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# Narrative, Normativity, and Causation

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# NARRATIVE, NORMATIVITY, AND CAUSATION\*

Lawrence B. Solum\*\*

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## I. INTRODUCTION

*The Will of the People*<sup>1</sup> is surely a magnificent accomplishment. Barry Friedman has written a grand history of the relationships between popular opinion, the Constitution, and the Supreme Court, telling the story from the conception and birth of the United States Constitution through the early days of the Roberts Court. In this essay, I will be interrogating the thesis of *The Will of the People*; that thesis is announced in the subtitle, *How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. I am not a historian; my bailiwick is legal theory. So I will be asking questions about the theoretical foundations and conceptual nature of Friedman’s claims. Questions like: “What are the theoretical assumptions of Friedman’s claim that public opinion influences the Supreme Court?”

Friedman’s method is narrative. He has a story to tell. There are stories, and then there are *stories*. Friedman might have approached the relationship between public opinion and the Supreme Court’s opinions with theoretical modesty: “Just the historical facts, ma’am.” One of the great

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1. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (New York: Farrar, Straus and Giroux, 2009).

strengths of *The Will of the People* is that much of what it does is just that—a detailed retelling of the story of American constitutional law accompanied by a detailed narrative that recounts the state of public opinion before, during, and after the legal events. Much of Friedman’s book consists of what appears to be straight narrative or descriptive history.

But *The Will of the People* is not a theoretically modest book. It makes important theoretical claims of two kinds. First and foremost, *The Will of the People* is an exercise in mostly implicit (but frequently explicit) positive legal theory: it makes sweeping claims about the causal mechanisms that determine the content of constitutional law. *The Will of the People* claims that “popular opinion has influenced the Supreme Court and shaped the meaning of the Constitution,” and it seems fair to recharacterize Friedman’s claim as a bit stronger than that. A slightly longer and less elegant subtitle might have been: “How Popular Opinion Controls the Supreme Court and Determines the Content of Constitutional Law.”

*The Will of the People* makes another sort of claim—albeit less overtly. Friedman’s book displays a normative vision of constitutional practice. Some historians eschew “the lessons of history,” but not Friedman. *The Will of the People* applauds a progressive version of popular constitutionalism and displays open hostility to the normative constitutional theories that emphasize the rule of law and the binding force of the constitutional text. Another version of the subtitle might have read: “Why Popular Opinion Should Influence the Supreme Court and Ought to Determine the Meaning of the Constitution.”

*The Will of the People* makes both positive and normative claims, and these claims depend on theoretical assumptions. In these remarks, my aim is to tease out these assumptions and question their validity.

## II. POSITIVE LEGAL THEORY AND THE CAUSAL INFLUENCE OF POPULAR OPINION

The interrogation of *The Will of the People* can begin with a preliminary investigation into the nature of the claims that it makes. We can begin by investigating the general structure of Friedman’s argument, which proceeds from narrative to causation.

### A. Narratives and Causation

Positive legal theory takes as its subject matter questions about the causal forces that determine legal content. In the context of constitutional law, such questions include the following:

- “What causal forces determine the outcomes of Supreme Court opinions in constitutional cases?”

- “What role does political ideology play in determining the selection of Supreme Court justices?”
- “Do the views of individual justices about interpretive methodology have a causal influence on their votes in individual cases?”

And these questions (about causal forces and mechanisms) lead to other questions about methodology:

- “Does rational choice theory provide the best explanatory framework for studying judicial behavior?”
- “Can historical narratives generate causal explanations?”
- “Must causal theories of judicial behavior specify the mechanisms (or “microfoundations”) by which causal forces work?”

The two different kinds of questions point to two different types of positive legal theory: (1) theories that provide causal explanations for particular legal events or general event types (*causal theories*), and (2) theories that describe and assess the methods for the production of causal explanations (*methodological theories*).

*The Will of the People* contains both implicit and explicit causal theories, but it has very little to say about methodology. This is not surprising. *The Will of the People* presents itself as a narrative—as a story about the interactions between popular opinion and constitutional law. One can tell stories without making causal claims: let us call such stories *causally agnostic*. A causally agnostic story simply relates the flow of events—first A, then B, then C, then D, and so forth.

But very few stories are causally agnostic all the way down. Even a story that is causally agnostic on its surface can be read as making (implicit but deep) causal claims. Even a simple event, such as brushing one’s teeth, involves a vast number of component events, each of which can be described in multitudinous ways. The movement of an arm can be described in the language of physics, kinesiology, or chemistry, but most narrative descriptions of actions like brushing one’s teeth assume an intentionalist causal framework: “John reached for the brush and lifted it to his mouth, then methodically worked the bristles up and down.” This narrative description implicitly provides a causal theory: John’s intentional actions caused the movement of the brush. And the brushing narrative also relies implicitly on a methodological theory; intentional explanations of human behavior that rely on the concepts of folk psychology are sound.<sup>2</sup>

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2. On folk psychology and its relationship to narrative, see DANIEL D. HUTTO, *FOLK PSYCHOLOGICAL NARRATIVES: THE SOCIOCULTURAL BASIS OF UNDERSTANDING REASONS* (Cambridge (MA: MIT Press, 2008). Cf. MATTHEW RATCLIFFE, *RETHINKING COMMONSENSE PSYCHOLOGY: A CRITIQUE OF FOLK PSYCHOLOGY, THEORY OF MIND AND SIMULATION* (Basingstoke: Palgrave Macmillan 2007) (discussing philosophical debates about folk psychology).

The implications of this point about narrative and causal claims are profound. Many stories that seem, on their surface, to be causally agnostic are, in fact, implicitly making assertions about causation. Let us call a narrative that commits (implicitly or explicitly) to causal claims, *causally-committed*. I said “many stories” but the use of the word “many” is misleading. For something to count as a recognizable narrative, it must do more than string together a series of events in chronological order. Narratives make sense because they identify causally salient actions and events. This point should be qualified; not every event or action in a story is causally salient, and there may be some stories that emphasize events that are causally irrelevant. And we might even be able to imagine something we could call a “story” that consisted entirely of a random sequence of causally unrelated events. But that would be a special and derivative use of the word “story.” Historical narratives are always—or almost always—committed to explicit and implicit causal claims. *The Will of the People* is a causally committed historical narrative.

There is another deeply important point about the relationship between narrative and causation: causally committed narratives implicitly or explicitly make claims about counterfactuals.<sup>3</sup> A definition first: the term “counterfactual” refers to an event or state that is *contrary to fact*. Causally committed narratives have counterfactual implications. If public opinion caused the decision in *Brown v. Board of Education*,<sup>4</sup> then it follows that had public opinion been relevantly different, *Brown* would have been decided differently.

