The Will of the People and the Process of Constitutional Change

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Introduction

Professors Jenna Bednar, William Forbath, and Richard Primus have been more than generous in their comments on *The Will of the People*.[1] Not simply because their kind words far exceeded the requirements of ordinary politeness when reviewing a book, but because they take much of the argument of *The Will of the People* as established and then move beyond it to a set of inquiries that really do deserve attention.

Collectively, their comments raise important questions regarding a subject that rests at the heart of *The Will of the People*: the process of constitutional change. My goal here is to acknowledge and offer some response to those questions. It will be clear that there is much to know and much yet to understand. As Professor Bednar correctly observes, the concluding chapter of *The Will of the People* raises as many issues as it resolves.[2] *The Will of the People* was written to change the conversation about judicial review, to shift the focus of the academy. I intended it effectively to set out a research agenda for further inquiry about judicial review.

This Reply first briefly summarizes a common set of assumptions both my commentators and I take away from *The Will of the People*. Next, it provides a synthesis of how *The Will of the People* understands the process of constitutional change. Then, in the third Part, it offers some thoughts regarding the engaging questions, suggestions, and worries that Professors Bednar, Forbath, and Primus raise regarding that depiction of constitutional change.

I. Moving Past the Countermajoritarian Difficulty

Professors Bednar, Forbath, and Primus all seem to accept the central premise of *The Will of the People*, which is that judicial review does not require some special justification given that when courts en-

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

2 *See* Jenna Bednar, *The Dialogic Theory of Judicial Review: A New Social Science Research Agenda*, 78 GEO. WASH. L. REV. 1178, 1179, 1189–90 (2010).

gage in it, they adhere to the will of the majority. The practice of judicial review finds broad support. And in particular, all seem willing to accept the fact that the judiciary is to some extent hemmed in by public opinion, and that in the face of that constraint, the general worry about an unaccountable judiciary can be put aside.[3] To be sure, there are small-bore questions regarding judicial accountability that arise, as will be apparent shortly. But the "counter-majoritarian" problem that has so beguiled the academy is, in the broad terms often stated, hardly a problem at all.[4] This alone is no small point of agreement.

I have spent the better part of my academic career arguing that this central trope regarding judicial review rested on a misapprehension of the actual facts. I made the point over fifteen years ago, in an article titled "Dialogue and Judicial Review."[5] Between then and now, I came to despair that the academic conversation would never move past the idea that judicial review must be understood (and defended) as counter to the will of the majority. Today, however—as chapter 10 of *The Will of the People* explains—many people both inside and outside of the academy have come to see judicial review not so much as trumping the will of the majority as confirming it.[6] It is this fact that allows scholars to finally start asking a more apt set of questions about the practice.

The Will of the People establishes three propositions: (1) that judicial review has been exercised for over 250 years, at least 150 of

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3 *See id.* at 1178–79; William E. Forbath, *The Will of the People? Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1191–92 (2010); Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1212 (2010); *see also* FRIEDMAN, *supra* note 1, at 14–16.

4 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962) (discussing the "counter-majoritarian difficulty").

5 *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 607–09 (1993) (finding that the Supreme Court reflects the majority opinion more often than thought and that public opinion polls show that even controversial judicial decisions frequently enjoy substantial public support).

6 *See* FRIEDMAN, *supra* note 1, at 354–65. Indeed, recent scholarship ironically criticizes the Court for mirroring the will of the people. *Id.* at 364–65; *see also* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 899–907 (2009) (criticizing the Court's acquiescence in the democratic process); J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1987 (2006) ("Splitting the difference ought not to be confused with judicial restraint."); Jeffrey Rosen, *Answer Key: Decoding Samuel Alito Jr.*, NEW REPUBLIC, Nov. 21, 2005, at 16 (accusing Justice Sandra Day O'Connor of "short-circuit[ing] all of our most contested political debates" by splitting every difference).

them quite vigorously;[7] (2) that for roughly the last seventy years, and surely by 2005, there has been widespread public acceptance—and perhaps warm embrace—of the practice;[8] and (3) that the Court is, and always has been, accountable to the will of the majority.[9] It thus behooves the academy to move past the long-dominant notion that judicial review is the black sheep of American democracy, needing some superheroic justification. Rather, it is a very normal and accepted part of American constitutionalism.

