Will and Principle
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WILL AND PRINCIPLE

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The utterly unintended consequence of *The Will of the People* is a vindication, of sorts, of a moral or otherwise principled reading of the Constitution, while claiming a vanquishment. At the same time it stands as a stark repudiation of originalism. But I get ahead of myself. . . .

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In *The Will of the People*, Barry Friedman holds up a mirror to the American people, inviting us to take a new look at our relationship with our unelected judiciary.[1] Like a dysfunctional family in recovery, we are shown in the mirror an image of ourselves that is different from what we may have told ourselves and others about who we are. We see that issues that have worried us and caused us to fight amongst ourselves may not be quite what we thought they were. We pictured ourselves as committed to an independent judiciary, with all the pride and self-congratulation it permitted us as we touted a self-image committed to the protection of individual rights and principles of fairness and justice secured against the pressures of public passion. Yet, we have also argued about whether this image of ourselves is permissible, and we have indulged in a fair amount of self-loathing and apology for allowing an unelected judiciary to speak for a democratic polity.

The good news in Friedman's mirror, he tells us, is that the wrenching identity crisis has been for naught, the legitimacy of our compromise not at risk. The bad news, however, is the price of the good news: our higher

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* Newton Professor of Constitutional Law, USC Gould School of Law. This Essay was prepared for inclusion in the Symposium on *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, by Barry Friedman. My thanks go to David Strauss for his comments.

1. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

sense of self. According to Friedman's account, the family secret we have been guarding, even from ourselves, is that we the people do not actually have higher aspirations of principle transcending popular passion. Taken for its strongest claim, the book seeks to demonstrate that transient popular will is indistinguishable from transcendent constitutional principle. The former guides and constructs the latter; the latter more or less entrenches the former.

The book responds to the countless expressions of concern—voiced over decades in constitutional theory tomes, scholarly articles, judicial opinions, popular media, and political speeches—bemoaning the apparent tension between democracy and judicial review. The questions are familiar to anyone with a passing interest in basic civics: do we rule ourselves, as a commitment to democracy seemingly requires, or do we allow unelected judges—Platonic guardians, if you will—to rule us? If government legitimacy can come only from the people, how do we find such legitimacy either in the 220-year-old document that none of us voted for, or in the scrawls of nine life-tenured judges who divine its meaning? The judiciary has labored under the cloud of this so-called counter-majoritarian difficulty whenever it has employed its power to invalidate laws passed by elected officials, based on its reading of constitutional text.

Through exhaustive historical research, Friedman's book seeks to demonstrate that the evolving practice of our judiciary has resolved the difficulty by ensuring that even when it invalidates a nominally majoritarian law or action, the Court does so based on a larger sense of majority will. As Friedman puts it, "when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people."[2] That is, the Court is better understood as a check, not on majorities, but on elected government that strays too *far* from majority will. If the judges fail to gauge that will correctly the first time, then they ultimately correct themselves so that "over the long term on the important issues the people are going to have their way."[3] In this Essay, I will offer an alternative lesson to be learned from Friedman's impressive findings.

I must confess that I come to this book with something of an attitude. For all the many years that my dear friend has been working on this project, he has valiantly pursued, developed, and defended his early instinct that the Court is democratically legitimate because it is really not counter-majoritarian. During that same period, I have just as vehemently insisted that the Court's legitimacy does not depend at all on whether it is or isn't counter-majoritarian, making the central question of his project something

2. *Id.* at 368.
3. *Id.* at 377.

of a distraction.[4] With the completion of the book that is the culmination of a monumental historical inquiry, it is now time to come to grips with this twenty-year-old argument between us.

