Constitutional Theology: The Revival of Whig History in American Public Law

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THE REVIVAL OF WHIG HISTORY IN AMERICAN PUBLIC LAW

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INTRODUCTION

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“For some time the aftereffects of the idea of God remained recognizable. In America this manifested itself in the reasonable and pragmatic belief that the voice of the people is the voice of God. . . . In democratic thought the people hover above the political life of the state, just as God does above the world, as the cause and the end of all things.”

– Carl Schmitt, Political Theology (1922)1

“That the manufacture of consent is capable of great refinements no one, I think, denies. The process by which public opinions arise is certainly no less intricate than it has appeared in these pages, and the opportunities for manipulation open to anyone who understands the process are plain enough. The creation of consent is not a new art.”

– Walter Lippmann, Public Opinion (1922)2

“Perhaps all history-books hold a danger for those who do not know a great deal of history already.”

– Herbert Butterfield, The Whig Interpretation of History (1931)3

2. WALTER LIPPmann, PUBLIC OPINION 248 (1922).
INTRODUCTION

One of the things I admire about the profession of history is that there are no admissions requirements. Like being a novelist or a member of Congress, the door is open to almost anyone who wants to try their hand at the art or craft. In a world of an increasingly specialized division of professional labor, that is a relatively rare and special thing. Though I teach in a law school, for example, I would be in trouble if I tried to pass myself off as a lawyer. Though I could perhaps irritatingly refer to myself as a doctor owing to my Ph.D., if I tried writing medical treatises, they would be ignored. Though I dabble a bit in economic history, if I started calling myself an economist, I would certainly be reproached. But while there is a rigorous, heavily-credentialed, and well-established historical profession in the United States, the policing of disciplinary boundaries has not been its main priority. In fact, professional historians are marvelously ecumenical in welcoming others and outsiders to their field of study. Indeed, one of the most prestigious Ph.D. dissertation prizes in the United States is named after Allan Nevins—a journalist with a Masters degree in English who became one of the most widely admired of American historians. Barbara Tuchman, David McCollough, and many other Pulitzer Prize winners have followed in this venerable tradition. Historians might mutter privately when yet another journalist formally proclaims him- or herself a “Presidential historian” on CNN, but for the most part the reaction of professional historians to the expansion of their ranks in all possible directions is let a thousand flowers bloom. The house of history has many mansions.

Recently, the fields of American legal and constitutional history have been greatly enlivened by just such openness and transdisciplinarity. The field is exploding, especially in law schools and political science departments. In the most recent Association of American Law Schools Directory of Law Teachers, almost twice as many law professors declared a subject matter interest in legal history than in “law and economics” or “law and literature.”4 In the field of constitutional law, as Richard Primus has recently noted, it has become seemingly obligatory for the very leading scholars (e.g., Bruce Ackerman, Akhil Amar, Larry Kramer, Geoffrey Stone), or aspirants thereto, to produce a full-blown constitutional history to buttress their more doctrinal or jurisprudential positions.5 The historical turn in po-

Political science that generated the field of American political development has also spawned a renaissance of interest in American constitutional history. And increased political sparring over constitutional issues like original public meaning, the Second Amendment, takings, government regulation, war powers, and the like has produced a deluge of distinctly partisan or ideological histories written specifically to bolster pre-established policy positions. Of late, conservatives and libertarians have been particularly attuned to the benefits of history in constructing a distinctly useable constitutional past. But liberals have also responded in kind. For the most part, this proliferation of constitutional history is an unambiguously good thing—a simple embarrassment of riches that should be celebrated with a Holmesian faith that the “ultimate good desired” is best reached through a plentiful, vigorous, and “free trade in ideas.”

But this diverse plenitude of constitutional history does create some very important and unavoidable challenges for scholarly interpretation, evaluation, selection, and authority. Within the field of professional history itself, Peter Novick’s That Noble Dream has portrayed a contemporary crisis over meaning and method in American historical practice symbolized by relentless fragmentation, a “collapse in comity,” and the troubling emergence of “every group its own historian.” Indeed, Novick concludes his history of modern history with a verse from the Book of Judges that also seems to capture the current state of constitutional history: “In those days there was no king in Israel; every man did that which was right in his own eyes.”

11. Id. at 628; see also James T. Kloppenberg, Objectivity and Historicism: A Century of American Historical Writing, 94 Am. Historical Rev. 1011 (1989).
In constitutional history, these mounting historiographical difficulties are exacerbated by the divergent research methods and writing traditions deployed by professional legal scholars and professional historians. As has been frequently commented upon, the fields of law and history approach the past rather differently. As Robert Gordon, Jack Rakove, Martin Flaherty, and William Nelson (among many others) have described, histories written by lawyers and historians often seem to be composed by entirely different animals—hedgehogs and foxes in Rakove's application of Isaiah Berlin's famous typology—after distinctly different kinds of intellectual prey. The result is the proliferation of a bewildering array of constitutional histories that look similar on the surface—dust jacket, table of contents, great case citations, ample secondary footnote apparatus, etc.—but actually reflect vastly divergent research methodologies and intellectual traditions and objectives. An uninitiated reader or researcher is justifiably confused. Where does one go, for example, for an authoritative historical account of the Dred Scott Case—the very latest provocative interpretation of political scientist Mark Graber or the more traditional epic of historian Don Fehrenbacher? Does it matter? How does it matter? How do we know? Can one profess to have a historical understanding of Dred Scott without reckoning with the mountain of new social histories of slavery from Eugene Genovese to Ira Berlin and beyond? Or can one safely ignore wide swaths of professional historical secondary literature in defense of time, discipline, or political preferences? Perhaps the text of the case just speaks for itself—and everyone should simply do what is right in his or her own eyes. Or perhaps we can just let the market (or the SSRN download index or the blogosphere) be our guide.

Now were this but an internal scholarly debate about somewhat dead historical questions—something akin to whether the Progressives were an old middle-class consumed by status anxiety or a new middle-class anxious

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to modernize society—confusion about what we are (or should be) reading and wherein lies its authority might be safely relegated to the esoteric footnotes of a handful of caring cognoscenti. But, as Chief Justice Marshall said about the task at hand, “we must never forget, that it is a constitution we are expounding.”15 The important real world consequences of historical constitutional debate are all around us from old fights over originalism to new concerns about the implications of Fourteenth Amendment birthright citizenship. Indeed, the best recent example of the power of history in constitutional interpretation and the stakes involved in being able to distinguish different kinds of historical authority is the role of history and historians in interpreting the Second Amendment in District of Columbia v. Heller and McDonald v. City of Chicago.16 Justice Breyer’s dissenting opinion in McDonald eloquently made the case for history’s current power in constitutional law as well as the need for greater circumspection of the nature of historical argument:

The Court based its conclusions almost exclusively upon its reading of history. But the relevant history in Heller was far from clear . . . . And subsequent scholarly writing reveals why disputed history provides treacherous ground on which to build decisions written by judges who are not expert at history. Since Heller, historians, scholars, and judges have continued to express the view that the Court’s historical account was flawed.17

Breyer diplomatically stayed somewhat above the fray in characterizing the history deployed in these cases as “disputed history”—echoing Justice Stevens’ on the “malleability and elusiveness of history.”18 Historians Jack Rakove, Alison LaCroix, and Saul Cornell, however, conclude otherwise—that though the historical matters before the court were indeed disputed (wholly expected in an adversary process with such powerful special interests—indeed, social movements—at stake), among professional historians there was a surprising degree of scholarly consensus.19

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17. McDonald, 130 S. Ct. at 3121. Among the historians Breyer cited on this point were: David Thomas Konig, Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America, 56 UCLA L. REV. 1295 (2009); Paul Finkelman, It Really Was About a Well Regulated Militia, 59 SYRACUSE L. REV. 267 (2008); Saul Cornell, St. George Tucker’s Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment, 103 N.W. U. L. REV. 1541 (2009).
18. McDonald, 128 S. Ct. at 3117.
Now it is certainly true that history as an unalterably human (rather than a natural) science does not provide final and apodictic answers for use by lawyers and judges. But that does not imply that all historical arguments are created equal or that there is no historical basis to distinguish divergent accounts. Historians do not stand helpless before a "disputed" or "malleable" past unable to choose between—to take the extreme case—professional, authoritative histories of the Third Reich on the one hand and propagandistic fictions of Holocaust deniers on the other. To the contrary, the historical community has developed a set of evolving standards, professional methods, and coherent, contestable reasons for choosing or preferring one version of the past to another. Indeed, such issues have been at the heart of hermeneutic practice—historical, textual, and biblical—from time immemorial. Given the recent cacophony of constitutional history writing and the consequences flowing therefrom, it is perhaps a good time to think back through some of those continually evolving standards, methods, and reasons to try to determine why historians prefer certain approaches to the past over others.

The publication of Barry Friedman’s ambitious one-volume constitutional history of judicial review provides an excellent opportunity to do just that—to wrestle with issues like the methods of constitutional history, the nature of historical authority, and the recent historical turn in the field of public law. Big books warrant broad-scale reviews. And Friedman’s synthesis is certainly a big book. Indeed, Friedman’s will of the people attempts the seemingly impossible, the production of a one-volume narrative that simultaneously: a) aims at both a professional as well as a wide general trade audience; b) builds upon some of the best recent secondary constitutional history scholarship available; c) incorporates primary sources like newspaper, case, speech, and letter quotations whenever possible; and d) makes a single overarching interpretive argument about the relationship of the Supreme Court and American democracy. And there is no question that the book succeeds on many levels. In the marketplace of ideas, at least as

measured by Jeff Bezos, Barry Friedman’s book currently ranks somewhere around 35,000.23 Not bad at all considering that Oliver Wendell Holmes’s *The Common Law* ranks around 250,000; James Willard Hurst’s *Law and the Conditions of Freedom* comes in at 500,000;24 and the great *History of English Law* by Pollack and Maitland brings up the rear somewhere near 6,000,000.25 The book has been widely noted and much discussed, including an enviable full-page review in the *New York Times* calling it both “authoritative” and “riveting” and praising “the breadth and detail of his historical canvas.”26 The book even has its own web page.27

But while the book has received an unusual number of academic and journalistic reviews and has been the sole subject of a number of specially-organized symposia like this one, most reviewers have not spent much time worrying about identifying what the book actually is or is not or thinking about how it was put together or reflecting on how it fits within the pantheon of extant legal, political, and socio-economic history. Rather, *The Will of the People* is usually approached and assessed rather simply and matter-of-factly as one of two separate things: either as another straightforward, general history of the Supreme Court much like any other or as an interpretive and political argument about the proper role of judicial review in the United States. By contrast in this review, I would like to challenge this easy categorization—“if it walks like constitutional history and talks like constitutional history, it must be constitutional history”—and examine more closely the kind of history practiced in this volume, the methods used in its construction, and the relationship between history and interpretive argument. In particular, I would like to assess Friedman’s accomplishment according to three entirely different styles and methods of legal-constitutional history: 1) synthetic or narrative constitutional history; 2) the new socio-legal history; and 3) conceptual or analytical legal history.