None of this should be taken as expressing a normative view that judicial review is necessarily a wonderful thing and that obeisance to the decisions of the Supreme Court should be the practice. To the contrary, the conclusion of *The Will of the People* raises serious normative questions about its descriptive observations.[10] It is only an argument—a plea if you will—that the academy look realistically at judicial review, that it study it not on mythic terms but actual ones.

Indeed, the one suggestion in all the comments with which I vigorously disagree is Professor Primus's notion that the countermajoritarian difficulty should nonetheless be retained as a heuristic, a way to ask important questions of our students and ourselves about the practice of judicial review.[11] Despite my huge respect for Professor Primus and large agreement with many of his comments, on this one point I believe he is misguided. The countermajoritarian paradigm is not at all essential to asking the excellent questions Professor Primus himself wants to ask. More important, it has been insidious both to really understanding judicial review and to the practice of constitutional democracy itself. It is insidious to understanding judicial review because it has preoccupied the academy for years now, distracting scholars from a slew of really good and important questions.[12] And it is insidious to constitutional government because it fosters a belief that constitutional change is Court-centered, when the contrary is (and very much ought to be) the case.[13] The countermajoritarian difficulty cre-

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7 FRIEDMAN, *supra* note 1, at 12–13.

8 *Id.* at 13–14.

9 *Id.* at 14–15.

10 *See id.* at 373–74, 381.

11 Primus, *supra* note 3, at 1213.

12 *See* Friedman, *supra* note 5, at 578.

13 *See* FRIEDMAN, *supra* note 1, at 381–82 (describing how the Constitution acquires its meaning through the dialogic process of judicial decision, popular response, and judicial redecision).

ates a dichotomous tension between democracy and judicial review when, in reality, the two are symbiotic.[14]

There are perfectly reasonable anxieties about, and disagreements with, how judicial review presently operates. *The Will of the People* hopefully frees scholars to pursue the hard questions that follow from a realistic appraisal of the mechanics of judicial review. One hugely gratifying thing about the astute comments of Professors Bednar, Forbath, and Primus is that they ask just these sorts of questions.

II. The Process of Constitutional Change

The Will of the People depicts the process of constitutional change. This was not the purpose of the book. Rather, it bubbled up as that narrative developed, emerging inescapably from the interrelationship of popular opinion and judicial review. As Professor Primus says, "the concept that really takes it on the chin in this book, even more than the countermajoritarian difficulty, is the autonomy of law."[15] Popular politics and Court decisions, moving together sometimes in harmony and sometimes not, have shaped the meaning of the Constitution.[16] This depiction of constitutional change is not wholly novel (and certainly does not claim to be). A new generation of constitutional scholars and historians increasingly is converging around a similar set of ideas and understandings.[17]

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14 *See* Friedman, *supra* note 5, at 579–81 (positing that, despite accusations that judicial review is undemocratic, all segments of society participate in constitutional interpretation).

15 Primus, *supra* note 3, at 1217.

16 FRIEDMAN, *supra* note 1, at 381–84.

17 *See, e.g.*, STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 45 (1996) (explaining that the interplay of ordinary politics, interactions between the executive and legislative branches, and social culture shapes how Americans interpret the Constitution); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5 (2004) (arguing that "judicial decision making involves a combination of legal and political factors"); Jack M. Balkin, Plessy, Brown, *and* Grutter*: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1691 (2005) (showing that constitutional principles are political compromises by discussing the evolution of racial equality); Neal E. Devins, *Correspondence: The Stuff of Constitutional Law*, 77 IOWA L. REV. 1795, 1797 (1992) (arguing that Supreme Court Justices pay attention to politics in forming their decisions); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 959 (2004) (arguing that American constitutionalism has since its inception been a combination of the people's interpretation—"popular constitutionalism"—and the judiciary's "legal constitutionalism"); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (advancing the "democratic constitutionalism" model); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (arguing that the Supreme Court takes into account constitutional culture when deciding cases); Reva B. Siegel, *Text in Contest: Gender and the Constitu-*

Constitutional change occurs as public understandings of constitutional meaning and judicial interpretations of the Constitution interact with one another. The process is symbiotic. It moves in fits and starts and along several tracks at once.[18] For that reason, it is ungainly and difficult to model.[19] But the central point is the interaction itself: judicial meanings shift in response to changing public understandings, and judicial decisions provoke the public to consider what the Constitution ought to mean.[20] Through this interaction, the Constitution changes.

