to the idea of judicial review; polls now consistently show strong support for the Supreme Court as an institution of American governance. Second, because of the political dynamic between the Court and the American people, judicial decisions tend to come into line with popular preferences.⁶⁰ But, importantly, the claim is *not* that *all* decisions

60. FRIEDMAN, *supra* note 24, at 3-18.

come into line with popular preferences, and assuredly not that they come into line with *immediate* preferences, a point some readers overlook. Rather, the claim—as Neil Siegel correctly emphasized—is that “the Court’s decisions on socially *salient* issues tend to come into alignment ‘over time’ with popular preferences.”⁶¹

Having come to this understanding of the relationship between public opinion and judicial review, *TWOTP* then offers a normative take on judicial review. Namely judicial review’s most important function, particularly when exercised by the Supreme Court, is to foster dialogue among the public about our constitutional commitments. Once some consensus is reached, the Court then tends to ratify it. *TWOTP* speaks approvingly of this function of judicial review—assuming, of course, that it occurs as described.

Still, the normative take in the Conclusion of *TWOTP* is hardly unfailingly rosy. *TWOTP* does not stand as an unqualified plaudit for judicial review. To the contrary, it seeks to place responsibility for the institution where I believe it ultimately rests, as must all institutions in a democracy: in the hands of that ineffable “people.” Second, and related, *TWOTP* offers the beginning of what I believe is 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. This is a project I have continued—in both the academic and popular press—since its publication.⁶²

There are very legitimate concerns about judicial review—as, of course, there are about all institutions in our democracy. One necessarily has questions about a Court that has validated slavery, suppressed popular legislation designed to help the struggling classes, approved the internment of over 100,000 Japanese-Americans during World War II without anything approaching sufficient reason, and invalidated campaign finance laws that have enjoyed broad public support over a long period of time. I point to *precisely* these problems in the Conclusion of *TWOTP*. But, it seems wrong to me, in assessing an institution, to focus solely on its failings. Judicial review not only performs well at times, it also is a regular part of the everyday workings of our democracy. We’re not likely to eliminate the institution anytime soon. The alternative is to try to understand it as best we can, and to make the most of it as an institution in our democratic practice.

61. Neil S. Siegel, *A Coase Theorem for Constitutional Theory*, 2010 MICH. ST. L. REV. 583, 585 (2011) (emphasis added).

62. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010); Friedman & Lithwick, *supra* note 58.

A. Judicial Review in Democracy: Limited Choices

Before turning to the specific concerns of commentators, it is useful to make something about judicial review explicit—indeed, in terms that have become clearer to me since the publication of *TWOTP*. It is this: there are limited possibilities regarding the relationship between constitutional judges (i.e. those who exercise the power of judicial review) and the democratic process and/or the people generally. And so we must choose from among this limited set what we believe is most accurate. And then do what we can to make the most of that choice.

The choices, it seems to me, are these:

- a. Judges are constrained by some interpretive method in giving meaning to the Constitution.
- b. Judges impose their own values in giving meaning to the Constitution.
- c. Judges are constrained by some other—most likely political—force in giving meaning to the Constitution.

Whichever one of these it is—and there are proponents both among my commentators and among the world at large for (a) and (c), but not too many for (b)—then that approach has to reflect reality and be normatively attractive. That is to say, if we prefer one over the others, we have to have normative reasons for preferring it and positive reasons for believing it is true.

B. The Impossibility of Interpretive Constraint

Solum and (on first glance) Rebecca Brown are (a)s, which is to say they believe in interpretation. And, of course, there is nothing wrong with interpretation. It is what most of us who live lives in the law spend most of those lives doing: reading legal texts and making interpretive arguments about their meaning.⁶³

The question, however, is whether the process of constitutional interpretation provides any meaningful constraint on judges, particularly Supreme Court justices. If judges are not constrained in any meaningful way by interpretive methodology, then absent the sort of argument made in *TWOTP* about political constraints, we find ourselves in (b). That's just the way it is. And so the issue is whether interpretive theory can constrain, and whether in fact it does so.

