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Book Review

**\*81 THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION BY BARRY FRIEDMAN FARRAR, STRAUSS AND GIROUX, NEW YORK, NY, 2009. 593 PAGES, \$32.50**

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Barry Friedman's *The Will of the People* is an ambitious book. Examining, as per its subtitle, *How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, it covers our entire constitutional history, interweaving public reactions that have shaped it for better or worse. It is a tall order, well met.

How does public opinion influence the Court? And what expressions of opinion reach the justices in their marble palace? Elections? Polls? E-mails? Those of members of Congress? The answer, of course, is all of the above. But, not surprisingly, these influences are felt most with respect to the Court's unpopular decisions.

And just what can the public do about unpopular decisions? Precious little, Friedman concludes. The Court is immune from direct attack by anything other than impeachment, and that never occurs. So why is the Court responsive to outside opinion, as it surely is?

There are outside factors that can change the Court's direction: the appointment of justices is one. Pressure from Congress can simply be a chorus of criticism, or the threat of impeachment, or movement to limit jurisdiction. Mr. Dooley assured us a century ago that the Supreme Court follows the election returns. (To Friedman's credit, he shows remarkable restraint, not quoting that venerable barfly until page 252.)

But most important is public opinion itself. The Court cannot get too far ahead of the people. Or too far behind. The *Korematsu* ruling is cited as the paradigm of how public opinion pushed the Court to perhaps its greatest error since the *Dred Scott* decision. In the face of virtually no evidence of danger, overwhelming public opinion resulted in a mass violation of human rights. As Friedman points out, "In time, the country rightly tripped over itself apologizing."

Did public opinion force a change in the justices' positions in the "Red Scare" cases? During the 1956 term, the Court decided 12 cases in which statutes attacking Communist activities were challenged as unconstitutional, and the government won none of them. "On one day alone, June 17, 1957--quickly dubbed 'Red Monday'--the Court decided four such cases." Press and public opinion strongly opposed the decisions, and Congress was poised to act with jurisdiction-stripping legislation. But the opposition was appeased when Justices Frankfurter and Harlan changed their positions and \*82 began ruling in favor of the government. Friedman attributes the switch to the concern of the two justices, particularly Felix Frankfurter, for the Court's reputation. He quotes Chief Justice Warren as saying that "Felix changed on Communist cases because he couldn't take criticism."

There is a lot more to this story, as Friedman relates, including the role of the legal academy in joining the chorus claiming that the Court had gone too far. But only the 1937 switch in time, which blocked Roosevelt's Court-packing plan, matches it for a sudden about-face on such a critical issue.

For sheer shock value and violent reaction, nothing quite matches the demise and rebirth of the death penalty. A five-to-four majority in 1972 (the four dissenters being the four Nixon appointees) invalidated every state death penalty law on the basis that its arbitrary enforcement violated the "unusual" part of the Eighth Amendment's ban on cruel and unusual punishments. The public was shocked and outraged by the decision, despite the fact that imposition of capital punishment had been in serious decline nationwide. The states quickly enacted new laws, a majority passing laws within one year of the decision. Arguing in support of the state laws, Solicitor General Robert Bork said "once we have thirty-five [state legislatures] and Congress adopting a penalty, it is impossible to say that it is in conflict with current morality."

The Court fell into line. Justices White and Stewart switched sides; Justice Stevens, who had just joined the Court as President Gerald Ford's only appointee, joined them, and presto! A five-to-four vote against the death penalty became seven-to-two for it. But the death penalty law as it emerged was reshaped. Bifurcated guilt and penalty phases were mandated, as were specific aggravated circumstances, and rape could no longer be a capital crime. Nevertheless, the 60 percent of the American people who had polled in favor of the death penalty were apparently mollified.

Friedman begins and ends with the same question: If the Court responds to the will of the people, does this not "threaten the whole idea of constitutionalism?" One of his conclusions is that, although the public and the Court may be at odds over particular decisions, "they come into line with each other *over time*." He quotes Woodrow Wilson as distinguishing between the "opinion of the moment" and the "opinion of the age."

But that is what the Constitution is supposed to do: protect against short-term rashness by imposing a daunting burden on amendment. "The making and enforcing of constitutional meaning," Friedman writes, "are the result of an extended dialogue between and among the courts and the American people."

*The Will of the People* considers public reaction, as it affects the Court, as part of an ongoing dialogue. The constitutional protections of the Court, and its imperviousness to short-term actions, stand as the means of assuring that the dialogue continues.

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