The Constitution shifts continually, in ways great and small. Indeed, a third thing that takes it on the chin in *The Will of the People*, also unintended, is any pretense that we live under an original Constitution. We are so far removed from the original understandings and practices under the Constitution that arguments that originalism has a serious pedigree, or that we could return to that original moment without enormous disruption, are difficult to take seriously.[21] If nothing else, consider the emergence of political parties (unintended)[22] and of the administrative state (unimagined).[23] Indeed, for all the controversy Bruce Ackerman's schematized version of constitutional

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tion from a Social Movement Perspective, 150 U. PA. L. REV. 297, 303 (2001) (stating that in times of "constitutional mobilization, citizens make claims about the Constitution's meaning in a wide variety of social settings," which plays an important role in shaping how both courts and the general population interpret the text).

18 *See* Friedman, *supra* note 5, at 679 ("The judiciary is both visionary and reactionary simply because it is always somewhat out of sync with the waves of more political branches—always inching ahead or lagging behind. The divergence between popular sentiment and the judiciary is what makes the dialogue work. . . . Judicial action creates the dynamic tension that moves the system of constitutional interpretation along.").

19 *Id.*

20 FRIEDMAN, *supra* note 1, at 381–82.

21 The process of constitutional change evolves through the process of judicial responsiveness to public opinion. The very premise of this exchange undermines the basic philosophy of originalist interpretation—that the role of the judiciary is to divine the Framers' intent. *See id.* at 383–84 (describing the dialogic back-and-forth between the public and the Court); *see also id.* at 308–11 (discussing the shortcomings of originalism).

22 *See* Gerald Leonard, *Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 227–34 (2001) (explaining the historical reasons for the Framers' antipartyism).

23 *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233–49 (1994) (explaining the rise of the modern administrative state and how its structure departs from what was anticipated by the Framers of the Constitution). Consider also the New Deal's expansion of national power. Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 850, 881–83 (2002) (arguing that the New Deal cases expanded congressional power beyond what the Framers could have imagined at the time of the ratification); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 165–66 (2001) (citing Judge Douglas Gins-

change has engendered, he is surely right that there have been seismic shifts during moments of unusual public engagement.[24] His stylized account falls short, however, in accounting for the much more quotidian evolution of constitutional law.[25] Each constitutional decision of the Supreme Court (and other courts as well) invariably shifts constitutional practice in some small way, as public actors take account of, and respond to, new decisions. Most of this change is interstitial, even glacial—the gradual working out of doctrine and principle.[26]

There is undoubtedly some relationship between fundamental and ordinary constitutional change. The subject is vastly understudied. As doctrines mutate and evolve, they either become instantiated in public understanding or they collapse of their own weight. An example of the former might be the rules (following *Gideon v. Wainwright*[27]) concerning when lawyers must be provided to defendants in criminal cases,[28] and the latter is apparent in the collapse of the federalism doctrine that followed *National League of Cities v. Usery*.[29]

What is important is this: judicial decisions and public understandings swim in a current together and influence one another, leading to constant change. This can be understood from either side of the

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burg's phrase "the Constitution-in-Exile" as representative of restorationist scholars' belief that the New Deal exiled the original Constitution).

24 *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 40–41, 44, 266–68 (1991) (identifying the Founding, Reconstruction, and the New Deal as three constitutional moments in which the people expressed themselves in such a way as to engage in "higher lawmaking").

25 *See* Michael Les Benedict, Book Review, 10 LAW & HIST. REV. 377, 379–80 (1992) (criticizing legal scholars for their overemphasis on particular events rather than on the continuous process of change); Post, *supra* note 17, at 38–41 (using *Frontiero v. Richardson*, 411 U.S. 677 (1973), and its progeny as an example of when "constitutional culture," in this case the evolving notion of gender, modifies judicial doctrine).

26 Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33–44 (1998) (arguing that constitutional values are mediated between past and present and evolve through this process); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 905–06 (1996) (explaining how changes in judicial decisions and gradual shifts in politics and society, rather than revisions to the text of the Constitution, have led to important constitutional change).