63. How this vast and remarkable world of legal practice actually operates is one of the great intellectual questions, one I put aside for now as well beyond my present assignment.

1. *Solum and Originalism*

Solum is a fan of originalism, and he is extremely unhappy about what I have to say in *TWOTP* about the practice. And he is right to be unhappy. Originalism takes it on the chin in the book. But contrary to what Solum suggests, I'm not to blame for this, and it is certainly not something I set out to do. Rather, the problem is that originalism in practice is unable to fulfill the promise of originalism in theory. (If it could, I might be willing to subscribe to it, although we almost certainly would need an easier way to amend the Constitution than that given to us by the Framers.)

Before turning to the particulars, I want to address Solum's somewhat strident claim that hidden normative commitments are driving my discussion of originalism, a claim I believe to be utterly false. Solum says *TWOTP* is "normatively charged," though he's not sure exactly how.⁶⁴ With regard to originalism, he claims my normativity is explicit and criticizes my treatment of the Reagan/Meese Justice Department lawyers who helped to make originalism a fetish. But he is never quite able to put his finger on what my supposed normativity is, other than to suggest that my preferences rest with originalism's "rival, living constitutionalism."⁶⁵

I certainly have normative commitments, but I don't think they are on display in *TWOTP*, and certainly not in choosing between interpretive methods. I'm confident about this for two reasons. First, immediately prior to the part of Chapter Nine that tackles originalism, I go after the left's notion of living constitutionalism as well, a fact Solum neglects to mention. For the reasons I'd have thought were clear enough in that part of the book, I believe both theories have serious problems.

More to the point, I don't know what it would even mean to have a left-leaning or right-leaning commitment to judicial review, a doctrine that is, *qua* doctrine, politically-neutral. In practice, judicial review by the Supreme Court has so often been conservative that it is sometimes difficult to understand liberal enthusiasm for the institution. Negative rights far outstrip positive ones, and even negative rights only tend to get recognized by courts after the rest of the country is comfortable with them. *That* is the thesis of *TWOTP*. But I believe is very difficult to find a politically-grounded normative theory in *TWOTP*.

I think Solum misreads my argument in Chapter Nine because he is himself too wed to originalism, and so he sees any criticism of the events I describe there as an attack on the practice of originalism itself, or on the ideological right. In Chapter Nine, I try to explain how and why interpretive theory moved to center stage in constitutional debates when it did. The

64. Solum, *supra* note 46, at 610.

65. *Id.* at 611.

early part of the chapter demonstrates that the major Supreme Court initiatives of the Burger Court were difficult for observers to square with any understanding of the original Constitution. The examples there are *Roe v. Wade*, women's equality, and the abolition of the death penalty in *Furman v. Georgia*.

The whole point of Chapter Nine is to show how these Burger Court decisions set off a footrace on the part of the left to offer an interpretive theory that justified them, and concomitantly, on the part of the right, to offer a theory that was an antidote. And voilà: living constitutionalism and originalism were, if not born, then nurtured. Having said that, it was indeed my intention to show that the reason one prefers any interpretive theory necessarily is a product of one's deeper commitments about constitutional outcomes.

I don't mean to be lacking in generosity with regard to the choice any individual or group makes as to the "proper" interpretive theory, though Solum reads me as such. But I do mean to be candid about this—and we so seldom are. Does Solum, or anyone else for that matter, really believe it is simply an accident that most conservatives today are originalists and that originalism tends—in their hands, as opposed to say the hands of Justice Hugo Black, another originalist—to yield conservative results? (I'd ask the parallel question about the left, except that I think the left today is hopelessly adrift when it comes to interpretive theory.) I don't think so, and I find it extraordinary that the battle royal over interpretation goes on without attention to this single most salient fact. In Chapter Nine, I make precisely the same point about liberals and living constitutionalism; I show how liberals came to this theory (or how the theory came to them) at just the right moment.