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A few caveats before I begin this constructive critique. First, I know of no work by any American legal historian that simultaneously performs all three of these tasks well. This is an ideal and an aspiration, not a norm. Critically measuring Friedman's book against three different kinds of history underscores rather than diminishes its achievement. Secondly, as already suggested, I undertake this assessment perfectly aware of the inherent differences between legal and historical scholarship (even after the explosion of joint J.D./Ph.D. programs) and without the expectation that legal and constitutional work with a historical dimension must conform to historians' desires or standards. It also goes without saying that not all historians will assent to the depiction of evolving standards described in this historiographical survey. Finally, however, I do have a dog in this fight. Given the increased reliance on history in constitutional interpretation, I think it is incumbent upon all practitioners of the craft to think seriously about what they are doing and not doing, to be explicit about what they are doing and especially how they are doing it, and to try to raise the bar generally for the practice of history in law. Given the real and high stakes of this particular brand of historical debate, it seems to me that historians and legal scholars should insist upon the highest standards attainable even as we continue to debate the particular standards to be applied in any given case or the flaws in particular arguments or positions. We are living through trying times in which the manufacture of authority and consent is being plied with ever greater efficacy. History is up for grabs. And as George Orwell warned, "Who controls the past controls the future."  

I. NARRATIVE CONSTITUTIONAL SYNTHESIS

The oldest kind of constitutional history in the United States is the narrative synthesis. Indeed, in the nineteenth century, most American history took the form of a grand national—explicitly constitutional—narrative that told the (usually heroic) story of the rise of the republic from the Philadelphia Convention of 1787 onwards. There are a couple key features of narrative synthesis. First, narrative synthesis is focused on the whole rather than the parts. It aims to tell something like "The Story of America" or the
"Biography of the Constitution"—"Our Story!" the exclamation point conveying something of the spirit of the typical enterprise. Narrative synthesis usually holds that there is one story and that the whole story can be conveyed—that a single narrative can be found that unites all the strands and peoples, the many twists and turns, the tremendous complexities and uncertainties—_E Pluribus Unum_. With its explicit focus on capturing the whole (the synthetic part), narrative history usually deploys a straight-forward chronological tale of constitutional development from the founding to the present (whenever that happens to be). Second, because of the great difficulty of covering the whole, narrative synthesis invariably restricts itself to a story involving a small number of exclusively national figures (e.g., Founders, Presidents, Justices), major events (wars, crises, depressions), and great documents (The Constitution, The Federalist Papers, a Presidential or Congressional speech, a Supreme Court case, a front page story from the _New York Times_). You usually know you are reading a page of constitutional history as synthetic narrative when you have a noun, a verb, a great case, a famous person, a major event, and a president. You also know you are in the presence of narrative synthesis when the pictures flowing through your mind resemble something like serially updated versions of Gilbert Stuart’s portraits of George Washington or Howard Chandler Christy’s painting of the signing of the Constitution.

Now, narrative synthesis is a necessary and indispensable part of the field of constitutional history. It is important to reckon with the whole. Not everyone has the time to leisurely work their way through the Library of Congress JK and KF sections yet alone historical archives and ever balloon- ing case reports. Consequently, the production of narrative syntheses has a special place in the field. Indeed, before the proliferation of secondary materials, nineteenth-century historians like George Bancroft and Hermann von Holst produced multi-volume constitutional narratives that worked from primary documents to fashion a foundation for future, more specialized studies.32 Later, historians as diverse as Andrew McLaughlin, Charles Warren, and Charles Beard continued to produce important narrative syntheses of the Constitution, the Supreme Court, and American history that shaped the future of the field.33

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But with the extraordinary expansion and specialization of professional historical research and writing in the second half of the twentieth century, it becomes harder to find single historical authors bold enough to attempt to take on the whole of American constitutional history. Indeed, the tendency among historians of late is to leave the task of authoritative narrative synthesis to teams of scholars and multi-volume series. From the *Cambridge History of Law in America* to the *New American Nation Series* to the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, the integrative work of authoritative narrative synthesis is seen as so complex and involving so much secondary reading and expertise that it can only be effectively produced collectively with experienced specialists contributing individual parts—and very senior specialists at that.\(^{34}\) In the field of professional history, narrative synthesis is frequently a last rather than a first book—the crowning achievement of a career built working close to the sources and mastering an entire field of inquiry. The reason for this division of labor is apparent. Given the centrality of primary research to professional history (i.e., the necessity of mastering a historical period from the archives up) as well as the rapidly expanding secondary bibliography accompanying a dizzying array of historical subfields, it is difficult to imagine a single author producing a narrative synthesis of over two centuries of American experience that the profession as a whole would recognize as grounded, well-informed, and authoritative. That said, the collective approach has yielded some extraordinary synthetic achievements like the *Oxford History of the United States* or *The American Constitution: Its Origins and Development* by Alfred H. Kelly, Winfred A. Harbison, and Herman Belz.\(^{35}\)

Despite this caution of professional historians, however, legal scholars and political scientists have pushed forward with narrative syntheses of United States constitutional history with increasing abandon. Indeed, a cottage industry has emerged as constitutional law experts rewrite the constitutional history of the United States to fit a growing variety of ever-changing theses and theories. These histories range widely in form and content from Robert McCloskey’s extremely brief and pointed *History of the Supreme Court* to Akhil Amar’s provocative reinterpretation of the history of *The Bill of Rights* to single-issue syntheses like Geoffrey Stone’s *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*.\(^{36}\) These narratives are a bit different from the professional historical

\(^{34}\) *The Cambridge History of Law in America* (Michael Grossberg & Christopher Tomlins eds., 2008) (three volume set).


\(^{36}\) *Robert G. McCloskey, The American Supreme Court* (Daniel J. Boorstin ed., 1960); *Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction*
kind in that they do not really aspire to be authoritative syntheses of the current state of historical knowledge on the subject. Nor are they produced by scholars who have spent decades wrestling with the primary and secondary materials. Rather, primary and secondary materials are marshaled here quite selectively much the way a lawyer constructs a powerful brief by providing pieces of historical evidence strictly in the service of a larger political or theoretical argument. Rather than working aimlessly (and for ridiculously long periods of time) in the raw material of the primary sources in order to figure out from the bottom-up what is going on at a particular moment (so as to subsequently generate a hypothesis to be further investigated and turned into a true historical thesis), recent constitutional histories more often seem to work from the top-down, starting with a strong thesis and then scouring the past for evidence specifically selected to bolster an original position.

Now, in legal scholarship generally, there is nothing unusual or aberrant in such a methodology. On the contrary, it is frequently exactly what law students are specifically trained to do—to take a position on one side of a contested issue and find as much credible legal evidence in as many directions as possible to support that particular position. Judges and law professors have the additional benefit (should they choose to rely on it, and certainly not all do) of a veritable army of clerks and research assistants specially trained to look for evidence for pre-established positions or arguments. In fact, a leading constitutional law scholar, Lawrence Tribe, described his reliance on research assistants in precisely this way:

I rely on my students to gather information and data, and to draft (often with considerable guidance on my part and invariably with substantial editing once they are done) straightforward descriptions of statutes, regulations, and administrative and judicial decisions (including summaries of the facts and holdings and sometimes the reasoning), but not to provide the underlying ideas or analytic framework for what I am writing. I rely on research assistants much less than most judges and justices are known to rely on their law clerks for drafting opinions.37

When used to construct synthetic narrative or constitutional-historical argument, this method has frequently been derided by some professional historians as “law office history” or “history lite.”38

Some very influential constitutional narratives have been produced by working from the top-down rather than from the bottom-up. Though Amar claims that his Bill of Rights is but “a law book (written about law by a law

professor)" and "framed by text and textualism," his keen historical instincts and conscientious, personal attention to both secondary and primary materials make it the indispensable history on the topic.\textsuperscript{39} This is also the case with Larry Kramer's \emph{The People Themselves}—a powerful thesis-driven history built from a true immersion in primary sources. And there are some wonderful exceptions in this genre generally. My favorite is David Currie's \emph{The Constitution in the Supreme Court}. Currie's history is not animated by any particular ideological or political argument. His use of secondary history is careful and judicious. And he produces an ever authoritative history by emphasizing and staying close and true to his primary sources. Currie simply systematically read through all of the \emph{United States Supreme Court Reports} and reported on what he found there. His footnotes are a treasure trove for future research.\textsuperscript{40}

So, how does Barry Friedman's \emph{Will of the People} fare as narrative synthesis? I do not think there is much doubt that Friedman's book succeeds admirably as a one-volume narrative history of U.S. Supreme Court judicial review. The book is engagingly written and covers an enormous amount of material smartly and quickly. Moreover, the book's overarching argument about the on-going, tense relationship of popular will and judicial review makes for a compelling interpretive framework around which to refashion some of the classic tales in the story of American constitutional development. Moreover, Friedman's book makes good use of recent secondary histories in building his narrative, and he is an able guide to some of the latest literature in legal history and constitutional law. The book is the product of much labor, thought, and time in the assembly of a single coherent narrative, and it shows. Friedman does not compete with Currie as a systematic survey of everything that the Supreme Court as a political institution is concerned with over time. But as a narrative synthesis, Friedman's book provides a good entry-level, one-volume introduction to the history of the Court, particularly as it regards the special problem of the emergence and development of judicial review.