The first thing I want to say is that Friedman has exceeded even the wildest hopes of what I thought could be achieved. He has produced a gripping, comprehensive, scrupulously well-documented account of the political history of the Court, beautifully told and stunningly original in its portrayal of each historical period. It has an internal coherence that is nothing short of remarkable for a project of this chronological scope. In its syntheses of events, the story pulses with personality, insight, movement, and life—the attributes that set the best historical works apart. The book is a significant contribution to our debates about constitutionalism, and will edify all those who are interested in the history, not only of the Supreme Court, but also of the American people—and, of course, the complex relationship between the two. I have learned a great deal from this book, and I applaud the outstanding contribution it makes to our collective candor in speaking about the Court. In the discussion to follow, I wish to build upon the fascinating history by suggesting a different way to think about the compelling story Friedman tells.

Friedman has shown us that there is an eventual correlation between the Court's interpretations of the Constitution and some zone of approval that can be attributed to the American public.[5] The burning question, how-

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4. *See, e.g.*, Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 532-33 & n.3 (1998) (citing Friedman's defense of judicial review against Bickel's counter-majoritarian charge based on the claim that the Court is not unaccountable; arguing against this "siren song of popular sovereignty" as the foundation of constitutional legitimacy).

5. The concept of whose views count as those of the people is a very difficult matter. Friedman has worked heroically to address this concern as responsibly as possible, by delving into everything he can possibly find showing what people at all points on the social ladder were saying about actions that the Court was taking at any given time. *See* FRIEDMAN, *supra* note 1, at 16-18. Despite his high degree of scholarly integrity, there are still conceptual obstacles to fulfilling the ambition of the project, however, in that most of the Court decisions discussed in the book were quite controversial in their own times. That is what makes them famous and significant. But by definition, the controversial decisions will have supporters on both sides of the issue, and it is not clear to me how one selects, in those circumstances, one view as reflecting that of "the people." Clearly, Friedman is not interested in counting precise numbers, nor should he be. But the nature of many of his claims requires him to decide which of two popular views was dominant, yet without any real means to establish that status. A theory that involves a claim, for example, that *Brown v. Board of Education* was popularly supported at the time of its rendering, *id.* at 245, seems to be missing something, even if its numerical reliance on national poll numbers is accurate. Similarly, when speaking of the Warren Court decisions on race, legislative apportionment, and the rights of criminally accused, the book states that "the public supported [the] outcomes." *Id.* at 237 (citing to a statement of New York Times journalist Anthony Lewis). Yet, "when the national majority abandoned it—on the issue of crime—the Warren Court itself was lost." *Id.* at 238. It is difficult for me to comprehend this as a historical claim. Did the same

ever, is *why*. The book offers both weaker and stronger versions of an answer to this question. In the weaker version, *The Will of the People* suggests that the institutional structure of the Court, including political appointment and need for enforcement of its decisions by the political branches, very generally operates to ensure that decisions will be within some degree of acceptability to the larger public. But Friedman does not find this explanation sufficient.[6] In the end, he embraces the strong version of the answer, which relies on an anthropomorphism of both the Court and the public. "[I]f [the people] simply raise a finger, the Court seems to get the message."[7] Friedman's answer suggests that individual justices have consciously made outcome-determinative decisions in cases based on their sense of the direction of public opinion.[8] Furthermore, they have done so out of self interest. The motivation for accommodating popular opinion is a fear of popular efforts to "discipline" the Court: imposing political checks on the judiciary such as impeachment, defiance of court orders, court-packing, and jurisdiction-stripping.[9]

Two aspects of Friedman's account make me uneasy. Both involve a lurking concern I have that this account of judicial review minimizes what I hold to be profoundly important values in our constitutional democracy. The first of these values is the public commitment to an independent judiciary, and the second is the importance of judgment to constitutional interpretation. I will discuss each in turn.

I. THE PUBLIC COMMITMENT TO JUDICIAL INDEPENDENCE

Perhaps the most prominent theme of the book is the repeated efforts by the people to discipline the Court when it has strayed from their will.