I don't think this explanation for why any individual or group adopts a particular interpretive is as cynical as Solum reads me to suggest, and if it seems otherwise in *TWOTP*, I regret it. I *don't* think America's two teams snuck into their individual caucus rooms, made a list of all their desired constitutional outcomes, and then thought up an interpretive method that (mostly) got them there, only to emerge proclaiming such method of reading the Constitution is the one true way. Rather, what happens is that people constantly mediate between the world as it is and the world as they believe it should be. Call it Bayesian updating or reflective equilibrium or what you will. They have priors about how things should be. They view the Constitution, naturally, as consistent with their priors. And how they interpret the Constitution—and how they view the right way to interpret the Constitution—is naturally one that supports those priors. Thus, interpretive views are born and develop their advocates. There is no bad faith involved on anyone's part; it is just the ordinary process of people making sense of their (constitutional) world.

In truth, Solum's problem is a far larger one than he seems inclined to admit, which is that the history of constitutionalism on display in *TWOTP* undermines originalism entirely. Solum focuses on the discussion of the birth of modern conservative originalism in Chapter Nine, but the history that I lay out is what is truly devastating to the endeavor of originalism, something Solum (and most of today's originalists) simply does not take up. I did not set out to make this argument; indeed, I do not understand it to be an "argument" in *TWOTP* at all. Rather, as *TWOTP* describes the sweep of American constitutional history, it is impossible to observe the distance the Constitution has traveled since 1787 and honestly think that originalism is in any way consistent with that.

The Constitution of today is in myriad ways not our forefathers' Constitution. Does anyone really believe otherwise? The framers of the original Constitution would hardly recognize the size of the federal government we have today, a fact that even originalism's most prominent proponents concede.⁶⁶ And if that is conceded, why not much else? Women's equality? Most originalists don't even try to justify that in originalist terms. Integrated schools remain a struggle for originalists to explain. There are many examples, including some that often receive little attention: the right to counsel, the scope of the right against self-incrimination, arguably the entire apparatus for enforcing the rights of criminal procedure.

One could acknowledge that the Constitution isn't what it was, but that it *should* be. That what is needed is a return to the Constitution of yore. Few are willing to make this claim wholeheartedly. But even on these terms, originalism is a normative theory; it is most certainly not an account of what we have done. And that is precisely my point regarding the difference between "imagining" and realism.

Originalism not only fails as a description of today's Constitution, it also fails as an account of how judges actually go about interpreting the Constitution. Very few judges are originalists, and even a subset of this small set are "faint-hearted."⁶⁷ I count exactly one relentless originalist on the Court today, and in my view he can afford to take that posture because he isn't the median justice with the power to decide cases. On the lower courts, I suspect—without having engaged in anything other than casual empiricism—that the percentage may be well below one-ninth.

In the political world, originalism is nothing but a slogan for preferred conservative outcomes. In the academic world, it has become an unbelieva-

66. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 222-23 (2004); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 216 (1990) ("[T]he consolidation of all power at the federal level is too firmly entrenched and woven into our governmental practices and private lives to be undone.").

67. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862, 864 (1989).

bly refined and pedantic exercise. There is no “originalism”; there are “originalisms,” and they have become almost Talmudic in their differentiation from one another—a “narcissism of minor differences.”⁶⁸

It isn’t just originalism that is the problem, it is the notion that there is any single “ism” by which the Constitution can be interpreted, let alone that the one true method of interpreting the Constitution happens felicitously to yield a set of outcomes that consistently favor one ideological side over the other. For what it is worth this isn’t how the vast majority of judges interpret the Constitution. They use a variety of modalities and techniques, and even the most apparently ideological among them actually comes to a variety of outcomes leaning both left and right. In this, I think they are correct.⁶⁹

Isn’t the reality of constitutional interpretation and judicial review a lot more attractive normatively than the theoretical alternatives, at least when we can take our team colors off for just a moment and be honest? Is it conceivably true, or conceivably admirable, that the Constitution means what my team or your team (assuming we are on different teams) thinks it should mean at any given moment? If anything is astounding—and it is truly astounding—it is that we have this long-running debate over the proper method of interpreting the Constitution as though it is real, as though it is what judges actually do, or ever did.