27 Gideon v. Wainwright, 372 U.S. 335 (1963).

28 *Id.* at 344–45 (holding that an indigent defendant's right to counsel is fundamental to a fair criminal trial); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (holding that a defendant has a right to his counsel of choice); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (holding that the defendant in any criminal prosecution involving the potential deprivation of liberty has a right to counsel).

29 Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding that the 1974 amendments to the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006), were unconstitutional under the Tenth Amendment because they trespassed on the traditional state function of regulating its employees' wages), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–31 (1985).

equation, i.e., by looking at how social trends motivated seminal constitutional decisions or by looking at how Supreme Court decisions provoked movements contesting constitutional understandings. *The Will of the People* explains why it is not at all surprising that the Supreme Court decided *Furman v. Georgia*,[30] *Roe v. Wade*,[31] *Gideon v. Wainwright*,[32] *Frontiero v. Richardson*,[33] *Grutter v. Bollinger*,[34] *Bowers v. Hardwick*,[35] *Brown v. Board of Education*,[36] and *Lopez v. United States*[37] when it did.[38]

The specific outcomes were not determined; with a different Court, any could have gone the other way. But each of these decisions was the product of its time. Still, in flat repudiation of central premises of the countermajoritarian difficulty, none of these decisions was the last word about the meaning of the Constitution (nor likely would have been were any decided otherwise). Some of these decisions engendered nothing more than the continual contest in constitutional adjudication, rendering slowly mutating doctrine.[39] Others

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30 Furman v. Georgia, 408 U.S. 238 (1972).

31 Roe v. Wade, 410 U.S. 113 (1973).

32 Gideon v. Wainwright, 372 U.S. 335 (1963).

33 Frontiero v. Richardson, 411 U.S. 677 (1973).

34 Grutter v. Bollinger, 539 U.S. 306 (2003).

35 Bowers v. Hardwick, 478 U.S. 186 (1986).

36 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

37 Lopez v. United States, 514 U.S. 549 (1995).

38 *See* FRIEDMAN, *supra* note 1, at 285–87 (showing how at the time of the *Furman* decision, social trends indicated a drop in the utilization of the death penalty, and substantial evidence existed that public sentiments ran against its continued use); *id.* at 296–99 (explaining that the Court decided *Roe* when the legalization of abortion became an important public issue in the 1960s largely due to the women's movement and the sexual revolution taking place in the United States, and amid polls suggesting that the decision to abort should be a private one between a woman and her doctor); *id.* at 273 (finding that the Warren Court decided *Gideon* at a time when forty-five states already required indigent defendants accused of felonies to be appointed counsel); *id.* at 293 (explaining how *Frontiero* was a reaction to the women's rights movement); *id.* at 361–62, 338 n.154 (noting that the Court's acceptance of The University of Michigan Law School's affirmative action scheme was consistent with public views about affirmative action); *id.* at 359 (explaining how the Court decided *Bowers* amidst the 1980s backlash against the gay rights movement and at the height of public panic over the AIDS epidemic; polls at the time showed that only thirty-three percent of the country supported the legalization of sodomy); *id.* at 243–44 (detailing how *Brown* was decided in light of strong social changes); *id.* at 330–32, 355–56 (analyzing the backdrop of the *Lopez* decision).

39 *See id.* at 273 (discussing the familiar road to *Gideon*); *id.* at 294–95 (explaining the evolution of the Court's sex discrimination jurisprudence following *Frontiero*); *see also* Strauss, *supra* note 26, at 905 (arguing that the "federalization of criminal procedure" and "the development of constitutional protections for women" evolved gradually over time).

sparked a serious backlash, one that eventually required the Court to reevaluate its conclusions.[40]

Is this process of constitutional change a good thing? For the most part, *The Will of the People* takes a positive, not a normative, stance. Yet, in one sense it had better be because this is how American constitutionalism has worked for over 200 years. Indeed, as explained below, it is awfully hard, in light of the difficulty of the Article V amendment process, to see how it could be any different.[41]

At its very end, *The Will of the People* takes a normative turn, suggesting the American people might rest comfortably with this process of constitutional change.[42] But the terms of that argument depart sharply from the shopworn countermajoritarian debate. In the public sphere at least (as opposed to theoretical concerns in the academy), accusations of countermajoritarian decisionmaking have almost always been opportunistic.[43] The Court is commended for adhering to the Constitution by those who approve of its decisions; it is accused of departing from democratic principles and inappropriately trumping the will of the majority by those who do not.[44] These claims rarely represent reality or seriously try to understand the true process of constitutional change.[45] And, frankly, they get old.