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people change their minds on the Warren Court agenda? Did different people come into the fore and overshadow the original supporters? How does one see or document such a shift? I raise this only to air a concern I have about the extent to which it is even possible to speak about a "majoritarian" or "counter-majoritarian" point of view once one departs from Bickel's original use of the term as referring to the invalidation of democratically-enacted laws. Of course, using that definition, all of the Warren Court's numerous decisions striking down state laws are indeed "counter-majoritarian." Friedman wants to attribute a different definition to the concept of counter-majoritarianism, looking to the policy views held by a broader segment of society than those who may have passed the laws in question. I will argue in text that a claim to identify the will of the American people on matters of principle is incoherent without the introduction of personal judgment that can mediate among the competing popular views and determine which best fits the traditions of our constitutional democracy.

6. *Id.* at 374.

7. *Id.* at 376.

8. *See, e.g.*, *id.* at 230-33 (strongly suggesting that Justice Roberts switched under pressure in 1937); *id.* at 258 (strongly suggesting that Justices Frankfurter and Harlan switched their positions under pressure after 1957); *id.* at 364-65 (suggesting that Justice O'Connor frequently voted in a way that resulted in the Court following public opinion).

9. *Id.* at 375.

Indeed, acts of discipline are portrayed as having been so significant and effective over the Court's 170 years or so that subsequently, "[t]he justices don't actually have to get into trouble before retribution occurs; they can sense trouble and avoid it. The people do not actually have to discipline the justices; if they simply raise a finger, the Court seems to get the message."[10]

The book discusses several examples of popular efforts to discipline the Court, and emphasizes four principal ones. In 1804, Justice Samuel Chase was tried on eight articles of impeachment relating to allegedly partisan acts of judging.[11] During the Civil War and Reconstruction period, tension between Congress and the Court resulted in a great deal of manipulation of the Court's docket and jurisdiction by statutes seeking to avoid the judicial invalidation of efforts viewed as necessary to the war effort.[12] In 1937, President Franklin Roosevelt proposed a plan to permit the appointment of one new justice to the Court for each sitting justice who reached the age of seventy without retiring, for the undeniable purpose of stacking the Court with justices sympathetic to his New Deal programs.[13] In 1957, Congress considered several aggressive legislative measures aimed at reversing or limiting the effect of what were perceived to be pro-Communist decisions.[14] These political uprisings are the centerpiece of Friedman's claim that the American people have demonstrated an insistence on controlling the judiciary.[15]

But they did not happen. With the exception of the Civil War measures, these threats did *not* clear the political hurdles necessary to make them happen.

I would set the Civil War efforts to one side, as part of a series of events that can perhaps be best understood as extra-constitutional, outside of our constitutive traditions rather than reflective of them. These measures were, after all, part of the grossly aberrational pursuit of and emergence from a civil war and so have tenuous status in discussion of constitutive law.[16] I turn, then, to the lessons to be drawn from the other examples of discipline.

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10. *Id.* at 376.
11. *Id.* at 64-71.
12. *Id.* at 124-33.
13. *Id.* at 223-34.
14. *Id.* at 250-58.
15. *Id.* at 11-14.
16. If this seems unfair, there is more that can be said about the Civil War statutes to portray them as less an outlier from my argument than they may at first appear. In the case of the Congress's removal of jurisdiction to hear habeas cases arising out of Reconstruction's martial law, for example, the Court in *Ex parte McCardle* bowed to it, but with the express qualification that other avenues for judicial review of constitutional claims still survived. Ex parte McCardle, 74 U.S. (7 Wall.) 506, 515 (1868). I concede that any national commitment to judicial independence was strained in these years, but even then it was not abandoned altogether.

Although Justice Chase was apparently widely believed to have engaged in serious misconduct,[17] the impeachment was blatantly partisan, Republicans against Federalists. Nevertheless, Chase mysteriously secured the votes of six Senators from the opposing political party, and thus was acquitted. As Friedman tells it, there is some evidence that at least some of these "no" votes were in response to the defense strategy of framing the case against Chase as an attack on "[a]n upright and independent judiciary."[18] Insofar as broader morals can be drawn from the story regarding what the people want from their Court, this failed impeachment effort stands as some evidence of respect for an independent judiciary overriding transient political preferences. No other Supreme Court Justice has been impeached since, no matter how vehemently public opinion may have disagreed with individual votes or collective decisions of the Court. Thus, it seems that if any discipline took place with respect to the impeachment, it was a discipline of the political branches, reminding them to respect the independence of the Court even when it may be misbehaving.