That said, as narrative constitutional history, Friedman's survey also unavoidably reflects some of the inherent limits of the synthetic genre. For the most part, the cases, controversies, cast of characters, and chronology that make up Friedman's story are wholly familiar to students of constitutional history: the Founders and the Constitution; Marshall and \emph{Marbury}; Jackson, the Bank War and Nullification; \emph{Dred Scott}, the Civil War, and Reconstruction; the \emph{Lochner} Era; FDR and court-packing and so on. And, as expected in such a sweeping survey, the main outlines of historical expo-

\textsuperscript{39} Amar, \textit{supra} note 36, at 301-02.

sition on these episodes usually track the extant secondary literature fairly conventionally. Significant parts of Friedman's comparatively lengthy discussion of FDR's battle with the Court, for example, follow William Leuchtenburg's 1963 description of events in *Franklin D. Roosevelt and the New Deal* which in turn relies heavily on Joseph Alsop and Turner Catledge's *The 168 Days* from 1938—a very prominent text in Friedman's notes as well.41 Also as expected in any narrative synthesis that tries to deal with the whole sweep of American history, there are some jumps, gaps, and omissions about which historians will never fail to complain. World War I, for example, plays a surprisingly modest role in Friedman's narrative, despite its centrality to developing American conceptions of civil liberties in the twentieth century.42 Similarly, I seemed not to be able to really locate the 1920s in the book. There is a brief mention of child labor, *Adkins*, and legal realism, but just as Friedman seems to settle into a narrative focused around Robert La Follette's attacks on the Court in his Progressive Party campaign in 1924 (around page 180), chronology moves to the background and source references jump around from the late 1890s to 1930 in a wide-ranging epitaph for the *Lochner* era.

Finally, though no one will argue with the originality and provocativeness of Friedman's overarching thesis about the influence of public opinion on the Supreme Court,43 there is simply not enough room for novelty or revelation in narrative synthesis when it comes to particular eras or sub-themes. For example, the story Friedman relates about the so-called *Lochner* era is essentially the same one constitutional historians have been telling since 1932-1937.44 The usual narrative arc is reflected perfectly by Friedman's section titles: "Business Packs the Court"; "The Federal Judiciary Supports Business and Property Rights"; "Enacting Social Legislation"; "Conservatives Seek Refuge in the Constitution"; and "The Judges Repeatedly Strike Progressive Measures." Moreover, the case law through which Friedman tells the oft-told tale of the Progressive battle with the *Lochner*


42. Friedman transitions away from the theme of *Lochner* and Progressivism this way: "Change was under way on the Court as well: most of the justices in the *Lochner* majority had left the bench. Then World War I gave the country something other than the judiciary on which to focus." FRIEDMAN, supra note 20, at 180 (internal citation omitted).

43. Though "weak" versions of this perspective have perhaps been around in constitutional commentary at least since Mr. Dooley's famous observation that "no matter whether th' constitution follows th' flag or not; th' supreme court follows th' iliction returns." Peter Finley Dunne, *MR. DOOLEY ON THE CHOICE OF LAW* 52 (Edward J. Bander, ed., 1963).

44. In 1933, in the shadow of Roosevelt's rise to power, Max Lerner (at the urging of Abe Fortas) began his essay on *The Supreme Court and American Capitalism*, 42 *YALE L.J.* 668 (1933). In 1938, in the wake of FDR's battle with the Supreme Court, Benjamin R. Twiss began revising his dissertation into the book *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).
Court is as classic as it is limited. In the History of American Law, Lawrence Friedman identified five cases as establishing the orthodox position that “annex[ed] the principles of laissez faire capitalism to the Constitution and put them beyond reach of state legislative power”: Wynehamer v. New York; In Re Jacobs; Godcharles v. Wigeman; Ritchie v. People; and Lochner v. New York.45 To this list are usually added what Morton Keller dubbed the “unholy trinity of Supreme Court decisions in the mid-nineties”: In Re Debs, E.C. Knight, and Pollock v. Farmers’ Loan and Trust.46 Barry Friedman’s portrait centers directly on those usual suspects: Jacobs, Godcharles, Pollock, Debs, E.C. Knight, and, of course, Lochner v. New York.

A couple things to note here. First, the inclusion of state supreme court decisions (Jacobs and Godcharles) are somewhat puzzling as Friedman’s book is about the influence of public opinion on the U.S. Supreme Court, and the book as a whole includes very little about what is going on in state courts generally. Second, as has been noted before about the orthodox myth of a “Lochner era,” this is an exceedingly thin case base on which to base a major generalization about the relationship of the Supreme Court to American capitalism. What about the hundreds (thousands on the state level) of other cases in this period concerning transportation, shipping, communications, agriculture, banking, and public utilities? Are they not significant in shaping public opinion about the Court’s relationship to American political economy?47 Are there no new cases to be discussed in such a new history? Now much to his credit, Friedman does give attention to a burgeoning revisionist literature concerning the “contested turf” of the Lochner era, but in the end, he assimilates it, tames it, and sustains the orthodox narrative.48 Herbert Butterfield once noted a similar tendency in English political and constitutional history “to patch the new research into the old story even when the research in detail has altered the bearings of the whole subject.”49 In the Structure of Scientific Revolutions, Thomas Kuhn talked about this tendency under the rubric of “normal science.”50 In history, Butterfield

48. FRIEDMAN, supra note 22, at 174.
49. BUTTERFIELD, supra note 3, at 6.
deemed it a leading indicator of what he labeled a "Whig interpretation of history."

II. THE NEW SOCIO-LEGAL HISTORY

Though narrative synthesis has a central place in historiography and will always be well-received among a popular audience, it is not the way most legal and constitutional history is currently written by professional historians. Rather, in the twentieth century, two very important intellectual developments moved most historians away from practicing history through the construction of high political or constitutional narratives. The first was the emergence of what Vernon Parrington called "critical realism" at the turn of the twentieth century.51 In history, the work of Frederick Jackson Turner and Charles Beard forged an economic interpretation of the past that was impatient with the old celebratory narratives of the nation-building work of founders and presidents and Supreme Court Justices.52 In alliance with a broader progressive muckraking tradition, critical scholars like these attempted to dig below the surface of high politics and lawmaking to expose the more gritty realities of everyday socio-economic experience.53 With intellectual influences ranging from historical materialism in social theory and pragmatism in philosophy to sociological jurisprudence in law, critical realists produced an approach to the past impatient with the typical survey of great cases and great events. They pioneered a more critical, analytical style that eschewed the usual sources and tried to build alternative interpretations through the in-depth exploitation of new types of archival materials. Beard's *Economic Interpretation of the Constitution* was iconic in this regard, examining not just the founders' well-known words, but expanding the historian's evidentiary base to include their actual economic holdings so as to produce a more critical and realistic overall assessment of historical cause, purpose, and effect.54

52. FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1920); CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).
54. BEARD, supra note 52.
The second related development was the increased professionalization of the discipline of history in the post World War II period. Rooted in the rise of professional social science in the modern university (as well as an influx of an extraordinary range of refugee scholars from Europe), this professionalization brought an increased rigor, specialization, and methodological sophistication to the study and production of history. The hallmark of this development was the degree to which the historical monograph—the specialized historical case study—came to displace the narrative synthesis as the reigning standard of professional achievement. The monograph reflected the increased standards of evidence, the significance of professional Ph.D. training, the new priority of primary over secondary source material, and the new emphasis on mastering a particular topic or period in its entirety—from the bottom-up. The ascendancy of the historical monograph also reflected the profession’s more comfortable embrace of historical complexity and contingency. As Richard Hofstadter argued, “an engaging and moving simplicity, accessible to the casual reader of history, [gave] way to a new awareness of the multiplicity of forces.” 55 Though he admitted the continued attraction of the simple, frequently moralistic, schemas of narrative synthesis and even early progressive history, Hofstadter contended that professional historians could “hardly continue to believe in them.” 56

In the fields of legal and constitutional history, the historian who best embodied these new priorities was James Willard Hurst—arguably the founder of both modern American legal history as well as the law and society movement in the United States. 57 Hurst brought together both the movement for critical realism in legal studies as well as the demand for increasing professionalization in the historical and social sciences. And he essentially launched the new socio-legal history through both his vigorous critique of the existing state of legal-constitutional history as well as his new example of close socio-legal historical practice. Revealingly, Hurst’s magnum opus and the product of his life’s work in law, history, and society was a monumental case study of the interaction of law and economy in the Wisconsin lumber industry (a tome that will never have its own webpage) a study in which Hurst is alleged to have read every extant piece of legal paper connected with this sprawling topic. 58 Hurst’s historical sociology consisted of a complicated array of interlocking methodological and analytical

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55. HOFSTADTER, supra note 53, at 442.
56. Id.
57. Lawrence M. Friedman, American Legal History: Past and Present, 34 J. LEGAL EDUC. 563 (1984); Bryant G. Garth, James Willard Hurst as Entrepreneur for the Field of Law and Social Science, 18 LAW & HIST. REV. 37 (2000).
pieces. For present purposes, three moves were crucial: a) Hurst’s critique of existing narrative syntheses; b) his insistence at building histories from the bottom-up through the mastery of new primary source material as well as secondary writings from a broad range of related fields; and c) his emphasis on always placing historical legal and constitutional developments in broader socio-economic context.