This point about *Brown* (and causation generally) needs to be qualified; if an event is *overdetermined*,<sup>5</sup> then it was the product of more than one sufficient cause. Suppose that the decision in *Brown* were caused by *both* public opinion *and* the belief on the part of the justices of the Supreme Court that national security required an end to segregation (because segregation sustained devastatingly effective Soviet propaganda). If public opinion alone had been different, the outcome would have been the same, but if neither public opinion nor the national security beliefs of the justices had been present, then *Brown* would have been decided differently. For the sake of simplicity, let us put overdetermination to the side for the remainder of this discussion.

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3. For discussion of counterfactuals and causation, see DAVID LEWIS, *COUNTERFACTUALS* (Oxford: Blackwell 1973) (discussing counterfactuals); CAUSATION AND COUNTERFACTUALS (John Collins, Ned Hall & L.A. Paul eds. Cambridge, Mass: MIT Press (2004) (collection of essays on the relationship between counterfactuals and causation).

4. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

5. For discussion of overdetermination, see MICHAEL MOORE, *CAUSATION AND RESPONSIBILITY: AN ESSAY IN LAW, MORALS, AND METAPHYSICS* 86-88, 114-15 (Oxford: Oxford University Press, 2009) (discussing overdetermination in the context of criminal responsibility).

Because historical narratives are causally committed, they make counterfactual claims. Sometimes these claims are explicit. The narrative includes sentences that begin “it could have gone otherwise” or “absent this event” and then proceed to describe a possible world<sup>6</sup> in which the causally salient action or event had not occurred. But it is frequently the case that the counterfactual claims made by historical narratives are implicit rather than explicit. The narrative tells the story as it actually happened, implying both causal commitment and counterfactual claims. Because *The Will of the People* is a causally committed historical narrative, it is no surprise that most of the counterfactual claims that it makes are implicit.

One more point about causation and narrative: causation requires mechanism.<sup>7</sup> The core of this point is so familiar that it hardly needs explanation. “*Post hoc ergo propter hoc*” (after this, therefore because of this) is an informal fallacy. “Correlation does not equal causation” is familiar to most undergraduates. There are circumstances where very strong correlations lead us to believe that causation must be present: for example, social scientists use elaborate statistical techniques (e.g., multiple regression analysis) that enable them to identify correlations that are strong evidence of causation. But true causation requires that a mechanism be present—even if we do not know what the mechanism is. Narratives emphasize temporal sequence (A then B then C), but temporal proximity is not sufficient to establish causation.

This brings us to the sixty-four thousand dollar question: can historical narratives provide good and sufficient reasons for the acceptance of causal claims? The narrative tells us how the story went, but not how it would have gone. There are a variety of possible answers to the sixty-four thousand dollar question. For example, narratives may identify sequences of events in which the causal forces are obvious (part of the background knowledge of the author and reader of the narrative). The well-established laws of natural science provide the causal glue in many narratives, and such laws provide causal connections between bullets and injuries, plagues and illnesses, earthquakes and tsunamis. But when narratives seek to explain human behavior, the background causal theory is usually based on folk psychology or rational choice theory:<sup>8</sup> the narratives assume that human behav-

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6. The philosophical idea of a “possible world” is similar to the notion of a state of affairs. For a comprehensive introduction, see JOHN DIVERS, *POSSIBLE WORLDS* (London: Routledge, 2002) (discussing the notion of a possible world in contemporary philosophy).

7. JON ELSTER, *MAKING SENSE OF MARX* 5-8 (Cambridge: Cambridge University Press, 1985) (discussing role of mechanisms in causal theories); JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 3-10 (Cambridge: Cambridge University Press, 1989) (discussing mechanisms in the context of the social sciences).

8. For an introduction to rational choice theory, see ITZHAK GILBOA, *RATIONAL CHOICE* (Cambridge: MIT Press 2010) (discussing rational choice theory). For folk psychology, see Hutton, *supra* note 2; Ratcliffe, *supra* note 2 (discussing folk psychology).

ior is caused by the beliefs and desires of individuals. *The Will of the People* makes assumptions of precisely this sort, explaining the behavior of the Supreme Court on the basis of the beliefs and desires of the individual justices.

Narratives can provide important and illuminating input for the development of causal theories, but they can also be misleading. The construction of a narrative requires the identification of salient actions and events. Narratives tell *a* story, but they cannot tell the *whole* story. This means that the construction of narratives faces a problem of selection bias. If the narrator has prior beliefs (which need not be conscious or explicit) about causation, those prior beliefs may determine which actions and events are included in the narrative and which are excluded. The resulting narrative then seems to establish a pattern of causation. For example, the narrative might suggest the following pattern of behavior by the Supreme Court: popular opinion favors X, then the Supreme Court decides to allow or require X. The repetition of that pattern can lead authors and readers to make implicit counterfactual assumptions: if popular opinion had not favored X, then the Supreme Court would not have decided to allow or require X. And these implicit counterfactual assumptions then validate explicit or implicit causal claims: public opinion causally determines the outcome of Supreme Court opinions. And these causal claims may be true! But the narrative may not have established the truth of the causal claims. Because selection bias can produce the appearance of causation even when true causation is not present, even a compelling story may not provide a good and sufficient reason to believe the storyteller's causal claims are true.

The validation of causal claims always requires more than narrative. Sometimes the "something more" is obvious and uncontroversial—such as the laws of physics or cases in which folk psychology approximates the truth. But when we are trying to give causal explanations for complex social phenomenon—the behavior of the Supreme Court in particular or American constitutional practice in general—it is quite likely that the "something more" will be neither obvious nor uncontroversial. The constellation of actions and events that influence the Supreme Court and shape the meaning of the Constitution is likely to be complex, involving interaction between a multitude of individual actors that produce unintended consequences.

And this brings us back to *The Will of the People* and its claim that popular opinion has influenced the Supreme Court and shaped the meaning of the Constitution? Has Friedman given us good and sufficient reasons to accept these claims? We can begin with the first claim about the influence of popular opinion on the Supreme Court.

B. Has Popular Opinion “Influenced the Supreme Court” and “Shaped the Meaning of the Constitution”?

The core of *The Will of the People* is a narrative that relates public opinion to judicial behavior. Friedman’s narrative is remarkable for both its erudition and scope. No single volume could possibly canvass the state of public opinion, before, during, and after the decision of every constitutional opinion by the Supreme Court. But Friedman has provided a narrative that encompasses both the familiar and the obscure, at exactly the right level of detail.