2. *Brown’s Interpretive Theory*

For symmetry’s sake this response would proceed more easily if Rebecca Brown had taken up the cause for living constitutionalism, but that as it happens is not her cross. Rather, my dear friend worries for my interpretive soul.⁷⁰

Although the book offers passing references to interpretation and even a chapter with that name, one could read the entire book and come away having no idea that a constitutional decision represents a considered act of engagement between the judge and the text in an effort to find meaning. . . . Friedman’s account does not seek to provide any illumination of the profound question of how the court ought to decide tough interpretive questions.⁷¹

68. Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 16 (2009); SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 61 (James Strachey trans., W.W. Norton & Company Inc. 1961).

69. See generally Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

70. Rebecca L. Brown, *Will and Principle* 2010 MICH. ST. L. REV. 569, 570 (2011). Here’s local color: Rebecca and I were classmates in law school and have been friends since. We also were colleagues at Vanderbilt for many years, and did indeed have our longstanding intellectual differences—now, it seems to me, much resolved.

71. *Id.* at 576.

Hoping to redeem me, and apparently most of her interpretive heroes in the process, Brown offers a theory of interpretation that she believes makes the best normative sense of the account offered in *TWOTP*. I applaud the effort.

Brown's retelling of my account is actually a nice example of how empiricism and normativity can feed off one another. Brown notes in her piece that we have for many years had our disagreements: I have been relentlessly positive (in a social scientific sense) about what courts do, and she equally normative and despairing of what my positive account says about the possibilities of judicial review. But in her contribution, Brown embraces the empirical realities of judicial review as offered in *TWOTP* and fits them into her normative account. "What I will argue is that, rather than being forced by the historical evidence to abandon the role of theory in constitutional decision-making, we can explain that evidence quite robustly by looking to what it means to render a responsible interpretation of the Constitution."⁷² Brava, old friend. And, for what it is worth, I actually think—despite Brown's fretting—that much less now separates us than she believes is the case.

Brown adopts a Dworkinian notion of "fit," and argues that a judge looking for fit "has to pass judgments about how to square each interpretation with the long trajectory of American practice and beliefs over time."⁷³ I think this is exactly right; the only difference between us (as she sees it) is in the meaning of "has to." According to Brown, our views differ "in a critical respect."⁷⁴ Mine, says Brown, "sees judges as political actors motivated by self-interest," and hers "sees judges as independent arbiters of the principles to which the American people have committed themselves."⁷⁵

I am not sure Brown and I disagree, in that there is a difference between what judges understand themselves as doing (or should understand themselves as doing) and what a broader set of forces may over time compel them to do in some cases. *TWOTP* is most definitely not, as Brown observes, a theory about how judges *should* engage in interpretation. If anything, I hope I was clear enough that judges should not simply take passing popular preferences as their metric in giving meaning to the Constitution. Rather, I think I am quite plain that the way judicial review works is that judges ultimately do give voice to the fundamental commitments of the American people. (I have said this elsewhere as well.)⁷⁶

72. *Id.* at 577.

73. *Id.*

74. *Id.* at 581.

75. *Id.*

76. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1298-1303 (2004); Friedman & Smith, *supra* note 12, at 89.