The Will of the People suggests, instead, that this evolutionary, symbiotic process might be taken as both familiar and appropriate *if* it operates in a way to ensure the Constitution reflects the deepest foundational views of the American polity.[46] As *The Will of the People* explains, the very "stickiness" of constitutional decisions forces a public debate that is different from what occurs in ordinary politics over

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40 *See* FRIEDMAN, *supra* note 1, at 287–88 (showing how the Court fell in line with public opinion following *Furman* by upholding most state death penalty statutes); *id.* at 359–60 (discussing *Lawrence v. Texas*, 539 U.S. 558 (2003), which overruled *Bowers* in the face of increasing acceptance of gay rights by the mainstream American public); *see also id.* at 382 (explaining how the Court tends to respond to public backlash to its decisions).

41 *See infra* note 48 and accompanying text.

42 *See* FRIEDMAN, *supra* note 1, at 383–85 (finding value in the dialogic system that allows for the evolution over time of the Court's decisions in response to public debate).

43 *See* Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 149–50 (2004) (discussing the evolution of constitutional theory and the shift in theorists' positions over time, as the political valence of the Court changed); *see also* FRIEDMAN, *supra* note 1, at 369–70 (highlighting that those persons unhappy with a particular Supreme Court decision are likely to accuse the Justices of going against the will of the majority).

44 FRIEDMAN, *supra* note 1, at 369–70.

45 *See id.* at 370 (discussing the problematic underlying assumption shared by those who approve and those who disapprove of Supreme Court decisions).

46 *See id.* at 381–83.

nonconstitutional matters.[47] It is precisely because it is difficult to change or get around Supreme Court constitutional rulings that a longer-term and deeper mobilization occurs regarding those rulings if a substantial number of Americans are dissatisfied with the Court's decisions.[48]

Think of the responses to *Roe*, *Bowers*, and *Furman*. They differed in important ways, as I discuss below.[49] But they tended to engage great numbers of citizens, one suspects far more than most issues, and—in most but not all cases—to take place over a relatively long period of time. And it is out of this sustained engagement that emerged what *The Will of the People* calls "the considered judgment of the American people."[50] This is how the Constitution changes.

III. Questions About the Process of Constitutional Change

Still, note that "if" is italicized in the first sentence two paragraphs above. Undoubtedly there is difficulty and dysfunction in this process. That is precisely the sort of thing that requires examination, and *The Will of the People* assuredly was not meant to take a Panglossian best-of-all-possible-worlds stance. Sometimes the process works. Sometimes it does not. What scholars should not be asking is how to justify judicial review as a countermajoritarian institution. Instead, they should be studying how it operates in differing circumstances, posing normative questions and suggestions for change in light of that reality. That is where Professors Bednar, Forbath, and Primus come in. They ask probing and important questions about the process, and it is to those that this Reply now turns.

A. Who Are "the People"?

An important question that often is asked about *The Will of the People* is whether I inappropriately reify the concept of public opin-

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47 *Id.* at 383. See ACKERMAN, *supra* note 24, at 266–94, for distinctions between ordinary politics and constitutional decisions. Ackerman distinguishes between legislation enacted during times of "normal politics" by representatives of the people and the collective judgment of the people themselves as expressed through the Constitution in moments of "constitutional politics." *Id.* at 6–7; 266–94. See also Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1284 (2004), for an explanation of the difficulty in separating constitutional values from immediate preferences.

48 FRIEDMAN, *supra* note 1, at 383–84.

49 *See infra* note 137 and accompanying text (discussing the gradual response to *Roe* and *Bowers*); *infra* note 139 and accompanying text (discussing the immediate reaction to *Furman*).