But does this narrative establish Friedman’s causal claims? The answer to this question cannot be found in the narrative itself. Friedman’s story about the Supreme Court is not the only story that could be told. We can easily imagine alternative narratives that would provide plausible stories about the causal antecedents for decisions of the Supreme Court. Call one such story *the law story*: this story would trace important decisions of the Supreme Court to legal antecedents, including, for example, the text of the Constitution, prior decisions of the Court itself, background principles found in the common-law decisions of American and English courts, and so forth. The law story is at least as rich and textured as the story that Friedman told. And the law story has been told many times, exhaustively in some of the volumes in the Holmes Devise *History of the Supreme Court of the United States*.<sup>9</sup>

Or consider another story, which we can call the *elites story*. The elites story would situate the decisions of the Supreme Court with respect to the interests and values of elite groups. Public opinion might figure in this story, but it would be primarily a dependent variable (something that was subject to manipulation by economic and political elites). This story would focus on instances in which the actions of the Court served elite interests or reflected elite values, in spite of popular sentiment to the contrary. Lucas A. Powe, Jr. tells a version of the elites story in his book, *The Supreme Court and the American Elite, 1789-2008*.<sup>10</sup>

Selective narrative cannot, by itself, establish the causal claims that Friedman makes in *The Will of the People*. Such causal claims can only be established by combining narrative with two additional elements: (1) theories of causal mechanism, and (2) rigorous empirical confirmation. Fried-

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9. See, e.g., JULIUS GOEBEL JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 (Cambridge: Cambridge University Press, 1971); William M. Wiecek, 12 THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953 (Cambridge: Cambridge University Press, 2009).

10. Lucas A. Powe Jr., *The Supreme Court and the American Elite, 1789-2008* (Cambridge: Harvard University Press, 2009).



man has something to say about the first element (causal mechanisms) and remarkable little to say about the second (empirical confirmation). Friedman does have some general and suggestive remarks about the relationship between his narrative and the social scientific approach to the relationship between popular opinion and judicial behavior:

[W]hat we ought to be asking, is how much capacity the justices have to act independently of the public's views, how likely they are to do so, and in what situations. Is the Court even capable of standing up for constitutional rights when they are jeopardized by the majority? . . . [W]hat determines how far the Court can move away from the public before it is snapped back into line?<sup>11</sup>

Friedman then asserts that the social science answering these questions is "remarkably impoverished."<sup>12</sup> He writes:

The failure to devote adequate attention to these important questions traces back to a long-standing disagreement between political scientists over whether law or politics motivates the Supreme Court's decisions, one dating back to the aftermath of Roosevelt's Court-packing plan. In recent years, fortunately, scholars in both law and politics have begun to move past this silliness. Plainly what the justices do is law, and it does not detract from this point to acknowledge that they have a certain amount of discretion, even a large amount of it. But politics plainly influences the Court as well, in numerous ways ranging from the appointments process to responsiveness to public sentiments. Recent scholarship endeavors to say something tangible about the Supreme Court's responsiveness to (and independence from) popular politics, about what decides cases, and how all this works.<sup>13</sup>

The final sentence of this passage is followed by a footnote that cites some recent literature on the relationship between public opinion.<sup>14</sup>

What does that literature have to say about causal mechanisms and empirical confirmation? Consider one of the articles that Friedman cites, William Mishler and Reginald S. Sheehan's *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*.<sup>15</sup> Mishler and Sheehan describe two mechanisms by which public opinion can affect the behavior of the Supreme Court: one that operates via the judicial selection process and another that operates through political adjustment by the Justices themselves. What are these mechanisms? And what does Friedman have to say about them?

The first mechanism relies on the ability of the dominant political coalition to appoint justices to the Supreme Court. Thus, public opinion determines the ideological orientation of the President and the Senate; this leads

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11. *The Will of the People*, p 373.

12. *Id.*

13. *Id.*

14. *Id.* at 582 n. 49.

15. William Mishler and Reginald S. Sheehan, *The Supreme Court as a countermajoritarian institution? The impact of public opinion on Supreme Court decisions*, 87 AMERICAN POLITICAL SCIENCE REVIEW 90 (1993).

to the appointment of justices who reflect public opinion. This first mechanism is famously described in the work of Robert Dahl<sup>16</sup> and Richard Funston<sup>17</sup> and is sometimes called the Dahl-Funston hypothesis.<sup>18</sup> Friedman seems to reject the explanatory power of the Dahl-Funston hypothesis. He writes:

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 are rarely 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 the extremists in their own party.<sup>19</sup>

This passage is remarkable for combining bold and controversial empirical claims with almost nothing in the way of evidence or explanation. An adequate assessment of Friedman's claims in this paragraph could easily require an entire article, but a few comments can illustrate some of the difficulties. Assume that Presidents want the Court to align with their own political ideology. If Presidents had a unilateral power of appointment, they would select Justices whose ideology is identical to their own. But Presidents do not have a unilateral power of appointment; the Senate must approve Supreme Court Justices by a majority vote. If we assume that Senators also want Justices whose ideology aligns with their own, they will vote against nominees who move the ideological balance of the Court away from their own ideological orientation. And this picture is complicated by the fact that the filibuster permits forty-one members of the Senate to block a judicial nomination. Presidents who want their nominees confirmed must consider whether their nominee will receive fifty-one votes on the floor and whether the nomination will trigger a filibuster requiring a sixty-vote supermajority to move to a vote on the merits. It is difficult to see how this process could possibly result in presidential nomination of candidates who would please "extremists in [the President's] own party."<sup>20</sup> And even if a President wanted to nominate an ideological extremist, it is difficult to imagine how such a candidate could be confirmed—so long as Senators care about the ideological makeup of the Court.

What should we expect from the institutional structure of the nomination and confirmation process? The answer to this question will depend on

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16. Robert Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policymaker*, 6 *Journal of Public Law* 279 (1957).

17. Richard Funston, *The Supreme Court and Critical Elections*, 69 *AMERICAN POLITICAL SCIENCE REVIEW* 795 (1975).

18. *Id.* at 88-89.

19. *The Will of the People*, p. 374 (emphasis added).

20. *Id.*

both the ideological makeup of the Senate, the ideological preferences of the President, and the ideological balance on the current Supreme Court. For example, if the median Justice on the Supreme Court (“median” on the basis of political ideology) is very conservative and the President and sixty Senators are very liberal, we could expect that the President will nominate and the Senate will confirm a liberal nominee. But suppose that the median Justice is conservative, the President is very liberal, but the median Senator (again “median” on the basis of political ideology) is a political moderate. The median Senator may be unwilling to confirm a very liberal nominee. If the President knows that this is the case, the President may select the most liberal nominee the median Senator would be willing to confirm. When that nominee was in fact confirmed, it might appear that the President had been able to “get the sort of justice” that the President wanted, but this appearance could be deceiving—because the President might have picked someone else had the composition of the Senate been different.

Given the strategic interactions produced by the institutional framework for judicial selection, what affect will public opinion have? Again, this question is complex and an adequate answer would require a monograph (or a series of monographs). Much might depend on the role that votes on judicial nominations by Senators have on their chances for reelection. If we assume that Senators attempt to vote in ways that are acceptable to the median voter in their state (again “median” on the basis of political ideology), then the confirmability of judicial nominees will depend on the ideological makeup of the electorate. Given the structure of the Senate (two Senators per state), the ideology of the median Senator might vary significantly from the ideology of the median voter in the United States as a whole.

These observations about Friedman’s brief comments with respect to the relationship between public opinion and the nomination and confirmation of Supreme Court Justices have a very limited purpose. My point is simply that Friedman’s bold claims are not well supported, either by a theory of the judicial selection process or by empirical evidence.