Though Willard Hurst’s first historical research and writing effort was a collaboration with Felix Frankfurter on *The Commerce Clause under Marshall, Taney, and Waite*, he never again wrote a constitutional history or a history of the Supreme Court. The choice was serious and intentional, for Hurst believed that such syntheses concealed and misdirected as much as they revealed, and more significantly, they allowed the great mass of legal historical materials to remain unexamined. As Hurst told Hendrik Hartog, “I didn’t want to wind up knowing nothing except all the gossip about the judges. This didn’t seem to be that important.” He confessed irritation with legal history as a “recital of Great Cases” which “tends to take the cream off the top of the bottle and let the nutritious skimmed stuff flow down the drain because it is bulky to handle [not unlike this metaphor] and not so immediately pleasing to taste.” In contrast to the atypical and overemphasized great case or controversy, Hurst urged the reconstruction of the field of legal history around the everyday interaction of law in society and economy as reflected in the thousands upon thousands of unexamined cases and materials from institutions like local and state courts, legislatures, and administrative agencies. The great bulk of the legal-constitutional history of the United States, Hurst contended, remained largely unknown and unwritten. Finally, Hurst’s emphasis on the bottom-up reconstruction of unexamined primary sources reflected the priority he gave to studying law in action and law in context. In a rebuke to the internalist, doctrinal constitutional histories of the past, Hurst emphasized the need to study law “not as a self-contained system but as part of the life of its society”—inextricably


connected to larger issues of economy, polity, and society. Hurst thus
gave early voice to the need for a “social history of law”—a contextual his­
tory “pursuing law into whatever relations it has had to the whole course of
the society.”

What is interesting about the reception of the new socio-legal history
is that it has had seemingly opposite effects in the fields of history and con­
stitutional law. In history (and among professional legal historians) Hurst’s
call for a contextual and social history of law has become the reigning stan­
dard as scholars (many of whom take issue with the substantive conclusions
and elisions of some of Hurst’s own histories) push the social-historical
approach in ever new directions, exploiting wholly new areas and archives
with only increasing specialization, expertise, and methodological innovation
and sophistication. In the field of constitutional law, however, the cur­
rent wave of new constitutional histories continues as if Hurst (or for that
matter: Marx, Weber, and Durkheim; Maine, Maitland, and Vinogradoff;
Turner, Beard, and Parrington; James, Dewey, and Parsons; Horwitz, Gor­
don, and Tomlins) had never even written. Indeed, a troubling number of
the most popular constitutional histories produced today have simply not
reckoned in any serious methodological or analytical way with socio-legal
theory or scholarship.

So, how does the Will of the People fare as new socio-legal history?

At first glance, Friedman’s book seems to be quite sympathetic to the new
methods and texts. Ubiquitous citations to the work of socio-legal histo­
rians like Richard Morris, William E. Nelson, John Philip Reid, and many
others dominate the sprawling 200-page footnotes section of the book. So
do citations to many of the most important works in twentieth century social
science, political economy, and American history—for example, V.O. Key,
Robert Dahl, Joseph Schumpeter, David Truman, Gordon Wood, and Wil­
liam Leuchtenburg. Friedman seems to have read and reflected on an im­
posing amount of secondary literature. When one adds the numerous news­
paper articles, speeches, correspondence, and cases also cited in the notes,
one seems faced with an impossibly precocious first book—a narrative syn­
thesis that seems to hold to the standards of the new socio-legal history.

But once the reader enters the actual narrative, however, one is less
likely to find much in the way of actual socio-legal history or theory. Ra­
ther, traditional narrative synthesis prevails—focused in each period on the
usual suspects—a handful of great cases, great personages, great texts, and

63. JAMES WILLARD HURST, JUSTICE HOLMES ON LEGAL HISTORY 89 (1964).
64. JAMES WILLARD HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 42
65. See, e.g., Michael Grossberg, Social History Update: “Fighting Faiths” and the
Challenges of Legal History, 25 J. SOC. HIST. 191 (1991); Barbara Y. Welke, Willard Hurst
great newspaper articles. In contrast to Hurst's call for a contextual and social history of law, Friedman's constitutional narrative remains detached from socio-economic context as well as from new social and cultural history. Somewhat stunningly (especially given the recent preoccupations of legal and social history), changing socio-economic patterns of capitalism and class relations really do not receive much attention in this book. Sure, "business" makes an appearance as a prominent actor in a familiar depiction of the *Lochner* era, but the market revolution plays almost no role in Friedman's account of early American constitutionalism. The *Dartmouth College* and *Charles River Bridge* cases\(^66\) are not discussed and Willard Hurst's and Morton Horwitz's pathbreaking works on nineteenth-century American law and economy are not mentioned at all.\(^67\) Have structural changes in capitalism influenced the shape of constitutional law, the Supreme Court, and/or public opinion since the late 18th century? It would be difficult to answer that all-important question with the information provided in this book. So too, changing patterns of work and demographics are rarely factored into the analysis. Immigration is not really explored until Friedman reaches the 1990s. Race, gender, and sexuality are referenced as they play into court-based civil rights victories, but they are not given any independent historical analysis. General intellectual developments also do not figure prominently in this narrative—republicanism, liberalism, pragmatism, nationalism, and imperialism play no real substantive role in Friedman's story. And ultimately, modernity is also not an independent variable as urbanization, industrialization, rationalization, and the division of labor take a back seat to the history of high constitutional and political events and controversies.

The degree to which broad, socio-economic context and causation is detached from the synthetic narrative of a litany of great Supreme Court cases leads to some curious chronologies. For example, despite its founding importance in American law and constitutionalism, slavery is not mentioned in this narrative until Friedman needs to deal with the *Dred Scott* case. It is almost as if slaves and the larger contradiction of American bondage and freedom is not constitutionally significant until the Supreme Court summons the issue onto the historical stage. When do Native Americans become an important force in American history in this narrative? Predictably, when another great case demands it—the Cherokee controversy. The first laborer I recall meeting in this synthesis is Eugene Debs. And agriculture as a way of life and form of political economy is presented only briefly as a


prelude to “industrial growth” which is itself but a prelude to “business packs the court.”  

Friedman admits that “prominent women” are “few in this story, at least until its later years.” But while the Supreme Court has embraced “prominent women” only as of late, socio-legal history would require some treatment of women and women’s issues as social forces sometime before the need to deal with Muller v. Oregon.

But even more problematic from the perspective of the new socio-legal history than this lack of sufficient socio-economic context is Friedman’s historical method. Like almost all modern narrative syntheses, Friedman’s history is by nature built upon secondary literature. That is, with the exception of the classic cases in every constitutional scholar’s repertoire, Friedman is telling his story through a close reading of other, usually recent, secondary (e.g., Larry Kramer, Richard Ellis, Bruce Ackerman, William Leuchtenburg, Michael Klarman) rather than primary sources. As stated earlier, this is an inevitable byproduct—a veritable requirement—of historical synthesis. But one of the reasons professional historians have tended to leave synthesis to a senior scholar (or group of scholars) who has (or have) demonstrated competence and experience in the primary sources of a particular period or topical field is the difficulty of selecting and evaluating evidence via secondary sources alone. After all, if one does not have any previous independent experience with a substantial range of primary sources in a given field, how does one know whether George Bancroft or Charles Beard or Merrill Jensen or Catherine Drinker Bowen or Bernard Bailyn or Gordon Wood or Forrest McDonald or Jack Rakove or Akhil Amar gives a more accurate, convincing, and authoritative account of the founding? How does one know whose use of sources is most complete and judicious if one has not wrestled oneself with those materials? That is why continuous peer review plays such a major role in the modern professional historical discipline.

Now, of course, Friedman’s footnotes are also replete with copious primary as well as secondary sources—speeches, letters, newspaper articles, etc. But the key question is whether these references come from independent, bottom-up primary historical research or whether they themselves come from the top-down via previous references in other secondary histories. Given the scale and scope of Friedman’s project, it is unlikely that he constructed his history by reading most of the historic New York Times (yet alone the San Diego Union-Tribune), scanning all of the debates of the Founding Fathers, or even reading all of Lincoln’s speeches or Frankfurter’s letters. More likely than not, his primary citations and examples come from previous secondary references. Indeed, some influential constitutional syn-

68. FRIEDMAN, supra note 22, at 150-51.
69. Id. at 17.
70. Id. at 17, 169.
thesizers have been known to use research assistants precisely for the task of tracking down correct original footnote citations to the primary documents that they have already cited via the secondary literature—i.e., citing a primary document with which they might not have ever come into actual physical contact for an argument that has already been made. From the perspective of professional socio-legal history, the dangers of this once-removed approach to building historical synthesis are readily apparent.

History is a famously inexact science. But almost any professionally-trained historian who has worked extensively in the primary sources of a particular period can usually “sense” when something is not quite right in a given historical narrative. And when reading The Will of the People from the perspective of socio-legal history, there were times when I questioned the account’s authority. Let me note one specific example where I can provide some detail of the way in which relying on secondary sources for primary sources can lead a history somewhat astray.

Given the amount of time and space covered in Friedman’s synthesis, he usually has to treat each topic with a certain amount of historical shorthand. Thus, Friedman’s absolutely crucial account of the original American rise of judicial review has to be covered in a painfully short number of pages (he gets from Bonham’s Case in 1610 to the 1787 constitutional convention in 12 pages). In the process (and perhaps for rhetorical effect) Friedman builds his account around a partial quote from James Iredell that gets used 3 times in 5 pages, including as epigraph for the crucial founding section of this book and argument on “The Impetus for Judicial Review.”

Iredell, North Carolina attorney general and later an Associate Justice of the United States Supreme Court (whom we learn from Friedman emigrated from Great Britain as a “teenager”), called the work of the North Carolina state legislature in 1780 “the vilest collection of trash ever formed by a legislative body.” For reasons the socio-legal historian in me cannot fully explain, this epigraph bothered me—it seemed excessive, seemed not to fit fuller existing accounts of the relationship of legislation and law in this period, seemed too neatly tailored to make an argument rather than to render the past more comprehensible. So I dug in here a bit more than the usual reader.

As expected, this quotation from Iredell’s correspondence is not original to Friedman’s research. And in fact, this single, partial quotation from a personal letter home has figured all too prominently in existing secondary historical literature. Gordon Wood’s epic account of the “vices of the system” in the “critical period” in the Creation of the American Republic is the locus classicus, and Friedman’s account of the rise of judicial review is

71. Id. at 23, 24, 28.
72. Id. at 24.
rooted firmly in Wood’s and other historians’ portraits of the 1780s as an age of legislative excess. And most other scholars seem to have come to the quote not from a bottom-up scan of Iredell’s writings and works and correspondence in this period, but from Wood (if not from another secondary source relying on Wood) who in turn relies on Griffith J. McRee’s *Life and Correspondence of James Iredell*. Wood spends a couple hundred pages on “The People Against the Legislatures” and “The Critical Period,” and in that context, the Iredell quote blends into a rich background of primary materials illuminating an intensely complicated legal-political struggle between popular sovereignty and the rule of law. In Friedman’s narrative, however, the Iredell quote is brought out of this larger context and placed front and center—made a linchpin in his argument about this period’s demand for constitutional restraints on excess democracy. Indeed, Friedman’s entire account of the impetus for judicial review rests on the evidentiary base of the Iredell quote; a couple quotes from Madison; single quotes from Noah Webster, William Plumer, and Edmund Randolph; and very brief discussions of *Vanhorne’s Lessee v. Dorrance*, *Rutger’s v. Waddington*, the *Writs of Assistance Case*, *Bayard v. Singleton*, *Trevett v. Weeden*, and *Kamper v. Hawkins*.