50 FRIEDMAN, *supra* note 1, at 368.

ion.[51] As I try to make clear at the very outset of the book, however, one properly is cautious claiming to speak about a collective people in a country as diverse and in flux as America.[52] I say more about this criticism elsewhere,[53] but in *The Will of the People*, I try to show the constantly contending voices of which the popular will was formed.[54] Despite the difficulty of identifying a collective public will, one can observe winners and losers in Court decisions, even if temporary ones, and assess the extent to which those winners reflected widespread popular sentiment.[55]

Professors Bednar and Forbath have commendably moved beyond the surface question of what comprises "the People" in *The Will of the People* to note—quite correctly—that the very notion of "the People" has changed over time. Professor Bednar observes the importance that federalism and state actors played in the early history of the Republic.[56] Professor Forbath offers a really wonderful synthesis of the shifting dynamic of popular expression throughout American history—from the dominance of elite views during the Founding era, through large popular movements like Populism and Progressivism, and right up to the present, in which public opinion often is constructed by polls.[57] While Professor Bednar wonders whether the American federal system provided assistance to the growth of judicial review,[58] Professor Forbath asks more generally how these shifting views have affected the story that is being told here.[59]

Given that *The Will of the People* is as much about the American people and how they have shaped judicial review as it is about how the judges exercise the power, all these observations are quite apt. It is inevitably the case that the public will is expressed by and mediated through institutions such as Congress or political parties.[60] Federalism

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51 *See, e.g.*, Forbath, *supra* note 3, at 1193 (stating that "'[t]he People' is a fiction"); Primus, *supra* note 3, at 1222 (noting that the public rarely has views approaching consensus).

52 FRIEDMAN, *supra* note 1, at 16–18.

53 *See* Friedman & Smith, *supra* note 26, at 80–85 (explaining that the American people are not a homogenous block).

54 *See, e.g.*, FRIEDMAN, *supra* note 1, at 17–18.

55 *See, e.g.*, *id.* at 287–88 (observing the winners and losers after the *Furman* decision and explaining that the winners did not reflect popular consensus).

56 Bednar, *supra* note 2, at 1183–84.

57 Forbath, *supra* note 3, at 1195–202; *see also* SARAH E. IGO, THE AVERAGED AMERICAN: SURVEYS, CITIZENS, AND THE MAKING OF A MASS PUBLIC 6 (2007) (explaining how polling in the United States shaped how Americans think of themselves).

58 Bednar, *supra* note 2, at 1183–84.

59 Forbath, *supra* note 3, at 1201.

60 *See, e.g.*, JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 9–10 (2006).

provided an enormous assist to get the system of judicial review up and running, a point I expand upon elsewhere.[61] Elite views are undoubtedly predominant at some times and in some ways, a point *The Will of the People* explicitly makes.[62]

When does mediation of the People's voice matter? If the views of institutions, elites, and the general public coalesce, then there is nothing particularly interesting to say. Many of the elite voices one hears in this story are people whose very place suggests they often capture broader popular sentiments, e.g., politicians and newspaper editors.[63] It is divergence that is interesting. This is a question that undoubtedly deserves further study.[64]

What is important is that the views of the American public have at various times served as both a goad and a check on other elite or institutional actors. The former was the case during the Progressive Era[65] and the latter during the Court-packing fight of 1937.[66] Particularly when the citizenry is mobilized on a subject, as it was in the spring of 1937, public opinion can tighten the inevitable slack between institutional and popular views. From a purely institutional perspective, one would have thought President Franklin Roosevelt's plan to pack the Court would have succeeded: he was the strong leader of a strong party with overwhelming majorities in both houses of Congress.[67] Yet, in the face of the storm that followed the announcement of the plan, many members of Congress kept their ears to the ground to figure out what their constituents wanted, stalling to resolve the issue until public opinion found its center.[68] Other examples in which

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61 *See* Barry Friedman & Erin F. Delaney, Becoming Supreme: How Federalism Fosters Judicial Power (March 29, 2010) (unpublished manuscript, on file with author) (judicial supremacy was fostered by the federal system); *see also* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1041–50 (1997) (arguing in part that judicial review developed largely in relation to policing the boundaries of federalism).

62 *See* FRIEDMAN, *supra* note 1, at 155–60, 175–78 (discussing how the business elite pledged campaign support in exchange for Supreme Court Justices amenable to their interests in the Gilded Age); *id.* at 378 (explaining how the Court deviated from the majority opinion of the general population in First Amendment cases where the results have been more in line with the views held by the media).

63 *See, e.g.*, ROSEN, *supra* note 60, at 9 ("[F]or much of American history, the most reliable representative of the constitutional views of the American people was Congress.").