So much for the first mechanism by which public opinion could influence the Supreme Court. What about the second? Mishler and Sheehan call the second mechanism “the political adjustment hypothesis.” Here is their description:

[A]nother perspective holds that the Court can and does respond to public opinion even in the absence of membership change. The argument usually advanced is that Supreme Court justices are acutely aware of the limitations of the Court’s power and its dependence on voluntary acquiescence to its decisions . . . .

According to this argument, the Court’s concern for its authority makes it reluctant to depart too far or too long in its decisions from prevailing public sentiment. . . . [M]embers of the Court are political creatures, who are broadly aware of fundamental trends in ideological tenor of public opinion, and that at least some justices, consciously or not, may adjust their decisions at the margins to accommodate such fundamental trends.

Even in the absence of concerns about the legitimacy of the Court's decisions, there are good reasons to believe that Supreme Court justices may be influenced by long-term changes in the climate of public opinion. Justices are no less susceptible than other individuals in society to influence by evolving societal norms and values. . . .

The likelihood, of course, is that under either of these variants of what we shall call the political adjustment hypothesis, the resulting changes in the decisions of individual justices will occur gradually over time and be almost imperceptible at the moment. Thus, it is unrealistic to expect the results of a specific public opinion poll to be linked to specific decisions either of an individual justice or of the Court as a whole. The expectation, rather, is that the overall pattern of justices' decisions--and thus the ideological center of gravity of the Court--should respond gradually, and at a considerable lag, to broad trends in the ideology of the public.<sup>21</sup>

And what is the state of the evidence for the political adjustment hypothesis? Mishler and Sheehan found strong evidence that decisions of the Supreme Court responded to public opinion with a five-year lag between 1951 and 1981, when Ronald Reagan assumed the presidency.<sup>22</sup> They find that much of this influence was attributable to the ideological make up of Congress and the President, but:

Nevertheless, the evidence suggests that public opinion exercises important influence on the decisions of the Supreme Court even in the absence of changes in the composition of the Court or in the partisan and ideological makeup of Congress and the presidency.<sup>23</sup>

But after 1981 the evidence pointed in another direction:

[O]ur analyses indicate that the relationship of the Court to public opinion has been very different in the years since 1981. The decisions of the Court during the Reagan years were significantly countermajoritarian in direction and appear to have been driven almost entirely by the changing ideological orientation of the Court. The Court grew increasingly conservative across this period despite a liberal resurgence in the public mood. Although the conservative appointments of Presidents Nixon and Ford probably reflected the prevailing public sentiment at the time, the appointments of President Reagan increasingly did not. Moreover, it is highly likely that the conservative ideology of the Court and its decisions have either remained unchanged or grown increasingly conservative during the Bush administration, given the appointments of Justices Souter and Thomas. Thus, there is every reason to believe that the gap between public opinion and the decisions of the Court has continued to widen.<sup>24</sup>

And what does Friedman have to say about the political adjustment hypothesis? He suggests that the justices may immediately respond to public opinion, because "it is human nature to be liked or even applauded and admired," but "[t]he most telling reason why the justice might care about

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21. *Id.*

22. Mishler & Sheehan, *supra* note 15, at 96.

23. Mishler & Sheehan, *supra* note 15, at 96.

24. *Id.* at 97.

public opinion . . . is simply that they do not have much of a choice. . . . If preceding history shows anything it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.”<sup>25</sup>

Friedman formulates this claim so that it is almost tautological. The key phrase is “what the public will tolerate.”<sup>26</sup> Of course, when the Court acts in ways that the public does not tolerate, by definition, the public reacts. But this formulation is not helpful if our aim is to determine the causal mechanisms by which public opinion influences the Supreme Court. Assessment of those mechanisms requires a theory as to what deviations between Supreme Court behavior and public opinion “the public will tolerate.”<sup>27</sup> And the theory must account for the ability of the Court to take public tolerance into account. If public intolerance is an occasional and unpredictable phenomenon, then it is difficult to see how it could be the case that their voting behavior could be influenced by it.

There is another difficulty with Friedman’s hypothesis about judicial anticipation of public intolerance. Friedman observes “that it has been a long time since the justices were disciplined in any significant way.”<sup>28</sup> Noting that the last threat of court packing was fended off in 1937 and that the last serious attempt at jurisdiction stripping failed in 1957, Friedman asserts that it “seems paradoxical . . . that in recent years, as these weapons to control the justices look to have been ruled off the table or lost their force, the Court has come most directly into line with public opinion.”<sup>29</sup> He then writes:

The explanation for this paradox is that it has take the Court and public some time to learn how their relationship might work; now that it is understood, violent upheaval is no longer necessary.<sup>30</sup>

This is itself an empirical hypothesis, but Friedman offers almost no evidence for these sweeping claims. Is it in fact that case that Supreme Court Justices have been ignorant of the possibility that their decisions would provoke political backlash until recently? This is an assertion about the knowledge of particular individuals; redeeming the claim requires more than a showing that the Court has provoked political retaliation.

But suppose that Friedman were right about this claim. The implication would be that the primary mechanism by which public opinion does influence the behavior of the Court has not been in operation until recent years. But the argument of *The Will of the People* seems to be to the con-

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25. *The Will of the People*, p. 375.

26. *Id.*

27. *Id.*

28. *Id.* at 376.

29. *Id.*

30. *Id.*

trary. Friedman's book seems to tell a story of substantial public influence over the whole history of the Court—that story is not limited to instances in which the Court was actually disciplined by court packing, jurisdiction stripping, or impeachment.

There is yet another problem with Friedman's "learning curve" hypothesis. It is not clear that it would be confirmed by rigorous empirical work. Indeed, Mishler and Sheehan, in the very article cited by Friedman, reached exactly the opposite conclusion in the passage quoted above: "The decisions of the Court during the Reagan years were significantly counter-majoritarian in direction and appear to have been driven almost entirely by the changing ideological orientation of the Court."<sup>31</sup>

*The Will of the People* tells a plausible story about the relationship between public opinion and the decisions of the Supreme Court. Does Friedman's narrative establish his central thesis—that public opinion has influenced the Supreme Court? Has he shown that "the Supreme Court exercises the power it has precisely because that is the will of the people"?<sup>32</sup> Does his story make "the case that 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"?<sup>33</sup> Surely, Friedman's narrative is suggestive—it provides a series of anecdotes and incidents that are consistent with his causal claims. But Friedman's narrative falls short of providing good and sufficient evidence for our acceptance of his broad causal claims, because it lacks a rigorous account of causal mechanisms and empirical confirmation of their operation.

### III. NORMATIVE LEGAL THEORY: POPULAR OPINION AND CONSTITUTIONAL PRACTICE

The primary thrust of *The Will of the People* is positive, but it is clear that Friedman's narrative is also deeply normative. What are the normative assumptions of Friedman's story about the relationship between popular opinion and the Constitution?