FDR's court-packing plan came close to passing at the time, and its ultimate defeat was perhaps determined by a series of bizarre fortuities, but the fact remains that it did not pass. It is important to recognize that the court-packing proposal met with dramatic response from all quarters. Friedman documents an opposition that "stressed the danger of dictatorship" that could ensue from loss of an independent judiciary.[19] "'[T]he political drama of a generation,'" it was called.[20] Some of the opposition no doubt derived from disagreement with the New Deal philosophy that the newly minted seats on the Court could secure.[21] But much of the objection was structural: the President should not be "applying 'force to the judiciary.'"[22] Thus, the 1937 experience, like the Chase impeachment, reflects a failed attempt by some political actors to attain sufficient political support to succeed in placing transient political preferences above the overriding value of judicial independence.

The same can be said of the 1957 to 1958 legislative attack on the Court. Unhappy with a series of Court decisions invalidating convictions for communist activities, Congress set out to "curb" the Court.[23] A series of measures designed to overturn these domestic security decisions went up for a congressional vote, but failed by the slimmest of margins.[24] Again, the

17. FRIEDMAN, *supra* note 1, at 66-67.
18. *Id.* at 70 & n.228 (internal quotations omitted).
19. *Id.* at 218.
20. *Id.* at 223.
21. *Id.* at 224.
22. *Id.* at 228 (quoting from Senate Judiciary Committee's negative report on the plan).
23. *Id.* at 253.
24. *Id.* at 254.

effort was extremely controversial; the opposition was apparently some combination of those who agreed with the Court on its civil-liberties holdings and those who believed that the Congress should not control the Court. As with all political efforts, there are no doubt many contributing causes for the defeat of the bills, but in the end, once again, defeated they were. Subsequent efforts to wrest control from the Court on issues on which it had rendered unpopular decisions such as school prayer, school busing, abortion, and flag burning, have not even come close to passage.

The question remains what to make of these stories. Friedman is unalterably committed to the characterization of these events as "discipline." They have contributed, he argues, to a sense of trepidation in the Court of crossing the public at its peril.[25] Friedman insists that these stories show the people repeatedly warning the Court that they stand ready to pounce if it steps out of line. While there is no doubt some truth in this characterization, it seems to me overstated. These moments more 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. Even when brandishing judicial decisions that most people disagreed with, the proponents of interference with the Court have been unable to muster enough political support to succeed. The effort to control judicial outcomes has consistently been viewed as of an entirely different nature from simply criticizing the Court for being wrong. How else does one make sense of the profound drama and outrage occasioned by FDR's plan? *Why* was it viewed as "the drama of a generation"?[26] If the people indeed expect that their Court will be brought into line with public opinion, then a blatant effort to do so, such as the court-packing plan, should not arouse a huge outcry. The kind of controversy that Friedman portrays in 1937 makes sense only if the act of interference is seen as cutting against a deeply held constitutive belief of the American people. Otherwise the size of the Court, or the future of the New Deal programs, would have been just another policy dispute, and hardly the drama of a generation.

The country's experience with *Bush v. Gore* supports this interpretation. According to Friedman's account, Gallup polls showed that after the unpopular decision came out in 2000, most people believed that the Supreme Court should be allowed to make the decision, even though it had resolved an election against the preferences of a plurality of Americans.[27] Friedman cannot explain this: "It is difficult to know why Americans so willingly accepted the Supreme Court's resolution of the election."[28] He ultimately has to guess that this is an aberration: the Court simply weathered

25. *Id.* at 377.
26. *Id.* at 223.
27. *Id.* at 358.
28. *Id.*

the storm of discontent by drawing on its built-up capital of public trust in the judiciary. But a much more straightforward and plausible interpretation of the public acceptance of an unpopular decision is the same as that which explains 1804, 1937, and 1957: even when we disagree deeply with a Supreme Court decision, we accept it because of our overriding belief in the independence of our judiciary. We believe that in the long run, we as a democracy are better off having a Court whose job it is to resolve foundational questions free of popular pressure, and we will sacrifice short-term victories in order to preserve the institution. We will of course work to persuade the Court to change its mind in future cases, or to elect presidents who will populate the Court with justices whose decisions we like better, but when the Court speaks, we do not use political power to silence or reverse it. That, I argue, is the overriding will of the people.