The question is: How significant is the Iredell quote? How much historical explaining can we expect it to do? Well, when placed in proper context (a key method and goal of socio-legal history) I would argue, not much. The May 18, 1780 quote comes from a letter to Iredell’s wife Hannah Iredell during an arduous sojourn away from home. Iredell’s conclusion about the legislature is harsh and extreme—exactly like everything else in the letter. Indeed, the larger context for this quotation is a litany of complaint written after Iredell arrived in Newbern “after an infinite deal of difficulty and trouble.” Iredell complains about the weather, the roads (“almost impassable”), the distance (“long”), the rivers (“unfordable”), the bridges (“torn up”), the milldams (“broke”), the Circuit (“disagreeable”), expenses (“monstrous”), the circumstances of Continental troops around Charleston (a “melancholy account”), his companion Mr. Williams (“severe inflammation in his eyes, and pain in his head”), and the Doctor’s wife (“one of the fattest women I ever saw”). His previous letter was even more “disagreeable” noting “that spunging creature Lathberry is shut up in the house with us, and so insolent with his tory conversation and sly slanders, that we have been obliged to handle him a little roughly, and should have done it much

74. WOOD, *supra* note 73, at 257, 391.
75. McRREE, *supra* note 73, at 444-46.
more.” 76 No careful archival historian reading the entire letter or better yet the entire correspondence would miss the exaggerated, inventive, and self-consciously entertaining tone of Iredell’s very personal letter. Moreover, the special psychology of the absentee letter home (as anyone who has written one knows) is to try to put a beloved at ease by assuring them that everything could not be more miserable in their absence—everything. We should not confuse Iredell’s remark with a judicious assessment of legislative activity or make it emblematic of the period in general, yet alone give it any central causal role in the story of the rise of judicial review.

But there is more. For no secondary history that I can locate quotes the sentence just prior to the “vilest collection of trash” remark. It is crucial, for it notes that “I have been skimming over the laws, so far as a very few minutes would permit me.” 77 In other words, Iredell’s conclusion is not based on much at all. Iredell does not elaborate any further on his critique of the legislature in this letter, and in fact in the next lines turns his disagreeable pen on the Court’s own “very little business.” If at this point one has any doubt about the historical trustworthiness of Iredell’s conclusion, let me impugn his objectivity as well. For within months of this letter, Iredell was petitioning the very war-time North Carolina legislature he was criticizing for nothing other than a salary increase—a salary grab for which he received a lump sum payment in early 1781. 78 The line that immediately follows the “vilest collection of trash” remark concerns Iredell’s salary. 79 In short, there are good reasons for historians to qualify rather than amplify the explanatory force of the over-used Iredell quote.

Now, this is a lot of time to spend analyzing a single partial quote from Friedman’s expansive survey. But the point is to highlight the different evidentiary standards of different approaches to reconstructing the American legal past. For it was precisely a discomfort and impatience with using secondary materials, a handful of great cases, and illustrative literary quotes from the letters and speeches of legal luminaries that inspired the methodological innovations of the new socio-legal history. As Hurst interestingly put it:

With intelligent diligence and some literary flair anyone can make a good story out of the spotlighted star acts, like the Federal Convention or the Legal Tender Cases or the Court-packing bill. But the spotlighted acts could not go on without stage crew and audience, and without a complicated enviroring pattern of activity which

76.  Id. at 442.
77.  Id. at 446.
79.  MCREE, supra note 73, at 446.
produced a theatre, a city, and an economic surplus sufficient to allow the luxury of star performances.80

Another rather bulky metaphor via Hurst, but his point is crucial. The socio-legal historian is skeptical of the flowery quote by the famous actor and skeptical of the star performances of the great cases. The question is what is actually going on in the legislatures and courts of this period—in the thousands of unexamined legal and political and socio-economic acts that play so crucially into the changing negotiation of democracy and law in this critical period. In Griffith McRee’s own Life and Correspondence of James Iredell, there is additional evidence of this kind that would seem more important than Iredell’s dyspeptic letter. McRee describes a harried North Carolina assembly working under the most extreme and adverse conditions—working during a difficult time in the war, with a governor in whom they lost faith, and in severe economic crisis and social turmoil. Yet, according to McRee, the legislature levied a public tax, emitted bills of credit, established a Board of Commission to attempt to redress the difficulties of obtaining salt and other foreign commodities, authorized the Governor to send up to eight-thousand men to the relief of South Carolina and to fill the ranks of the Continental battalions, and passed acts to limit counterfeiting and “to protect Quakers, Moravians, Menonists, and Dunkards against persons who had taken possession of their lands.”81 But again, I can offer this information only with the warning that it comes from a single secondary account. How reliable is McRee’s judgment? Notably, McRee compiled his Life and Correspondence of Iredell in 1857, and he too seems to have an axe to grind—a political argument to make through the construction of a distinctly useable (if not abusable) past:

Now, if North Carolina, under the most unfavorable circumstances, with a divided people and a powerful enemy within her borders, could keep her blacks in order, and make effectual her defence, why need the same State, with an united and homogenous white race, ever entertain aught of fear on account of the machinations of incendiary Abolitionists?”82

McRee’s presentism, bias, and distortion (not to mention racism) is precisely why the new socio-legal history put such an emphasis on context and the bottom up reconstruction of history from primary sources to secondary accounts rather than top down from secondary sources to primary citations. It would seem to me that the new penchant for narrative historical synthesis in constitutional law should demand no less a standard.

80. Hurst, supra note 62, at 18.
81. McRee, supra note 73, at 443-44, 449.
82. Id. at 449 (emphasis added).
III. TOWARDS A CRITICAL, CONCEPTUAL HISTORY OF LAW

So far, we have examined some real, well-established, past modes of legal and constitutional history writing. But, it might also be helpful (if unconventional and no doubt a bit unfair) to assess Barry Friedman's accomplishment as well by the legal-historical standards of the future—something akin to an aspirational vision that historiography has been reaching for since the dawn of the modern era. For amid the dominant achievements of the original constitutional narratives and the pioneering professionalism of the new socio-legal history, one can detect the outlines and beginnings of a bolder, critical approach to assessing the role of law in modern American polity, society, and economy. And I think it is a pretty good bet that the future of legal and constitutional history will continue to move in the direction of a more conceptual, philosophical, and analytical history. What do I mean?83

Back in 1956, Richard Hofstadter provided something of a road map forward in his influential essay “History and the Social Sciences.” There Hofstadter urged historians to broaden their interpretive horizon and develop a more analytical, interdisciplinary, and social-scientific approach to the past.84 Hofstadter worried about both traditional narrative history wherein authors “rarely hesitate to retell a story that is already substantially known” as well as the fate of professional monographs that left readers as well as authors “with misgivings as to whether that part of it which is new is truly significant.”85 He exhorted historians instead to move beyond traditional disciplinary limitations and embrace the broader social sciences (sociology, psychology, political science, economics, and even critical theory). Enhancing the “methodological self-consciousness” and the “analytical dimension” of their work, Hofstadter argued, would bring history into closer dialogue with the “modern intellectual climate.”86 Hofstadter was not advocating the simple historical adoption of social science methods nor did he

83. I attempted a similar (though briefer) description of this aspirational vision in my article, Long Live the Myth of the Weak State? A Response to Adams, Gerstle, and Witt, 115 AM. HIST. REV. 792 (2010).
84. Richard Hofstadter, History and the Social Sciences, in The Varieties of History: From Voltaire to the Present 359-70 (Fritz Stern ed., 1956). I am indebted to Ira Katznelson for bringing this essay to my attention. See Ira Katznelson, The Possibilities of Analytical Political History, in The Democratic Experiment: New Directions in American Political History 381-400 (Meg Jacobs et al. eds., 2003); see also Ira Katznelson, Rewriting the Epic of America, in Shaped by War and Trade: International Influences on American Political Development 3-23 (Ira Katznelson & Martin Shefter eds., 2002); Ira Katznelson, Periodization and Preferences: Reflections on Purposive Action in Comparative Historical Social Science, in Comparative Historical Analysis in the Social Sciences 270-301 (James Mahoney & Dietrich Rueschemeyer eds., 2003).
85. Hofstadter, supra note 84, at 359.
86. Id. at 362-63.
endorse the use of historical source material to illustrate preconceived social
theories or political commitments. Rather, he envisioned a general broadening
of historical inquiry itself, wherein historians wrestled with certain big
"insistent macroscopic questions" like the nature of the Renaissance, the
causes of the Industrial Revolution, or the effects of war on modern socie-
ties. Hofstadter was under no illusion that historians would ultimately
resolve or finally answer such huge perennial questions, but he understood
the historical task at hand—"so big in its implications, so hopelessly com-
plex, . . . so formidably challenging"—to be nothing less than the "represen-
tation of the human situation itself."88

One detects a similarly grand aspiration in the more recent revival of
interest in historical sociology. Theda Skocpol once identified historical
sociologists by their willingness "to ask bigger questions than most social
scientists ever dream of posing."89 Attempting to simultaneously account
for individual agency, collective action, socio-economic structure, and his-
torical change in interdisciplinary narratives that merge conceptual devel-
opment, comparative generalization, and empirical evidence, historical so-
ciology in many ways exemplifies the kind of analytical inquiry endorsed
by Hofstadter. Few would argue with the proposition that the classic histori-
cal-sociological texts of Montesquieu, Tocqueville, Marx, Weber, and
Durkheim or the modern variants of Barrington Moore, Karl Polanyi, E.P.
Thompson, and Immanuel Wallerstein offer compelling models of historical
scholarship animated by questions more than adequate to the challenge of
interpreting the past. More recently still, the efforts of sociologists like Ni-
kolas Rose and David Garland to elaborate and put into practice Michel
Foucault's idea of a "history of the present" also illustrates the potential of a
critical history fully engaged with broad intellectual problems and addressed
to urgent contemporary concerns.90 Within the field of history per se, how-