It is worth noting, though, that the approach Brown favors—the search for the tradition that Justice Harlan calls a “living thing”—is in many ways immanent in the doctrine of constitutional law itself. I, too, love the quote from *Poe v. Ullman* that Brown offers up. But where I have always differed from living constitutionalists is in thinking that judges should believe they are free to read the Constitution as they wish, without taking interpretation seriously. Still, as I suggested long ago (in *Dialogue and Judicial Review*), and as the corpus of Corinna Lain’s contribution to this symposium makes so clear, in manifold ways the doctrine itself takes explicit account of the evolving set of views of the American people.⁷⁷

One last word to Solum, for I fear he may read the prior paragraph and say, “Aha, I knew it—he’s a liberal, and a living constitutionalist after all.” I don’t buy it. I do believe that constitutional interpretation has to take account of the evolving commitments of the American polity, because I just don’t see how it can be any other way with a Constitution as old as ours. But I also think judges need to take account of text, framing intentions, and past practice. More importantly, I don’t think that way of interpreting the Constitution has any necessary ideological valence. Indeed—and Brown won’t like this—sometimes the longstanding commitments of the American people are conservative ones, and when they are, the Court will mirror those conservative commitments.

C. The Judges’ Own Values

Both Neil Siegel and Rebecca Brown gesture toward the (b) choice, that judges impose their own values on the rest of us, though each seems to arrive at this conclusion from a very different direction. Siegel worries about judges doing this; Brown seems to celebrate it, but under its *nom de plume*, judicial independence.⁷⁸ Here again, the historical evidence in *TWOTP* has something to say about what exactly it is that judges are doing. It suggests that judges come into line, over time, with the longstanding views of the American people.

Brown’s worry about *TWOTP* is that it misconstrues the evidence to tell a tale of judicial subservience rather than judicial independence. She re-reads my account of incidents like the 1937 Court packing plan as support for the notion that the people are committed to an independent judiciary. “Friedman,” she says, “is unalterably committed to the characterization of these events as ‘discipline.’”⁷⁹ For her, though, “[t]hese moments more

77. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653-55 (1993); see also Corinna Lain, *The Doctrinal Side of Majority Will*, 2010 MICH. ST. L. REV. 775 (2011).

78. See generally Siegel, *supra* note 61; Brown, *supra* note 70.

79. Brown, *supra* note 70, at 575.

plausibly suggest an opposite interpretation: that on these salient occasions of strife, our national commitment to an independent judiciary has come into view and has prevailed.”⁸⁰

I actually thought *TWOTP* was perfectly clear that over time the people *have* bought into this idea of judicial independence—albeit with limits. Brown, trapped in our old ways, sees disagreement where in fact we agree. As I note in *TWOTP*, the New Deal compromise was such that people agreed to support judicial review insofar as the Court was careful not to diverge too far from the mainstream. In truth, that mainstream is pretty wide and grants the justices plenty of room to roam. I also make perfectly clear that the reason the Court-packing plan was defeated was precisely because people felt the need for the judiciary to check government power and protect individual liberties.

What Brown fails to see in her admiration for the independent judiciary is that judicial independence is a two-edged sword. Our independent judiciary is an institution of which we may, in many ways, be justly proud, especially, for example, when one compares it to the “telephone justice” in other places at other times—when party officials instructed judges how to rule. But independence necessarily trades off against accountability. The less accountable judges are to something, the more likely they will simply vote their own preferences or values. This does not mean the judges will fully ignore the law. To the contrary, I hope and believe that most of them do their best in all good faith to understand and interpret the law—including the Constitution—in every case. However, to the extent interpretive methods do not constrain, this inevitably leaves room for very different interpretations by different judges.⁸¹

Neil Siegel provides a counterpoise to Brown; he worries that overly-independent judges have far more sway over us than we understand, and thus fears we still live with a countermajoritarian difficulty, albeit of a somewhat different sort than is typically expressed. Siegel offers what might be the most creative interpretation of my book yet, likening my theory of judicial review to the Coase Theorem: “regardless of the way the Court interprets the Constitution and initially assigns constitutional entitlements, Americans will eventually bargain their way towards an interpretation that reflects their considered judgment as a people.”⁸²

80. *Id.*

81. None of this is meant to speak to the efficacy of the rule of law, which is often more tangible—and properly so—with regard to vertical stare decisis. See, e.g., Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 617 (2004); Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC. REV. 143, 155 (2003); Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent* 64 J. POL. 534, 547-48 (2002).