#### A. Narrative and Normativity

Just as the relationship of narrative history to causation is an uneasy one, so too is the connection between narrative and normativity. Some narrative histories enthusiastically embrace normativity: Howard Zinn's *A People's History of the United States* is a clear case of narrative with ex-

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31. Mishler & Sheehan, *supra* note 15, at 97.

32. *The Will of the People*, p. 16.

33. *Id.* at 368.

plicit normative commitments.<sup>34</sup> But the normative claims of narratives are frequently implicit, and they rarely come in the form of fully developed normative arguments. The deep normative assumptions of narrative frequently come to the surface in the form of value-laden descriptions. Actions are explained by motives that are characterized as selfish or altruistic. Events are characterized as disasters or triumphs. At one level, the normativity of narrative is inescapable. The stories that interest humans are “morality plays,” with heroes and villains, happy endings and tragic finales, poetic justice and cruel twists of fate. No one should expect narrators to engage in “normative abstinence.” But some narrative histories are more explicit in their normative ambitions than others; let us call narratives that explicitly draw lessons from history “normatively charged.”

*The Will of the People* is a normatively-charged narrative; it is explicit about its normative ambitions and implications. The final chapter is titled, “Conclusion: What History Teaches,” and the lessons of history are offered as guidance for the future. Friedman’s normative vision is tangibly present on almost every page of *The Will of the People*, but at the same time it is elusive. Friedman’s evaluations are clear, but the normative commitments that motivate them are all but invisible.

*The Will of the People* concludes with these remarks:

[I]t is wrong to claim, as many have, that the judges have stolen the Constitution from us. Judicial review is our invention; we created it and have chosen to retain it. Judicial review has served as a means of forcing us to think about, and interpret, our Constitution ourselves. In the final analysis, when it comes to the Constitution, we are the highest court in the land.<sup>35</sup>

Stirring words, but what exactly do they mean? Clearly, they represent Friedman’s rejection of an argument against judicial review based on the premise that the Supreme Court’s power to invalidate the acts of elected officials is antidemocratic. If we know anything about Barry Friedman, we know that he does not accept the “countermajoritarian difficulty.”

Friedman’s refutation of the countermajoritarian difficulty is “on stage.” But what are the normative commitments that are “behind the scenes”—implicitly animating the lessons of history that Friedman draws from his narrative? The remainder of this Part will explore two implicit normative claims in *The Will of the People*. The first relates to the concept of democratic legitimacy: Friedman’s narrative rests on implicit claims about the nature of a democratic people and the capacity of democratic will formation to confer legitimacy on constitutional practice. The second implicit normative claim relates to normative constitutional theory, and in par-

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34. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492 TO PRESENT* (New York: HarperCollins, 2003).

35. *The Will of the People*, p. 285.

ticular, to Friedman's normative assessment of originalism and its rival, living constitutionalism.

#### B. Democratic Legitimacy and "The Will of the People"

The normative commitments of *The Will of the People* are deeply connected with notions of popular sovereignty and democratic legitimacy. Friedman's narrative is built on a vocabulary that emphasizes the word "people"<sup>36</sup> and related terms and phrases (e.g., "the will of the people,"<sup>37</sup> "public opinion,"<sup>38</sup> "the American People,"<sup>39</sup> "government by the people,"<sup>40</sup> "majority rule,"<sup>41</sup> "the people alone,"<sup>42</sup> "the will of the majority,"<sup>43</sup> and "majority will."<sup>44</sup> But what do these phrases mean? Why are they normatively significant?

Friedman's narrative is both normatively charged and grand in scope; it deals with most of the important events of American political history and it makes implicit normative claims about their democratic legitimacy. As a consequence, *The Will of the People* inevitably implicates all of the grand questions of political theory. But because Friedman's book is structured as a narrative, the precise nature of its normative claims is obscure.

The normative obscurity that characterizes *The Will of the People* is particularly acute when it comes to questions of democratic theory. What form of "democracy" grounds Friedman's normative claims? How is this form of democracy justified? Friedman might adopt what we might call an "avoidance strategy" with respect to these questions. He might argue, for example, that the normative elements in *The Will of the People* are based on very "thin" assumptions or that his normative conclusions will hold for any plausible version of democratic theory. For example, he might claim that his normatively charged narrative is consistent with either of the two (current and important) versions of democratic theory. We can call the first version "egalitarian democracy"<sup>45</sup> (democratic institutions are justified by concern for the equality of citizens) and second version "deliberative de-

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36. *Id.* at 3.

37. *Id.* at 1.

38. *Id.* at 3.

39. *Id.* at 3, 368.

40. *Id.* at 367.

41. *Id.*

42. *Id.*

43. *Id.* at 370.

44. *Id.*

45. Robert Post, *Democracy and Equality*, 1 LAW, CULTURE AND THE HUMANITIES 142 (2005).



mocracy”<sup>46</sup> (democracy legitimates through reasons that emerge from discursive practices).

Were Friedman to explicitly pursue the avoidance strategy, it seems likely that he would immediately encounter a number of obstacles. In particular, Friedman will run into what is sometimes called “the problem of democratic citizenship.”<sup>47</sup> Given the division of labor it is simply impossible for most citizens to participate in a meaningful way in democratic politics. When it comes to monitoring the Supreme Court this problem is particularly acute, since acquisition of the legal knowledge necessary for comprehension of most constitutional issues is particularly costly. On the familiar Downsian model, it would simply be irrational for most citizens to incur these costs.<sup>48</sup>

Are Friedman’s implicit normative claims consistent with both egalitarian and deliberative conceptions of democracy? It is difficult to see how he could make out the case that they are. If our conception of democracy is egalitarian, the problem of democratic citizenship in the constitutional context is particularly acute: it seems utterly implausible to believe that the processes Friedman describes as popular checks on the Court operate in an egalitarian fashion. No plausible case could be made that any of the particular examples of popular influence on the Court that Friedman recounts involved equal participation and influence—I cannot even imagine how that story might go in the case of Roosevelt’s confrontation with the Court. And if Friedman’s conception of democracy is deliberative, then the difficulties loom even larger. Because of the complexity of constitutional issues and the mediation of popular opinion through the steering mechanisms of partisan politics that operates through the institutional structures (political parties, Congress, and so forth), it would be extraordinarily difficult for Friedman to demonstrate that the demanding standards of deliberative democracy have ever been satisfied—much less that their satisfaction is characteristic of popular influence on the Court.

But the fact that Friedman cannot successfully execute the avoidance strategy does not imply that he has not responded to the problem of democratic citizenship. Perhaps Friedman’s narrative rests on an implicit conception of democracy that avoids the problems that arise for egalitarian and deliberative democracy. The alternative to avoidance strategy is for Friedman to offer a particular democratic theory, which must include (1) an ac-

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46. Joshua Cohen, *Deliberation and Democratic Legitimacy* in *THE GOOD POLITY* (Oxford 1989).