The importance of my disagreement with Friedman on this point cannot be overstated. If the American people do hold the commitment to judicial independence that I suggest, then that means that the people acknowledge the existence of enduring principles to which our democracy is committed, and that these principles transcend passing policy preferences. A belief in judicial independence is a pre-commitment to allow—and expect—the unelected judiciary to place principle over popularity in future cases. This is significant because of its dramatic impact on how we as a polity understand the act of constitutional interpretation.

II. THE IMPORTANCE OF JUDGMENT TO CONSTITUTIONAL INTERPRETATION

The danger of a story such as the one Friedman tells is that it could be understood to validate the view that there is no substance to interpretation, indeed that interpretation is a euphemism for political decisions. Although the book offers passing references to interpretation and even a chapter with that name,[29] 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. Worse yet, one might see the process of interpretation as nothing more than an elite parlor game providing a thin disguise for the validation of social policy preferences. Friedman's account does not seek to provide any illumination of the profound question of how the Court ought to decide tough interpretative questions. The omission is, of course, forgivable because that is not his project. But the risk of telling the story in this fashion is its implication: that there is no such thing as meaning; there is only gleaning of popular will.

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29. *Id.* at 280-322 (Chapter 9).

By depicting the history of the Court as simply a process of tug-o-war between the Court and the people, the book takes interpretation out of the picture. The Court is always gauging popular will and correcting its decisions to reflect it, motivated by an instinct of self-preservation. The only measure of success, if such a word even belongs, is eventual equilibrium, acquiescence by the people in their judiciary. But how is a court to know, at the time of its decision, what interpretation is right? How are two disagreeing justices to defend their respective points of view as better than the opposing position?

All theories of interpretation have answers to these questions. Under any theory of interpretation, the better interpretation is the one that more faithfully adheres to the principles animating the theory of interpretation. 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.

Principled theories of constitutional interpretation (by which I mean to describe those theories that seek to identify and apply constitutional principles in contemporary times, as distinguished from pragmatism or originalism, which have other goals) could be expected to produce the results that Friedman establishes in his book. Dworkin's moral reading of the Constitution, as a leading example, recommends a process by which the judge identifies a set of constitutional principles at a general level, and then applies those principles to concrete contemporary issues according to a requirement of constitutional integrity.[30] Integrity in turn, dictates that the application of constitutional principle to any particular issue "fits the broad story of America's historical record."[31]

It is the element of "fit" which situates principled constitutional interpretation within the evolutionary narrative that Friedman recounts. Fit is the step in the interpretative process that seeks to identify what the commitments of the American people actually are. Unlike polls, newspaper editorials, or proposed statutes or other indicators of what some people are seeking at any given time to achieve in the public sphere, 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. Dworkin offers, as an example, the question of whether the Constitution's Equal Protection Clause requires economic equality.[32] Although the pure text, or even abstract justice, might suggest the answer is yes, that interpretation does not comport with our history, our practice, the rest of the Constitution, or any

30. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

31. *Id.* at 11.

32. *Id.*

significant segment of public opinion, past or present, and so it is not the correct interpretation of the clause.[33] In contrast, a judge seeking to decide whether that same Equal Protection Clause protects women would reach a different ~~result. Although~~ at the time the clause was adopted and for many decades subsequent, equality for women was not part of the societal understanding or expectation. By 1973, a judge would have to consider evidence of changing practices and mores, and thus could conscientiously conclude that an affirmative answer was consistent with constitutional integrity.