82. Siegel, *supra* note 61, at 587.

Siegel insists that contrary to my seemingly rosy story, “the book may fail to fully register the power and potential influence of the particular individuals who sit on the Supreme Court at a given time.”⁸³ According to Siegel, the causal arrow of influence goes both ways, the people influence the Court, but the Court’s views also shape public opinion. Thus, Siegel fears that judicial wrong-headedness (of whatever shape or ideology) might affect the trend of constitutional decisions and public reaction to those decisions.

Although I think Siegel is on to something important, I’m not sure the evidence yet exists to support his theory as he puts it. People ask all the time: can’t the Court shape public values just as the public influences the Court? Usually they have in mind their own happy story, like the influence of *Brown v. Board of Education* on the march toward civil rights. Siegel worries about the converse, of course, that decisions he believes wrong-headed will nonetheless end up accepted—and acceptable—because the Court handed them down. The social science on this remains thin, but what there is tends to suggest that the Court doesn’t influence public opinion as much as one might think, except in perverse ways, i.e. by fomenting backlash. People who like the Court’s decisions simply nod, while those opposed mobilize. This doesn’t mean Siegel is wrong; it just means the work still has to be done to know whether he is right.

Siegel’s analogy to the Coase Theorem, though, may be more apt than he stresses, and in an equally troubling way. The Coase Theorem is all about transaction costs. In their absence, bargaining will lead to an efficient solution. But transaction costs do exist—they always necessarily exist—and there’s the rub of it.

Judicial review is sticky, which is to say that the transaction costs of reversing the Court are enormous. This has its advantages, but it also takes its toll. I argue in *TWOTP* that the stickiness of judicial review is what forces mobilization in reaction to the Court decisions, which in the long run helps achieve some sort of social consensus, which in turn shapes the meaning of the Constitution. This sort of mobilization can lead to the court being reversed, but in the meantime the Court’s rulings stand, and often with disastrous consequences. I don’t think I’m subtle in the least about this in *TWOTP*. The tragedy of the Japanese internment is my primary example, but *Citizens’ United* may prove to be another such decision. *Betts v. Brady* perpetuated the practice of sending many undeserving people to prison for lack of counsel. *Hamer v. Dagenhart* condemned children to work, often at difficult labor. One could go on.

All of this is simply to say that a normative theory that puts the meaning of the Constitution into the hands of whatever judges happen to sit on the Supreme Court, with no constraint upon them, is not a very attractive

83. *Id.* at 583.

one. That's why, despite all our rhetoric about judicial independence, you don't see this, as a normative theory at least, offered up very often. Indeed, I can't think of one serious piece of scholarship that argues judges should just get to read the Constitution however they please.

D. The Will of the People

If interpretive theory and method don't constrain, and judges deciding however they please what the Constitution means isn't normatively attractive, what's the alternative? *TWOTP* is meant to suggest, roughly, that the constraint on the justices is political. *Contra* the political scientists, though, who think it is only about institutions, my point is that what ultimately constrains the Court is popular views about the meaning of the Constitution.

When I say "popular views," however, I do not mean the passing fancy of the people, often expressed under some sort of pressure. Rebecca Brown suggests *TWOTP* "seeks to demonstrate that transient popular will is indistinguishable from transcendent constitutional principle."⁸⁴ On this one point, I could not disagree more strongly. The "rosy" side of *TWOTP* is just the opposite: precisely because of the stickiness of judicial review, we are forced to seek and ultimately forge broader consensus on the most difficult constitutional issues of our day. And it is this consensus that I hope comprises the deeper, more enduring values that ultimately become entrenched in the Constitution.

Indeed, what Siegel misses to some extent is that it is not so much about the people influencing the judges as it is the people influencing one another. My rosy story is that judicial review forces public debate, which goes on until there is some sort of consensus, which the judges ultimately adopt. Judges decide cases (the decisions of which do stick, sometimes in bad ways), and people who disagree are motivated to take action. In the long run that political action becomes a struggle over constitutional meaning. Indeed, in *TWOTP* it is precisely the backlash and mobilization that moves the story—that leads to the "dialogue" among the American people.