47. Tom Christiano, Democracy, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/democracy/>; see also CHARLES BEITZ, *POLITICAL EQUALITY: AN ESSAY ON DEMOCRATIC THEORY* (Princeton: Princeton University Press 1989).

48. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (Harper and Row 1957).

count of the justification for democracy, (2) an account of the conditions that must be satisfied for social arrangements to count as sufficiently democratic, and (3) an account of the scope and limits of the legitimacy that this kind of democracy confers on political decisions.

Even if Friedman were to articulate and defend a particular democratic theory, it is far from clear that any such theory could redeem some of the extravagant claims that are made in *The Will of the People*. Friedman makes claims about “the will of the people”. In particular he claims that “[j]udicial review is our invention” and it “forc[es] us to think about, and interpret, our Constitution ourselves” and hence “we are the highest court in the land.”<sup>49</sup> These claims commit Friedman to wildly implausible views about group agency and intentional group action.

Friedman seems to be assuming that there is an entity meaningfully identified as “the American people” that can have a “will” and engage in actions like the invention of judicial review, constitutional interpretation, and serving as a court. Of course, it is possible that Friedman said these things but did not really mean them. It might be the case that “the will of the people” is merely a metaphor. It could be that judicial review is not actually the invention of the American people at all. Friedman might instead mean something like: “Judicial review arose from the unintended consequences of many actions over a long period of time. Some of those actions were by actions by ordinary American citizens.” But if that is what Friedman meant, he has chosen a form of expression that is misleading at best and deceptive at worst.

Assuming that Friedman means what he says and that he is committed to the idea that the American people have exercised group agency, then we can ask whether his claims are plausible. Let us begin that inquiry with two assumptions. First, we can assume “methodological individualism.”<sup>50</sup> the basic premise, familiar from the social sciences, that the actions of groups must ultimately be explained in terms of the actions of individuals. Second, we can assume that group action is possible. That is, we can assume that there are circumstances in which two or more persons can act in a coordinated fashion so that their coordinated activity can be attributed to each individual and the group. These two premises lead to a corollary: consequences produced by the unintended consequences of uncoordinated actions by individuals are not meaningfully characterized as “group action.”

Given these assumptions, is it plausible to characterize the responsiveness of the Supreme Court to public opinion in the vocabulary of group agency? It is hard to see how Friedman could make the case that a group agent (the American People) engaged in group action (invented judicial

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49. *The Will of the People*, p. 385.

50. On methodological individualism, see Elster, *Making Sense of Marx*, *supra* note 7, at 5-7; Elster, *Nuts and Bolts for the Social Sciences*, *supra* note 7, at 13.

review). Groups as large as “the American people” cannot directly engage in coordinated action. This fact is not inconsistent with the notion that institutions that bear a relationship to the American people exist and act, but institutional action (action by particular courts or legislative bodies) is not the same thing as action by the American people.

These remarks merely pose a problem for Friedman. I have not shown that Friedman could not offer a theory of group agency that would redeem his bold claims. Perhaps Friedman can produce a theory of group agency that will redeem his claims. My modest point is that *The Will of the People* uses the language of group agency in ways that seem implausible.

### C. Original Public Meaning versus Living Popular Constitutionalism

*The Will of the People* is most explicitly normative in its concluding remarks about the lessons of history, but Friedman’s narrative is normatively charged throughout, although the strength of the charge varies from passage to passage and chapter to chapter. The normative charge is near its peak in Chapter 9, entitled “Interpretation,” where Friedman discusses originalism and living constitutionalism.<sup>51</sup>

Consider, for example, Friedman’s discussion of the development of originalist theory. He wrote:

Although conservative thinkers in and outside the Department of Justice obviously did not conjure up the idea of originalism out of thin air, the brand of originalism they promoted plainly was a doctrine of their own creation. For much of American history, courts had looked to both the Constitution’s text and framing era assumptions. Still it was just one of many interpretive strategies they used, including also stare decisis and the idea of the evolutionary Constitution.<sup>52</sup>

The footnote to this passage includes only a single citation, to Philip Bobbitt’s monograph, *Constitutional Fate*,<sup>53</sup> which famously argues that constitutional practice includes six modalities of argument: structural, textual, ethical, prudential, historical, and doctrinal.<sup>54</sup>

Was “originalism” a doctrine of Reagan-era conservative thinker’s own creation? Friedman is likely to have been aware that Paul Brest coined the term “originalism” prior to the Reagan presidency.<sup>55</sup> Here is how Brest

51. *The Will of the People*, pp. 280-322.

52. *The Will of the People*, p. 310.

53. *The Will of the People*, p. 541 n. 269 (citing Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982), 7-8).

54. It is not clear whether there is any conflict between Bobbitt’s observations about modalities and the notion that originalist ideas had a long historical pedigree. For Friedman to make out his claim, he would need to give an account of “originalism” and then show that it was, in fact, created.

55. The first appearance of the term “originalism” in Westlaw’s database of legal periodicals is found in an article by Paul Brest in 1981. Paul Brest, *The Fundamental Rights*

defined “originalism”: “By ‘originalism’ I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.”<sup>56</sup>

Unlike Brest, who believed that originalism was a familiar approach, Friedman seems to assert that “originalism” was a creation of Reagan-era conservatives. That assertion makes a claim of historical fact, but this portion of Friedman’s narrative is normatively charged. Friedman’s narrative implies that conservative lawyers and theoreticians created originalism for political reasons, while claiming that their new method had a long historical pedigree. In other words, the narrative aims to show that originalism is normatively unattractive because those who “created” originalism were politically motivated and intellectually dishonest.

This same pattern appears in another passage of Friedman’s normatively charged narrative:

There is no small tension between the claim that originalism had a long history and the gushing excitement Federalist Society leaders expressed about their “refinement” of the doctrine: long-established and well-accepted methods of interpreting the Constitution do not need to be hashed out in skull sessions.<sup>57</sup>

The source cited for direct support is the *Report to the Attorney General, Original Meaning Jurisprudence: A Sourcebook*, prepared by the Office of Legal Policy. The clarifying parenthetical quotation reads, “Original meaning jurisprudence has been the dominant form of constitutional interpretation during most of our nation’s history.”<sup>58</sup> The question whether the refinement of originalist theory is in tension with the claim that originalist methods have dominated constitutional practice is an interesting one—on which I make a few remarks in a footnote.<sup>59</sup> The main point is that Fried-

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*Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063, 1090 (1981). But Brest had used both “originalism” and “originalist” in 1980. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 234 (1980). So far as Brest knows, he coined the term. *Id.*

56. Brest, *The Misconceived Quest for the Original Understanding*, *supra* note 55, at 204.

57. *The Will of the People*, p. 311.