Although the word "fit" is associated most often with Ronald Dworkin, the general idea is common to all dynamic theories of constitutional interpretation. Whether it be termed "translation,"[34] the "'living' Constitution,"[35] "documentarianism,"[36] "ethical argument,"[37] or a host of other monikers, the central idea is that responsible constitutional interpretation must incorporate some means of connecting the text to the values and practices of the American people.

The Court, too, has recognized this principle of fit in many of its most important decisions. Justice John Marshall Harlan said it best. He spoke of a constitutional right as:

> the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. ***A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound***. No formula could serve as a substitute, in this area, for judgment and restraint.[38]

I would argue that this balance, which we call "ordered liberty," is at work in virtually all of the controversial cases Friedman documents over the course of our nation's history. Is Dred Scott, the former slave, a citizen of the United States? Can Fred Korematsu, a loyal American citizen, be deprived of his liberty of movement during wartime? Can Joseph Lochner

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33. *Id.* at 11.

34. *See* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1367 (1997).

35. *See* Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 710 (1975) (describing this metaphor as permitting the judiciary to elucidate the development and change in the content of rights over time).

36. *See* Akhil Reed Amar, *The Supreme Court 1999 Term, Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 53-54 (2000) (requiring "the reading that best fits the entire document's text, enactment history, and general structure[:] . . . the American People's particular sense of justice").

37. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 20 (1991) (explaining constitutional reasoning based on moral commitments reflected in the Constitution).

38. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (emphasis added).

employ his bakery workers for whatever number of hours they agree to? May Linda Brown insist on attending a formerly segregated school? Can Estelle Griswold be criminally punished for helping married couples get birth control?

Whether the justices acknowledged it or not, in each of these cases, the Court was required to evaluate the strength of an individual claim to liberty against the reasons the state offered for abridging it in the name of the common good.[39] Both sides of that balance involve considered judgments that of necessity involve some engagement with societal values. More precisely, the Court must determine how American society's sense of justice squares with the claimed right, and how society's sense of public necessity squares with the claimed justifications for limiting that right for the greater good.

On the rights side, it is very easy to see that a claim to a constitutional entitlement to equality would be framed entirely differently in 1870 as compared to 1970, and not so much because of intervening changes in constitutional text or precedent, but because society has an evolved understanding of what the abstract concept of equality implies. The same can be said of liberty. There was a time when our constitutional guarantee of liberty stood side-by-side with a practice of slavery. The meaning of liberty as an abstract concept has not changed, but the social understanding of what it means for actual social practice has changed considerably. Modern claims to liberty in the Court have been situated quite solidly in arguments about the evolving American sense of decency.[40] Court doctrine actually requires that a claim to liberty be supported by a showing of tradition or societal consensus.

Similarly, on the other side of the balance, the evaluation of government reasons is also necessarily tied to the circumstances of the times. When the Court evaluated the state of Kansas's reasons for wanting to maintain segregated schools in *Brown v. Board of Education*, it had no choice but to think about the claimed reasons for segregation in light of the setting of 1950's America.[41] If the Court had believed that the government's interest was strong enough, if somehow the state could have per-

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39. *See* Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J. L. & LIBERTY 570, 587 (2005); Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 WM. & MARY L. REV. 65, 67-81 (1999) (both discussing the substantive role of state claims of "common good" in evaluating claims of liberty under the Due Process Clause).

40. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 716 (1997) ("Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life . . . ."); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (emphasizing growing societal recognition for rights to personal dignity and autonomy).

41. *See* Brown v. Board of Education, 347 U.S. 483, 492-93 (1954) ("We must consider public education in the light of its full development and its present place in American life throughout the Nation.").

suaded the Court that its segregation policies averted some real harm, then the Court might well have considered the impairment of liberty and equality justified. But in light of what it perceived about the public values and social realities of 1954, the Court did not agree with the state that maintaining a system of white supremacy was a valid state goal, even though the Court had found it to be so at an earlier time in our history.[42] This is but one example of a general rule that state interests are evaluated in terms of what the Court sees as public opinion, filtered by judgment regarding which of conflicting social values may achieve the best fit with history and contemporary practice.