What I have come to believe over the course of many years is that this may be the most normatively attractive story one can tell about judicial review writ large. By "writ large," I mean to distinguish it from another story about judicial review in individual cases, in which judges use their power to, for example, protect individual liberty from the actions of petty officials. The tougher questions arise when the Supreme Court strikes legislation enacted by popular representatives and does so on a regular basis. Sure, some of those legislative choices may not, because of public choice dys-

84. Brown, *supra* note 70, at 570.

function or whatnot, be either reflective of the popular will or sound policy. Still, this is a democracy, and we properly cherish it, warts and all.

The best account I can give of judicial review is that it performs this separating function, taking some issues out of the realm of what Bruce Ackerman calls “normal politics” and into the realm of constitutional politics.⁸⁵ And once there, the best account I can offer is that over time the Constitution comes to reflect the deepest values of the American people. I don’t claim the system works well all the time—more on this in a moment—but given the lack of interpretive constraint and the unattractiveness of judges choosing for us, this is the best defense of the practice I have come to.

And it is precisely this that makes William Novak buggy. For most of his long review he seems to have issues not so much with *TWOTP* as with how history is being done by many, particularly non-professionally trained, historians. I am simply the fly in his web. Until the very end of his review.

Concluding his remarks, Novak changes guise from the historian to the normatively anxious law professor. Some thirty or more pages into his review, we finally come to what seems most to bother him about *TWOTP* itself: the claim that judicial review may serve to foster popular consensus. Novak reads this as “legitimation” of judicial review, and it bothers him mightily:

But the most significantly troubling aspect of these final lessons that more than two-hundred years of Supreme Court history teaches is . . . what an extraordinary justification and rationalization for the present order of things, for established power relations, for the influence of law and judges and courts in American society. Do not fret, hold your critiques, stop the historical and social scientific investigations . . . it has all had ‘the blessing of the American people’ worked through the “magic” of a “dialogue with the justices.”⁸⁶

The problem, of course, is that this is neither what I argued nor what the evidence suggests. Novak, ever the advocate of legislative power—that is, after all, his project in *The People’s Welfare*—caricatures *TWOTP* rather than trying to grasp what it actually says. Indeed, if anything is truly remarkable it is that in turning normative himself, Novak loses sight of the facts in a manner unusual for a historian.

In what in some ways really is a page too far, Novak seeks to tar not only me, but Mark Graber and Michael Klarman as well, with the racist sins of the Dunning School. “The judicial interpretations of the amendment, like the elections of 1874, embody, in fact, a reaction of the southern policy of the Grant administration”—a southern policy that was “harrying the white men of the South”—writes Novak, quoting Dunning.⁸⁷ He then juxtaposes the Dunning quotation with this from *TWOTP*: “The Court’s decisions dis-

85. BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 6, passim (1998).

86. Novak, *supra* note 16, at 568.

87. *Id.* at 661.

mantling Reconstruction were met to a remarkable degree by the widespread plaudits of the popular press.”⁸⁸

In this part of *TWOTP*, I’m making a *descriptive* point, one that I seriously doubt Novak would deny: that the Court *in fact* dismantled Reconstruction, and *in fact* was applauded by the mainstream press, including formerly abolitionist newspapers, for doing so. If Novak does deny it, I’d like to see his evidence. If, on the other hand, he agrees, then what matters is an appraisal of what this evidence means. My point was that a Supreme Court scarred by *Dred Scott* and the struggles over Reconstruction, found its way to power by pandering to then-popular sentiments. Personally, I find it regrettable, and elsewhere have written about what we ought to make of the history of Reconstruction as a matter of constitutional interpretation.⁸⁹ Whether the Court could in fact have stood against the tide and altered the sad history of race relations in this country is an excellent question, albeit a counterfactual that would be extremely difficult to answer. But as an account of what did occur, I stand by the chronicle of events in *TWOTP*. That is the difference between normativity and social science.