58. REPORT TO THE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987).

59. It is not clear to me that there is any tension between refinement of originalist theory and the claim that originalist methods have dominated historical practice. This is because “theory” and “practice” are conceptually distinct. Judges can engage in originalist methods of constitutional interpretation without having a well-worked out theory. This is a familiar point about complex human behaviors in a variety of domains. For example, humans engage in complex linguistic behaviors, without any conscious theory of what they are doing and how they are doing it. Similarly, it could be the case that originalist practice is based almost entirely on tacit knowledge. For example, judges, lawyers, and officials who engage in constitutional interpretation may have intuitive knowledge of the fact that linguistic meaning or semantic content is fixed when a text is authored (in the case of the Constitu-

man's narrative is normatively charged—the image of conservative lawyers “hashing out” originalism in “skull sessions” seems intended to delegitimize originalist theory.

Friedman's discussion of the alleged novelty of originalism serves as the foundation for another portion of his narrative where the normative charge is apparent. In a series of passages, Friedman asserts that conservative legal thinkers “shaped” originalism and implies that they did so in order to achieve the results that they found ideologically attractive.<sup>60</sup> Consider the following passage:

Conservative thinkers shaped the concept of originalism to suit their particular purposes. For example, when critics pointed out the implausibility of ever discerning the original “intentions” of the framers, Meese's theory quickly morphed into that of original “meaning” or “understanding.” The difference between the two incarnations of originalism was that whereas the first focused on the elusive specific intentions of the drafters of the Constitution itself, original meaning looked instead to the general vies of the entire ratifying generation. These latter views were obviously more malleable and amorphous than those expressed at the Constitutional Convention or held by those who attended it.<sup>61</sup>

The footnote that accompanies this paragraph<sup>62</sup> cites a law review article by Edwin Meese<sup>63</sup> and the Office of Legal Policy Report<sup>64</sup> for direct support.

Once again, it is not clear that the history is accurate. The best evidence for a general theory of original-intentions originalism is found in Attorney General Edwin Meese's speech before the American Bar Association in 1985.<sup>65</sup> Meese's speech included the following passage:

In reviewing a term of the Court, it is important to take a moment and reflect upon the proper role of the Supreme Court in our constitutional system. The intended role of the judiciary generally and the Supreme Court in particular was to serve as the “bulwarks of a limited constitution.” The judges, the Founders believed, would not fail to regard the Constitution as “fundamental law” and would “regulate their

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tion, framed and ratified). Similarly, they may have intuitive knowledge that the conventions of legal practice (the kinds of constitutive rules that H.L.A. Hart calls “the rule of recognition”) require that constitutional doctrine be consistent with the linguistic meaning of the text, absent special circumstances that authorize a departure. If this were the case, then tacit knowledge could account for the fact that constitutional practice has been dominated by originalist methods, even though explicit originalist theorizing was fairly crude and hence capable of refinement.

60. *The Will of the People*, p. 310-311.

61. *The Will of the People*, p. 310.

62. *Id.* at 541 n. 270.

63. Edwin Meese III, *Construing the Constitution*, 19 U.C. Davis. L. Rev. 26 (1985).

64. See Report to the Attorney General, *supra*, note 58.

65. See Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), reprinted in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* (Paul G. Cassel ed., 1986), available at <http://www.fed-soc.org/resources/id.49/default.asp>.

decisions” by it. As the “faithful guardians of the Constitution,” the judges were expected to resist any political effort to depart from the literal provisions of the Constitution. The text of the document and the original intention of those who framed it would be the judicial standard in giving effect to the Constitution.<sup>66</sup>

And even in this passage, it is clear that both the original meaning of the text and the intentions of the framers were to play a key role.

Friedman asserts that conservatives shaped originalism to suit their particular purposes. The implicit normative claim is that originalist theory is the unprincipled product of results-oriented theorizing, but the sources that Friedman cites simply do not support the claim he makes. At best, these sources suggest that originalism changed in emphasis, from an early phase that focused on original intent to a later phase that emphasized original meaning. But Friedman’s sources provide absolutely no support for the normatively significant claims in the narrative—that changes in originalist theory were motivated by the desire to achieve “particular purposes.” There are, of course, alternative explanations for these changes. For example, the shift in emphasis from original intentions to original meaning may have been motivated by theoretical considerations such as an appreciation of the criticisms directed at original-intentions originalism.

There is yet another passage in which the normative charge of Friedman’s narrative comes to the surface:

[M]ost conservatives agreed that the Fourth Amendment’s prohibition on searches and seizures would apply to electronic surveillance. As the OLP sourcebook explained in something akin to Orwellian doublespeak, while the Constitution’s “provisions may be applied to new circumstances as our society changes, its meaning remains fixed and timeless.”<sup>67</sup>

I take it that the normative significance of the phrase “Orwellian doublespeak” is unmistakable. The (slightly jumbled) reference is to George Orwell’s novel, *Nineteen Eighty-Four*<sup>68</sup> with its fictitious language “Newspeak” and the Newspeak word “doublethink.” Here is the famous passage:

The keyword here is blackwhite. Like so many Newspeak words, this word has two mutually contradictory meanings. Applied to an opponent, it means the habit of impudently claiming that black is white, in contradiction of the plain facts. Applied to a Party member, it means a loyal willingness to say that black is white when Party discipline demands this. But it means also the ability to believe that black is white, and more, to know that black is white, and to forget that one has ever believed the contrary. This demands a continuous alteration of the past, made possible by the system of thought which really embraces all the rest, and which is known in Newspeak as doublethink. Doublethink is basically the power of holding

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66. Meese, Speech Before the American Bar Association, *supra* note 65.

67. *The Will of the People*, p. 311.

68. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Secker and Warburg 1949).

two contradictory beliefs in one's mind simultaneously, and accepting both of them.<sup>69</sup>

The accusation that an opponent has engaged in “something akin to Orwellian doublespeak”<sup>70</sup> is a serious one—it implies a lack of intellectual integrity and a deliberate aim to deceive and manipulate.

Is Friedman's charge a fair one? Is it the case that an assertion that “Constitution's ‘provisions may be applied to new circumstances as our society changes, its meaning remains fixed and timeless’”<sup>71</sup> is deceptive and that its assertion lacks intellectual integrity. Friedman has nothing to say in support of this assertion; it is simply part of the narrative, offered as historical fact.

The passage that Friedman quotes makes two assertions: (1) constitutional meanings are fixed, and (2) fixed constitutional meanings can be applied to new circumstances. Interpreted charitably, these two assertions are fully consistent. Interpreted so as to be maximally incoherent, the two assertions are logically inconsistent and hence could be characterized as “something akin” to doublethink in Newspeak. Friedman's narrative does not even mention the possibility of a charitable interpretation, and instead presents the uncharitable reading as an historical fact.

It is difficult to understand how Friedman could possibly have believed that the uncharitable reading is the best one and hence that his Orwellian-doublespeak characterization is accurate. To see why this is so, we need to make a brief detour into general legal theory. When the detour is complete we will return to Friedman's interpretation and characterization of the passage asserting that the Constitution's “provisions may be applied to new circumstances as our society changes, its meaning remains fixed and timeless.”<sup>72</sup>

What does it mean to say that the Constitution's “meaning remains fixed and timeless”?<sup>73</sup> Unfortunately, this question has two occurrences of the forms of the verb “to mean”—this is an awkward but unavoidable fact. For this reason, we will need to discuss the meaning of the word “meaning.”<sup>74</sup> “Meaning” is ambiguous—it has more than one sense. When we refer to the meaning of a constitutional provision, we might refer to the linguistic meaning or semantic content. Call this first sense of meaning the *semantic sense*. But the term “meaning” can also be used to refer to impli-

69. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Secker and Warburg 1949).