My claim is that the Court's interpretative practice follows the guidance of the principled constitutional theorists in reading constitutional provisions in such a way as to incorporate judgments about what liberties and what constraints we as a people are committed to. Loosely speaking, this is the heart of Dworkin's notion of "fit," and it is also the heart of Justice Harlan's balance of ordered liberty. Given the widespread adoption of some version of this form of constitutional interpretation, it is not surprising that Court decisions and social practice should be found not to have veered too far from one another over time. If the Court is doing a reasonable job of reading the trajectory of American practice and moral commitments, there should be such a correspondence.

When Friedman tells his powerful story of a confluence between Court decisions and the sentiments of the people over the long run, I see it as a validation of this very basic understanding of what constitutionalism is—a judgment about the principles and values of our people: "the balance which our Nation . . . has struck between that liberty and the demands of organized society."[43] The translation of substantive constitutional principles, or concepts, into specific conceptions or manifestations of those principles in contemporary life, is exactly what principled constitutional reasoning asks judges to do.

It is important to emphasize the significance of the distinction I see between Friedman's account of our practice and the one I have just described. By Friedman's account, the Court's perception of public opinion drives its decision. The justices—or some justices—do what they think the public wants them to do for the reason that the public wants them to do it. By contrast, the process of dynamic constitutional interpretation that I have described means that the Court seeks to find the meaning of abstract concepts like equality or liberty by applying them to a particular situation in the light of traditional and contemporary mores. It is an act of interpretation taken because the judge believes, not that this is what the public wants, but that

42. *See* Plessy v. Ferguson, 163 U.S. 537 (1896) (noting the existence of social prejudices not created by the discriminatory law).

43. *Poe*, 367 U.S. at 542.

this accurately reflects the proper application of the concepts to which we are committed by our constitutional text. The two are different in a critical respect: the former sees judges as political actors motivated by self-interest, and the latter sees judges as independent arbiters of the principles to which the American people have committed themselves. The former sees public opinion as replacing interpretation, while the latter sees public opinion as an appropriate element of interpretation.

The findings presented in *The Will of the People* lend themselves to this latter alternative interpretation. The process that the book describes, of Court decisions engaged in eternal undulation of concord and discord with prevailing societal values, can be understood in a way that preserves the American people's commitment to an independent judiciary whose role is to remind us of our higher commitments and bring deviant actors into line with a longer and stronger trajectory of shared principle. Understood in this way, the book serves to vindicate the family of constitutional theories that seek to apply timeless constitutional principle to contemporary settings through notions of fit. It is hard to tell from the book's narrative whether the Court has done a good job of it or not, but at least the Court seems to have rendered judgments about American commitments that have largely fallen within a zone, buttressed by a public belief in judicial independence, that has not incited dramatic public outcry.

At the same time, Friedman's exposition of American practice over the centuries also serves as a dramatic refutation of any approach to understanding the Constitution that seeks to treat the great constitutional questions as abstractions removed from the context in which they arise and resolved by reference to distant and unchanging moral values. This, of course, is devastating to any claim that the American people have ever supported or participated in the practice of originalism. That theory's insistence on a complete divorce of constitutional principle from contemporary consensus simply cannot be squared with the dynamic interaction between constitutional principle and public opinion that Friedman's book documents.

CONCLUSION

The Will of the People presents an exciting opportunity for the American people to take an honest look at themselves and to ask what they want from their judiciary. The book does not need to dissolve the countermajoritarian difficulty to be of value. Indeed, if the book is read to vaporize the age-old tension between judicial independence and majority will, it will do a disservice to the principle at the heart of constitutional democracy. The American commitment to its independent judiciary looms large in the story and should not be sacrificed at the altar of democratic legitimacy. Better, I say, to celebrate *The Will of the People* as a validation of an independent Court that gains its democratic legitimacy by appropriately using its

judgments to effectuate the enduring principles of the polity through a dynamic process of principled constitutional interpretation.