TWOTP appears to Novak as “Whig history” only because he wants to make it Whig history, ignoring what the book was written against, its specific thesis, and what the evidence in support of that thesis says about the “American people” and their relationship with judicial review.

Novak asks a pile of what he says “are not rhetorical questions.”⁹⁰

Aren’t there fundamental inequities and distinctions in American society—rifts between, say, different segments of “the American people”—in which public law continues to play a significant role and about which we expect American constitutional history to say something? Doesn’t modern American constitutional law have a fundamental and complicated relationship to capitalism that has some bearing on public “will” formation? Isn’t the relationship between law and public opinion and democracy in modern mass societies (as A.V. Dicey, Walter Lippmann, John Dewey, Jürgen Habermas and countless other theorists and historians have demonstrated) an exceedingly intricate and difficult question that invites thousands of other hypotheses and inquiries, but resists just such easy, concluding generalization?⁹¹

YES! But these weren’t *my* questions, and with regard to my question I’m still completely in the dark about what Novak has to say. On the subject covered by *TWOTP*, Novak stands mute. Does he think we should abolish judicial review? Elect judges? If so, he should say so. *TWOTP* was hardly intended to legitimate judicial review, which I lack the power to do in any event. I do believe, however, and make clear in the book, that the

88. *Id.* at 660.

89. Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201 (2009).

90. Novak, *supra* note 16, at 659.

91. *Id.*

practices of American democracy over the last two hundred plus years have legitimated the institution. And if Novak thinks they haven't, or that they should not have, he should come out and make the case.

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 as well as events 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 Court reversed itself. 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, to place responsibility for our Constitution squarely where it belongs, on our own shoulders.

Having done that, though, I would have thought *TWOTP* plainly disaggregated us, the American people, as we struggle, as we must struggle, as we should struggle, over our most fundamental commitments, some of which end up entrenched in (like it or not!) our Constitution. Just because we are formally a political polity whose democratic will can in fact speak to judicial power in constructive ways, does not obviate our many divides. *TWOTP* is a canvas of that. Grangers, Abolitionists, Democrats, farmers, pro-life and pro-choice, plutocrat and proletarian. *TWOTP* was all about 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.

Reading Novak's review, I'd worry that this point was so easily lost, but for all of those who seem to have grasped it so well and run with it. Exemplary is a wonderful piece by John Ferejohn and Pasquale Pasquino that, relying on precisely the sort of political theory Novak feels is missing from *TWOTP*, shows how the exercise of judicial review actually fosters deliberation in ways that are more democratic than what we often see in legislative deliberations. What Ferejohn and Pasquino understand is that courts are, ironically, often more open to deliberative claims than are legislatures.⁹²

TWOTP was not intended either to be a last word or a purely rosy story. It bears repeating: it was meant to reshape the research agenda on the operation of judicial review. For example, as Siegel correctly highlights, not all cases are salient, a lot can fly under the radar. Since publishing *TWOTP*, I have continued to work on this project, noting in particular the

92. John Ferejohn & Pasquale Pasquino, *The Counter-majoritarian Opportunity*, ___ U. PA. J. CONST. L. ___ (forthcoming 2011).

ways the Supreme Court can manipulate the process. *TWOTP* legitimates judicial review only in the sense that it offers an answer to the countermajoritarian difficulty as it has been so often stated. But that answer serves only to bring into clearer relief instances of a system failure—instances when, in fact, it is difficult for “the People” to be aware of or respond to judicial action.

The relationship between popular opinion and judicial review is a complicated and nuanced one. That is what I hoped to show, over many hundred pages, covering two and a quarter centuries of American history. I don’t think that I could have captured that sort of nuance using a different, more discipline-specific method. The method I chose, while admittedly eclectic, enabled me to reach the conclusions that I did. And as to those conclusions, they remain available for alteration, correction, and normative dissent. That’s why we (academics) do what we do. I’m fortunate to live in that world and very grateful indeed for the thoughtful responses to *TWOTP*.