87. Id. at 369.
88. Id. at 370.
89. See Theda Skocpol, Sociology's Historical Imagination, in VISION AND METHOD
IN HISTORICAL SOCIOLOGY 1, 8 (Theda Skocpol ed., 1984); see also PHILIP ABRAMS,
HISTORICAL SOCIOLOGY (1982); DENNIS SMITH, THE RISE OF HISTORICAL SOCIOLOGY (1991);
Novak, supra note 59.
90. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 31
(Alan Sheridan trans., 1979); NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL
THOUGHT (1999); FOUCAL AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM, AND
RATIONALITIES OF GOVERNMENT (Andrew Barry et al. eds., 1996); DAVID GARLAND,
PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES (1985); DAVID GARLAND, THE
CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001). As
Garland describes his approach to the "history of the present":
I hope to distance myself from the conventions of narrative history. . . . My prima-
ry concern is analytical rather than archival. That concern is to understand the his-
torical conditions of existence upon which contemporary practices depend . . . .
The history that I propose is motivated . . . by a critical concern to come to terms
ever, it is harder to find scholars working at a comparable interpretive level. As Thomas Bender continues to remind us, the challenge first thrown down to the modern historical profession by James Harvey Robinson and Charles Beard in 1907—to devise a “new” history that was interdisciplinary, analytical, realistic, synthetic and that connected past to present—remains largely unmet today.91

More than a few historians, however, are making significant progress in this direction. In France, the work of Pierre Rosanvallon provides an excellent example of philosophical, analytical, and synthetic history. Rosanvallon’s intellectual project is an ambitious inquiry into the meaning and significance of modern French history from the Revolution to the rise and alleged fall of the contemporary welfare state. His history is animated by an overriding, self-conscious concern for addressing the largest questions in political theory, social philosophy, and historiography—the relationship of liberty and equality, economy and society, individual rights and social democracy, freedom and oppression, generality and particularity, continuity and change and revolution. His history, in other words, is rooted first in philosophy—in the great questions and works like Rousseau and Constant on freedom, Guizot and Tocqueville on democracy, Durkheim and Dumont on modernity. His project is rigorously historical in its research, sources, and analyses, yet consciously attuned to the problems of the recent past, the present, and the future: the power of totalitarianism, the pathology of post-war neo-liberalism, and the possibility of a more ambitious liberal democratic politics. For Rosanvallon, answers to such fundamental questions are not accessible via theory or statistics yet alone ideology. Rather they are provisionally available only by investigating, contemplating, and assessing the way in which such issues have actually been resolved in real human environments in different socio-economic contexts at specific moments in historical time. History, then, is studied not as an illustration or demonstration of social or political theory, but as an interpretive and philosophical endeavor in itself or, as Hofstadter put it, as a “representation of the human situation itself.”92


92. Hofstadter, supra note 84, at 370. My understanding of much of Rosanvallon’s still largely untranslated project is indebted to illuminating and energizing conversations with
In the United States, perhaps the best example of a historian working in this expansive interpretive tradition is James T. Kloppenberg. Like Rosanvallon, Kloppenberg works with the entire canvas of history, integrating into his synthesis concern with the ideals that animated the American founders, the reformulation of those ideals in the critical period after the Civil War and before the New Deal, and the contemporary fate of the modern American social-welfare state. Kloppenberg is also keenly interested in writing history as a philosophical and theoretical endeavor driven by a concern for fundamental questions as reflected in concrete historical struggles, especially the relationship of liberalism and democracy and the ideas of autonomy and popular sovereignty. But Kloppenberg’s project adds a couple of important components to the notion of a more philosophical history. First, his work is comparative and international, suggesting that American history can only be fully comprehended when held in relief against developments in other parts of the world. Second, Kloppenberg also incorporates into his analysis of American political, social, and economic development a distinctive role for religion and ethics, as most clearly seen in his rehabilitation of the “virtues” of American liberalism. But perhaps the most important of Kloppenberg’s methodological innovations toward a more philosophical history is his thorough-going epistemological defense of historicism. By carefully documenting the emergence of historicism in its own original historical moment in the philosophical crisis of modernity, Kloppenberg is able to show the linkages between a “historical sensibility” and the important intellectual contributions of American pragmatism thus demonstrating the continued salience of pragmatic hermeneutics today. 93 Given contemporary conditions and commitments, Kloppenberg argues that it is no longer possible to adequately understand ideas like liberalism or democracy “at the level of definition or abstract theory.” 94 Rather, “[o]nly historical accounts can show how real people juggled, or balanced, or held in suspension” competing public and private, pressures and ideals. 95 And “[o]nly historical analysis can reveal whether, or to what extent, the problems identified or the solutions proposed by . . . theorists have connected with the

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94. Id. at 9.
95. Id.
lives people have led and the choices they have been forced or enabled to make."

Together, Rosanvallon and Kloppenberg reinvigorate the idea of history as a philosophical and didactic enterprise. Such a history requires reckoning with broad sweeps of historical time and asking the largest possible questions of historical materials. It is a history in dialogue with social and political theory and in tune with the philosophical issues that propelled inquiries like Tocqueville’s, Weber’s, or Dewey’s. It is a history scrupulous in its method and analysis, yet in the end, unafraid of making explicit normative judgments about the past, for ultimately philosophical history remains actively committed to the present. Rather than investigate historical materials and events out of a nostalgic concern for the past—as an antiquarian or academic exercise generating data, filling gaps, setting the record straight, or bringing the past alive, philosophical history is driven instead by an explicit concern for the future, wherein the past just happens to be our most useful schoolhouse—a prudent source of insight and guidance about the nature and tendencies of modern societies. Indeed, Richard Rorty has suggested that in a late- or even post-modern world increasingly suspicious of scientific, objective, and foundational claims to knowledge, such history might be our only useful guide. As he once summed up the pragmatic historicism at the core of any truly modern philosophical history: “To accept the contingency of [our] starting-points is to accept our inheritance from, and our conversation with, our fellow-humans as our only source of guidance. . . . [O]ur glory is our participation in fallible and transitory human projects, not in our obedience to permanent nonhuman constraints.”

As implied by many of these scholars, a final crucial element in any conceptual history of the modern era (including modern politics, economics, and law) is criticality. And there is little doubt that the best legal-constitutional history of the future will be a form of critical history. Indeed, to date the most conceptually ambitious accounts of law and constitutionalism in the modern United States have had an important critical dimension, and one can almost see in them a nascent genealogy of an American critical tradition. From the pioneering critical realism of Frederick Jackson Turner, Vernon Parrington, and Charles Beard to the legal realism and critical pragmatism of folks like John Dewey, Morris Cohen, and Robert Lee Hale, to the work of Frankfurt School refugees in the United States like Franz Neumann and Friedrich Pollock to the legal histories of Morton Horwitz and the legal historiography of Robert W. Gordon—these are some of the building blocks of a critical, conceptual history of law in modern America. In Europe, of course, that critical tradition has been even more pronounced

96.  Id.; KLOPPEMBERG, supra note 20.
from the classic works of Marx, Weber, and Durkheim right down to the
dominant critical social theories of Habermas, Foucault, and Bourdieu.

The prominence of this critical tradition in thinking about modern
history should not be surprising. For despite all of the advances that have ac­
accompanied “the unfinished project of modernity,” few would deny that
things remain somewhat amiss.98 And while this is not the proper forum in
which to review the complex and multi-faceted critiques of modernity in
any detail, there are several famous short-hand exemplars of the critical
tradition that underscore the point—from Durkheim’s descriptions of ano­
mie and suicide to Weber’s portrait of the iron cage to Foucault’s genealogy
of modern disciplines.99 My favorite shorthand example for the proposition
that serious thinkers have not been especially bumptious about the dialectic
of enlightenment comes courtesy of the American philosopher Robert Pippin.
Pippin is another indispensable guide to the possibility of philosophical
history, and his whirlwind tour of modern literature and philosophy captures
the inescapability of an element of criticality better than anything I know:

Faust’s failed bargain (or the “failure of science” and especially scientific power
and knowledge, “for life”), Hölderlin’s elegiac sense of modernity’s profound loss,
... Balzac’s, Stendhal’s, Flaubert’s pictures of our new but not at all better bour­
geois, competitive, phony, low-minded world, constant prey to romantic fantasies
of recovery and restoration, Henry James’s international theme and its ever fading
(dying) traditional Europe, its acquisitive, money-obsessed, new-age Americans, ... Dostoevsky’s Grand Inquisitor speculations, Joyce’s and Eliot’s
ironic use of ancient myth, Rilke’s elegiac metaphysics of absence, ... Heidegger
on the forgetting of Being, and the nightmare worlds of Beckett and Kafka, domi­
nated by mere pretensions to presence and authority. ... The end of metaphysics,
... the death of the subject, negative dialectics, the end of art, the death of the nov­
el, the impossibility of poetry, ... anti-humanism, and on and on. Everywhere the
figures and images had been and are again the images of death and loss and failure,
and the language is the language of anxiety, unease, and mourning.100

98. Jürgen Habermas, Modernity: An Unfinished Project, in THE POST-MODERN
READER 158, 166 (Charles Jencks ed., 1992); Maurizio Passerin d’Entreves and Scyla Ben­
habib, eds., Habermas and the Unfinished Project of Modernity: Critical Essays on The
Philosophical Discourse of Modernity (1997). Here Habermas articulated a position of at­
tempting to learn from the aberrations, pathologies, and misdevelopments that have accom­
ppanied the project of modernity and the “mistakes of [its] extravagant programmes,” rather
than abandon modernity and its project altogether. Id.

99. EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY (W. D. Halls trans.,
1984); EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY (George Simpson ed., John A.
Spaulding & George Simpson trans., 1951); MAX WEBER, THE PROTESTANT ETHIC AND THE
SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958); FOUCAULT, supra note 90.

100. ROBERT B. PIPPIN, MODERNISM AS A PHILOSOPHICAL PROBLEM: ON THE
DISSATISFACTIONS OF EUROPEAN HIGH CULTURE xi-xii (2d ed.1999).
Pippin concludes perfectly that something clearly “is going on in all this hubbub.”\(^{101}\) And it seems only a critical approach to modernity stands any chance of illuminating it.

So, how does *Will of the People* fare against this outline of an emergent critical, conceptual history of law in modern America? As was the case with the category of socio-legal history, at first glance, Friedman’s book also seems to establish a place for itself within the conceptual category. Indeed, Friedman builds his constitutional history around a larger overarching argument involving two of the most difficult concepts in legal-political theory—the problem of the people’s will, popular sovereignty, and democracy on the one hand and the problem of the rule of law, constitutional limitations, and judicial review on the other. From the perspective of a philosophical conception of history, the aspiration is breathtaking. A conceptual history that reckoned fully with either one would be an extraordinary accomplishment (indeed, the first alone seems to be Pierre Rosanvallon’s life’s work), but a history that simultaneously explained how the two interacted over two centuries of legal-political development would be a *tour de force* indeed. The relationship of law and modern public opinion is certainly the kind of big, macroscopic question that Hofstadter encouraged historians to take up.

But in the end, a critical or philosophical development of these concepts is not part of Friedman’s synthesis. To start with the critical perspective—somewhat surprisingly this book makes almost no reference to and appears to have no self-consciousness about working within a tradition of legal-constitutional history-writing that might include any of the broad critical traditions sketched above. Charles Beard is used as a historical figure in sections on progressive reform, but seemingly without an awareness of the larger tradition of critical realism or progressive historiography of which his work was such an important part. Legal realism is similarly treated as a historical artifact in a three-page coda to *Lochnerism*, but without the kind of immanent engagement that would suggest connection between sociological jurisprudence, pragmatism, realism, and the intellectual apparatus that animates Friedman’s own inquiry.\(^{102}\) Karl Marx is mentioned in a quote from the *Nation* in response to the Supreme Court’s decision in *Pollock*, and Jürgen Habermas’s transformative study of opinion and the public sphere is oddly cited only once for the rather mundane assertion that “publishers of journals and authors of books have the means to ensure what they think, and


\(^{102}\) Friedman, *supra* note 22, at 191-94.
their thoughts remain available to the ages.” But otherwise one struggles to find any reckoning whatsoever with larger currents in philosophy or social theory. Alexis de Tocqueville and James Bryce receive some attention but more as general commentators—travel writers—on the American scene. The Dewey that gets mentioned twice in this book (focused directly as it is on the question of “the public and its problems”) is Governor Thomas rather than Philosopher John. Robert W. Gordon’s pioneering methodological and conceptual articles on “Historicism in Legal Scholarship” and “Critical Legal Histories” also escape scrutiny. If there is a larger critical intellectual or philosophical tradition in which (or with which) Friedman is working, it is not possible to decipher it in this text.

But if not critical history, what about conceptual history? The will of the people and the rule of law are certainly high theoretical concepts. For sure, but conceptual history requires not just that concepts be used, but that they be analyzed, scrutinized, and subject to close, critical interrogation. And in the end, neither concept is fully defined, developed, or historicized in Friedman’s constitutional survey. Take the notion of “the will of the people.” In the whole history of modern political development, perhaps no idea has been subject to more intense philosophical and theoretical and political scrutiny. A short list of major authors and treatises wrestling with this thorny subject would have to include such diverse perspectives as those of Hobbes, Locke, Montesquieu, Rousseau, Madison, Tocqueville, Guizot, Gierke, Mill, Dewey, Lippmann, Schmitt, the list goes on and on. Hanna Pitkin, in dealing with one small aspect of the idea of the will of the people (i.e., the problem of representation), produced an entire treatise of conflicting theories as to how that will was to be made manifest in governance. So difficult is the concept of the people’s will, that Edmund Morgan’s marvelous history of the rise of “popular sovereignty” in England and America treated it as a fiction—“Inventing the People.” As Morgan put it,

[government requires make-believe. Make believe that the king is divine, make believe that he can do no wrong or make believe that the voice of the people is the voice of God. Make believe that the people have a voice or make believe that the representatives of the people are the people. Make believe that the governors are the servants of the people. Make believe that all men are equal or make believe

103. See id. at 17, 175; JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence trans., 1989).
that they are not. The political world of make-believe mingles with the real world in strange ways.107

Pierre Rosanvallon made a similar point with characteristic insight and brevity: “The people is a master at once imperious and impossible to find.”108

In Barry Friedman’s narrative, the “will of the people” poses almost none of the problems worried about by this wide and distinguished spectrum of philosophical, political, and historical debate. For sure, Friedman does spend three paragraphs expressing “enormous trepidation” at “[c]laiming to capture the evolving views of the American public,” noting that “[p]ublic opinion is a collage of ever-shifting views” and that “a tally of votes, or a poll, can misrepresent the views of the American people in important ways.”109 But, in the end, he pushes ahead with his thesis that “the Supreme Court exercises the power it has precisely because that is the will of the people.”110 He notes that writing about this will of the people vis-a-vis judicial power is not so daunting once one realizes that “the elites whose views are recorded here were chosen or retained their places precisely because of their ability to give voice to the sentiments of their constituents and audiences.”111 That is simply “what long-serving politicians and successful journalists do.”112 Whether they mold or more often mirror public opinion, Friedman argues—without ever truly investigating or worrying about which is the case or the implications of the distinction for democratic theory or the rule of law or the fate of the republic—“[i]n either case, they can be its embodiment.”113 What could this possibly mean?

In neither socio-legal history nor conceptual history could “the will of the people” be so casually and unproblematically referred to as it is in this volume. In addition to the “will of the people” and “public opinion,” the other dominant phrase in this book is “the American people” (a phrase that appears 8 times on one particular page)114—used much the way contemporary politicians use it (on every side of every conceivable issue) to represent a clear, uncomplicated sense of what the people as a whole seem to demand. Professional historians, however, have not been this confident about deciphering the “will of the American people” since at least the 1950s. By the conclusion of the book, any conceptual problematization of the historical

108. PIERRE ROSANVALLON, DEMOCRACY PAST AND FUTURE 37 (Samuel Moyn ed., 2006).
109. FRIEDMAN, supra note 22, at 17.
110. Id. at 16.
111. Id. at 18.
112. Id.
113. Id. at 18, 16-18.
114. Id. at 16.
force of the will of the American people dissolves completely, as Fried­
man’s “people” takes on the majestic plural form—the royal “we.” “[W]e
have nothing but ourselves to fall back upon,” he concludes, “[j]udicial re­
view is our invention; we created it and have chosen to retain it. . . . In the
final analysis, when it comes to the Constitution, we are the highest court in
the land.”115 Mark Twain allegedly once quipped that only presidents, edi­
tors, and people with tapeworm should use “we” in this way.116 A socio­
legal historian would add that it is wholly predictable if one’s historical
sources come primarily from past presidents, editors, and justices of the
United States Supreme Court. But the conceptual historian’s critique goes
further, and it is captured in the epigraphs that head this essay. The concern
is that traditional narrative syntheses not only do not help unpack and scruti­
iniz the diverse historical practices and social contexts and processes that
give meaning to ideas like popular sovereignty and democracy as they de­
velop over historical time, but that they actually work to continue to obscure
and mask them, thus giving great comfort to their enemies.

CONCLUSION

It is this last issue that troubles me most, and it is this issue that
pushed this simple book review into more general concern with a rising tide
of whig history if not constitutional theology in American public law.

Barry Friedman’s own conclusion is boldly entitled “What History
Teaches.” Of course, what actually takes place in this section is “What Bar­
ry Argues.” The slippage between what is actually going on here and how it
is depicted is not insignificant or atypical. The voice of a modern, critical
social scientist arguing is pretty matter-of-fact—“this is the evidence that I
looked at, this is how I obtained that evidence, this is the best I can make of
it, I look forward to your corrections and criticism.” The voice of “History”
teaching is another matter—it is a much more abstract, ethereal, rather un­
approachable voice. It is a voice of authority from the mists of time, cus­
tom, and tradition (mixed with a dash of “people” and “nation”). It seems
to broach less uncertainty yet alone resistance. It is too frequently the voice
of American constitutional commentary.

It was exactly this tendency in British political and constitutional
thought that provoked Herbert Butterfield’s notable critique of whig history.
Butterfield decried the notion of an unfolding progressive “logic in history”

115. Id. at 385.

116. John P. Holms and Karin Baji, eds., Bite-Size Twain: Wit and Wisdom from the
Literary Legend (1998), p. 90. This quote is widely attributed to Mark Twain, but there is no
record that he ever said it. See Ben Zimmer, On Language: We, N.Y. TIMES MAG., Oct. 3,
t.html?_r=1.
whereby the whig historian imagines "the British constitution as coming down to us safely at last, in spite of so many vicissitudes." Whig history all-too-often led to the conclusion that things could not have been otherwise (at least without inviting the most dire—frequently unspecified—consequences). There was in whig constitutional history an implicit faith that, all-in-all, things (existing traditions, institutions, constitutions) were for the best—or, at least, that serious alternatives were unimaginable. In place of interrogation, whig history offered up legitimation; in place of close investigation, rhetorical and historical vindication. As Butterfield put it, whig history produced stories that involved not so much the critical scrutiny of the past but "the ratification if not the glorification of the present" constitutional order of things.

Now though Butterfield’s historical criticisms were written for a very different time, place, and politics, his cautions about certain tendencies in much writing about national constitutional traditions still resonate. Indeed, his critique of whig history nicely reinforces the concern of critical scholars like Pierre Bourdieu about the tendency of "[e]very established order" to produce "the naturalization of its own arbitrariness." American constitutional history continues to be common ground for just such social and ideological reproduction.