70. *The Will of the People*, p. 311.

71. *Id.*

72. *Id.*

73. *The Will of the People*, p. 311.

74. In the sentence that occurs in text immediately prior to the call to this footnote, the first occurrence of “meaning” is what philosophers call “use” and the second occurrence is what they call “mention.” The use of quotation marks serves to indicate that the second use of the word “meaning” refers to the word and not the thing.

cations, consequences, or applications. Call this second sense of meaning the *applicative sense*. We can also use the term “meaning” to refer to the purpose or function of a given constitutional provision. Call this third sense of meaning the *teleological sense*. These three senses of the word “meaning” are related to one another, and this makes it both difficult and important to keep them apart.

This distinction is important to originalist theory—and in particular to the so-called “new originalism” or “original-meaning originalism” that is the subject of the “shaping,” “morphing,” and “refinement” that Friedman incorporates into his narrative.<sup>75</sup> To fully appreciate the significance of the three senses of “meaning,” we need to introduce another theoretical distinction, between “interpretation” and “construction.”

Here is a first, rough cut at definitions that mark the distinction:

*Interpretation:* The activity that aims at recovery of the linguistic meaning—or semantic content—of a legal text. (Interpretation aims at meaning in the semantic sense.)

*Construction:* The activity of determining the legal effect—or application—of a legal text, sometimes involving the articulation of subsidiary rules or doctrines. (Construction produces meaning in the applicative sense.)<sup>76</sup>

With the three distinct senses of “meaning” and the interpretation-construction distinction in mind, we can return to the passage asserting that the Constitution’s “provisions may be applied to new circumstances as our society changes, its meaning remains fixed and timeless.”<sup>77</sup>

Consider the part of the passage that asserts that the meaning of the Constitution is fixed and timeless. Interpreted charitably, this passage asserts that linguistic meaning (meaning in the semantic sense) is fixed. That assertion is not only plausible: it is a general truth about the meaning of particular utterances (texts or oral communications). For example, Article One of the Constitution uses the phrase “domestic violence.”<sup>78</sup> That phrase has a contemporary linguistic meaning (or sense) that refers to violence within a family, such as spousal abuse or child abuse. But that sense of the phrase did not exist at the time the Constitution was framed and ratified. At that time, the phrase “domestic violence” referred to civic disturbances, e.g.,

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75. On the “new originalism” and “original meaning originalism,” see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & Pub. Pol’y 599, 608 (2004); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. Rev. 923, 933-34 (2009).

76. For another formulation, see Solum, *supra* note 75, at 933-34.

77. *The Will of the People*, p. 311.

78. U.S. CONST. art. IV, § 4.; see generally Mark S. Stein, *The Domestic Violence Clause in ‘New Originalist’ Theory*, 37 HASTINGS CONST. L.Q. 129 (2009) (criticizing the argument that the meaning of the domestic violence clause is fixed and discussing the literature).



riots and rebellions, that were internal to a state and not external, e.g., invasions.<sup>79</sup> We can call the claim that linguistic meaning is fixed, *the fixation thesis*. The fixation thesis is an assertion about constitutional interpretation—in the sense that the interpretation-construction distinction assigns to the word “interpretation.”

Now consider the part of the passage that asserts that constitutional “provisions may be applied to new circumstances as our society changes.”<sup>80</sup> This assertion is not an assertion about linguistic meaning. How could it be? To the extent that it is an assertion about meaning at all, it is an assertion about meaning in the applicative sense. In the vocabulary provided by the interpretation-construction distinction, the claim that the constitution can be applied to new circumstances is a claim about constitutional construction. And it is a very modest claim. The claim is simply the constitution can be given legal effect to new circumstances. That claim expresses a very general truth about legal texts: they use language that is general (i.e., language that abstracts from particular circumstances) and that enables legal texts to generate rules that can be applied in a variety of particular situations, including situation that are new or novel. Call this claim about constitutional construction, *the novelty claim*.

Is *the fixation thesis* consistent with *the novelty claim*? Of course, it is. The fixation thesis is about meaning in the semantic sense: it is a claim about constitutional interpretation. The *novelty claim* is a claim about meaning in the applicative sense: it is a claim about constitutional construction. These claims cannot contradict one another. The ability to believing them both is nothing like Orwell’s blackwhite, “the ability to believe that black is white, and more, to know that black is white, and to forget that one has ever believed the contrary.”<sup>81</sup>

Friedman’s charge that simultaneous assertion of *the fixation thesis* and *the novelty claim* is akin to Orwellian doublespeak is based on an interpretation that assumes that originalists were deliberately making a pair of assertions that contradicted one another with the intent to deceive. But that interpretation seems implausible. It violates the general principle of charity in interpretation: we assume that intelligent speakers rare utter logical contradictions. And how does Friedman think that originalists could believe that their Orwellian doublespeak could achieve any political purpose? *Nineteen Eighty-Four* was fiction, not fact. Even the most pessimistic as-

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79. At the Philadelphia Convention, James Wilson stated that the purpose of the clause was “to secure the States agst. dangerous commotions, insurrections and rebellions,” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 47 (Max Farrand ed., rev. ed. 1937). Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 33 (1997).

80. *The Will of the People*, p. 311.

81. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Secker and Warburg 1949).

assessment of the political conditions that prevailed in the United States in 1987 does not closely approximate the conditions of Oceania in 1984.

Friedman has a story to tell about originalism, and the way that he tells that story is normatively charged. What is unclear is whether the evidence that Friedman provides warrants the normative spin.

#### IV. CONCLUSION

The role of history and narrative is both firmly established and endlessly contestable. Narratives structure our understanding of the world, but much of the work that they do relies on implicit and unexamined assumptions about causal mechanisms and systematic regularities. Narratives have normative force, but their power to move and persuade sometimes relies on implicit and unexamined assumptions about political morality and personal ethics. When we read a grand narrative like *The Will of the People*, intellectual prudence requires that we interrogate the causal and normative assumptions that hold the story together and give it normative force.

But in the end, I want to emphasize the modest nature of the points that I have made. The core of *The Will of the People* is a richly detailed story about the relationship between popular opinion and the Supreme Court's construction of constitutional doctrine. I have attempted to bring out some of the limitations of that narrative—to cabin its causal claims and question its normative significance. But it would be a grave error to mistake focus on these limits and ignore the value of the narrative itself. No one who dives into *The Will of the People* will emerge unaltered by the power of its story. Friedman has written a transformative book; our intellectual landscape has been changed. *The Will of the People* is a scholarly achievement of the very highest order.