"What History Teaches" begins with the revealing epigraph: "[A] dialogue . . . with the people." There, Friedman contends that most have failed to see that judicial review has evolved historically, and in that "evolution" it has become something of "the American way" of dealing with "government under a Constitution." He further notes that though constitutional changes "are reflected in judicial decisions, they are rarely initiated there and in any event never would endure without the blessing of the American people." Here are key elements of the style of historical argument that Butterfield objected to: the inevitability and the necessity—the things that happened (more precisely, the things that past judges did with all of the special institutional prerogatives, powers, influences, and traditions bound up in Supreme Court decision-making amid all of the complex, multidimensional causal forces) happened because ultimately, deep down . . . the American people wanted them to happen. "Evolution" not revolution; the "blessing of the American people" not the political contestation of diverse interests, groups, individuals, corporations, and institutions; "the American

117. BUTTERFIELD, supra note 3, at 41-42.
118. Id. at v.
120. FRIEDMAN, supra note 22, at 367.
121. Id. at 367-68.
122. Id. at 368 (emphasis added).
way” not historical structures, functions, and processes, critically examined. Friedman goes on to say that the key to all this is what he calls “magic of the dialogic system of determining constitutional meaning.” 123 “What history shows,” he argues, is not that individual Supreme Court decisions always immediately reflect public opinion, but that over time the two eventually fall into line:

Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values. It frequently is 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. 124

Now, of course, with this concluding formulation, hundreds of secondary questions spring to mind that must be relegated to the footnotes. 125 But the most significantly troubling aspect of these final lessons that more than two-hundred years of Supreme Court history teaches is . . . what an extraordinary justification and rationalization for the present order of things, for established power relations, for the influence of law and judges and courts in American society. Do not fret, hold your critiques, stop the historical and social scientific investigations . . . it has all had “the blessing of the American people” worked through the ages through the “magic” of a “dialogue with the justices.” Beyond whig history, such a stunning conclusion takes on the trappings of what Carl Schmitt dubbed a “secularized theological concept”—a concept more appropriate to early church history than the

123. Id. at 382.
124. Id. at 382, 367-68 (emphasis added).
125. I am imagining questions along the lines of: “If the judiciary is enforcing the “will of the American people” against the other branches of government, what are the other branches of government doing—violating the “will of the American people”? How do we know? Could not Friedman write a history of Congress (The Will of the People Too?) that deploys the same style of argumentation to contend that Congress too, ultimately, eventually, in due course, reflects the “will of the American people”? Well perhaps in the hypothetical contest of branches of government that Friedman is envisioning, the judiciary reflects 51% of the “will of the American people” and Congress only 49%; or perhaps not, but ultimately the people will not complain loudly enough to reverse the situation, so in retrospect the Court reflects the “will of the American people.” Richard Primus represents this aporia in Friedman’s argument this way:

To get a sense of how much agency the constraints of public opinion still leave to the Court, [it might be illuminating to] consider how broadly Friedman’s thesis applies to social actors [other than the Supreme Court]. About whom else could we say, “Well, they might seem important, but in the end they can only do what the public will tolerate”? Here’s a partial list: Hollywood producers. Automobile manufacturers. Novelists. Advertisers. And so on. [But it would be odd to think that these people are all therefore just the subordinates of the public.] They are important causal actors in shaping the public and the world.

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

These are not rhetorical questions. And they do not concern only the present order of things. One of the great, violent, wrenching moments of social and political struggle in United States history, of course, was the battle over Reconstruction in the post-Civil War era. Here, the work of a legion of scholars from W.E.B. DuBois to C. Vann Woodward to Eric Foner to Rebecca Scott and beyond have built up a formidable scholarly record. Now, in this great struggle for American history and democracy, the handiwork of the United States Supreme Court played a prominent role in cases like Slaughterhouse, Cruikshank, the Civil Rights Cases, and ultimately Plessy v. Ferguson. Barry Friedman’s conclusions about this critical period (built on the handful of classic Supreme Court cases themselves, a smattering of synthetic secondary historical literature, some newer studies in political science and law by Robert Kaczorowski, Mark Graber, Michael Klarman, and Michael Kent Curtis, the Congressional Globe, and, if I am counting correctly, around a dozen newspaper articles—many quoted from other secondary sources) are as sweeping as they are troubling. He begins his conclusions with yet another epigraph: “[A] general apathy among the people concerning the war and the negro.” And then, that historically unscrutinized, apathetic will of the people is used to explain, justify, and, in the end, exonerate the Supreme Court for its role in one of the most important rollbacks of civil rights in American history.

128. FRIEDMAN, supra note 22, at 145.
129. Id.
Friedman starts by acknowledging the activism of the Reconstruction-era Court: "Had the Court unraveled this much of Congress's handiwork at any other time in history, it would have evoked an angry response." But in the end, it was but another example of the people's will: "[U]ndoing Reconstruction served only to enhance the Court's reputation, for by the time it acted the bulk of the American people—North and South, Republican and Democrat alike—had tired of the entire endeavor." There were dissenters, he notes—"notably blacks and their dwindling supporters"—but seemingly the "bulk" of the will of the people approved. How do we know? Because, as Friedman concludes, "the Court's decisions dismantling Reconstruction were met to a remarkable degree by the widespread plaudits of the popular press."

Conclusions like this are becoming increasingly familiar in a new strain of American constitutional history writing. Two major influences on Barry Friedman's interpretations of Dred Scott, Reconstruction, and Jim Crow seem to be Mark Graber and Michael Klarman. In his intentionally provocative book on the Dred Scott decision, Graber takes great pains to explain and justify (in terms of extant constitutional law rather than normative position) the U.S. Supreme Court's most infamous decision. The bold, confident (indeed startling) strokes of his historical argumentation should ring familiar: "Free blacks and former slaves were the least desired residents in antebellum America . . . The Taney-Daniel argument is true to the framers and subsequent legal doctrine as long as 'the African race [had not] been acknowledged as belonging to the [American] family.'" Klarman's treatment of Plessy in his synthetic history of the Supreme Court on racial equality also resonates with this tradition of viewing the Court in the late 19th century as essentially reflecting some kind of general (and largely unexamined) popular, historical, and unfortunate social necessity:

[The Plessy Court's race decisions reflected, far more than they created, the regressive racial climate of the era. Moreover, contrary to popular belief, these rulings were not blatant nullifications of post-Civil War constitutional amendments designed to secure racial equality. On the contrary, Plessy-era race decisions were plausible interpretations of conventional legal sources: text, original intent,]

130. Id.
131. Id.
132. Id. at 145-46.
133. Id. at 146.
135. GRABER, supra note 6 at 56-57. For one of many alternative takes on these topics, see Martha S. Jones, Leave of Court: African American Claims-Making in the Era of Dred Scott v. Sandford, in CONTESTED DEMOCRACY: FREEDOM, RACE, AND POWER IN AMERICAN HISTORY 54 (Manisha Sinha & Penny von Eschen eds., 2007).
136. The next most infamous decision after Dred Scott. Could a neo-whig revision of Buck v. Bell and eugenics be far away?
precedent, and custom. . . . It is also unlikely that contrary rulings would have sig-
nificantly alleviated the oppression of blacks: Such rulings probably could not have
been enforced, and, in any event, the oppression of blacks was largely the work of
forces other than law. 137

Given this recent trend in constitutional history writing, it is not uncommon
to hear less sophisticated students of constitutional history than Friedman,
Graber, and Klarman conclude that Dred Scott and Plessy were “rightly
decided.”

But while these constitutional histories are new, of course, this inter-
pretation of the role of the Court simply reflecting and validating a broader,
largely unseen public will or necessity is anything but. Indeed, it is perhaps
the fading echo of the ancient, oracular idea of common-law judging as but
the judicial recognition and validation of pre-existing social custom. 138 In
American constitutional history too, it has had plenty of previous acolytes.
As early as 1907, William Archibald Dunning launched the Dunning school
of historiography with his Reconstruction, Political and Economic,
1865-1877. There he articulated an understanding of the Supreme Court “in
the highest degree sensitive to the manifestations of public opinion.” 139 In-
deed, “considerations of public policy” and public opinion were integral to
the Court’s first interpretations of the 14th Amendment: “The judicial inter-
pretations of the amendment, like the elections of 1874, embody, in fact, a
reaction of moderate men against the southern policy of the Grant adminis-
tration”—a southern policy, Dunning revealingly concluded, that was “har-
raying the white men of the South.” 140

In American historiography, the Dunning school was perhaps the pain-
ful last gasp of a grand national synthetic narrative history that whiggishly
assured readers that the vicissitudes of some of the most violent political
and social struggles in American history worked out for the best—that sens-
ible, “moderate men” prevailed, bequeathing us political, economic, and
legal institutions in which we could place great faith. Much of the history
of professional history in the United States since Dunning has involved a
repudiation of such whiggish approaches to the American past, from the
critical realism of the progressive school to the social scientific approaches
advocated at mid-century to the new social and cultural history that predo-
minates at present. Some things have no doubt been lost in this professiona-

137. KLARMAN, supra note 134, at 9-10.
138. The legitimating power of this problematic formulation has received much criti-
cal attention in the work of Morton Horwitz. See Morton J. Horwitz, The Emergence of an
Instrumental Conception of American Law, 1780-1820, in 5 PERSPECTIVES IN AMERICAN
HISTORY (Donald Fleming & Bernard Bailyn eds., 1971); Morton J. Horwitz, The Conserva-
139. WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC
1865-1877, at 256 (1907).
140. Id. at 260, 265.
lization of American history writing—particularly the sweeping, authoritative, comforting voices of the national narrative histories of the nineteenth century. And the thousands of dense, cautious, complex, multi-voiced case-studies and monographs that currently dominate the field can be difficult to get through, yet alone synthesize in any kind of coherent way. That is somewhat regrettable. But compensating benefits more than offset the losses. For, since Dunning, the professionalization of history writing has protected discerning readers from ever concluding that the vast, complicated, contested proliferation of diverse activities that make up the history of the United States—all of the victories and defeats, pleasures and pains, egalitarianism and persistent inequalities, unprecedented achievements and notorious limitations—was ever simply a product of . . . "the will of the people."