64 For an interesting first cut, albeit with some difficulties, see Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. (forthcoming 2010).

65 FRIEDMAN, *supra* note 1, at 184.

66 *Id.* at 217–25.

67 *See id.* at 224.

68 *See id.* at 225; WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 139–40

broad public views have influenced judicial review include the nomination of Robert Bork to the Court, the outcry after *Furman v. Georgia*, and the entire abortion-rights debate.[69]

Of course, the public's attention span is neither long-lasting nor focused on every issue coming before the Supreme Court, providing the Justices with a certain amount of slack of their own.[70] Whether this is a good or bad thing undoubtedly depends on how that slack is used, what the issues are, and one's own views about those issues. One should not lose sight of the fact that even nonsalient issues can be made salient; policy entrepreneurs (think here of talk radio hosts, for example) will make hay when there is hay to be made.

Still, the freedom of movement the Court has, and how that plays out in particular situations, is a question well worth further study. *The Will of the People* was intended to set out such a research agenda. *The Will of the People* points out that elites might more often have their way with respect to First Amendment issues.[71] Similarly, "stealth overruling" by the Court is getting deserved attention today; this is the practice by which the Justices avoid the publicity that ought to attend important constitutional decisions in order for the process of constitutional change and judicial accountability to operate properly.[72] Professor Forbath talks about the Roberts Court's probusiness agenda as an area in which the Court might be deviating from public views.[73] But one notes that the Court itself has become divided after an initial surge of unanimity.[74] Were the Justices unrelentingly probusiness, one

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(1995) (discussing Democratic Senators' noncommittal strategy); JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 99 n.76 (1967) (presenting evidence that Senate opposition reflected constituent preferences); *see also John Doe Also Speaks Mind on President's Proposal*, NEWSWEEK, Feb. 20, 1937, at 17 (highlighting the public debate surrounding President Roosevelt's Court-packing plan).

69 *See* FRIEDMAN, *supra* note 1, at 280–81, 287–88, 297–99 (highlighting the backpedaling that took place in the wake of massive negative popular response to the Bork nomination, the *Furman* decision, and *Roe*).

70 *Id.* at 377–78.

71 *Id.* at 378.

72 *See, e.g.*, RONALD DWORKIN, THE SUPREME COURT PHALANX: THE COURT'S NEW RIGHT-WING BLOC 47 (2008) (accusing the Court's new right-wing bloc of "overruling, most often by stealth, the central constitutional doctrines that generations of past justices, conservative as well as liberal, had constructed"). For an extended description of the reasons for stealth overruling and a normative assessment of the practice, see Barry Friedman, The Wages of Stealth "Overruling" (with Particular Attention to *Miranda v. Arizona*) (May 29, 2010) (unpublished manuscript, on file with author).

73 Forbath, *supra* note 3, at 1202. The Roberts Court's probusiness decisions have not—until very recently—received the same mediatized attention as other decisions, e.g., abortion and gun control issues. *See* FRIEDMAN, *supra* note 1, at 377–78.

74 *See, e.g.*, Cuomo v. Clearing House Ass'n, 129 S. Ct. 2710, 2715 (2009) (split decision)

suspects norm entrepreneurs would bring this to the attention of the general public and evoke a reaction if the issue were salient. Campaign finance has not been an issue that received great public attention, but the Court's recent decision in *Citizens United v. FEC*[75] was targeted by President Barack Obama and has become the subject of great criticism.[76]

B. Have "the People" Lost Their Voice?

Professors Bednar and Forbath ask more particular questions about whether change over time has lessened the impact of the popular voice on constitutional law. Professor Bednar notes there have not been any big dustups lately, wondering if the entire process has decayed.[77] Professor Forbath expresses related worries—whether the people exist as anything but a conglomerate opinion poll and particularly whether this way of amalgamating popular opinion has caused the people to lose their constitutional voice.[78]

The phenomenon of observational equivalence might make it hard to know whether the popular fetters on the Court are working, keeping the Justices tolerably within the mainstream, or whether the whole process of judicial accountability has collapsed, allowing the Justices to run away with the cheese while the people are sleeping. In either case, one would observe relative quiet. Many scholars recently have worried the latter is the case.[79] After all, when was the Court last under serious threat?

(finding that a regulation suggesting the preemption of state-law enforcement did not reasonably interpret a provision of the National Bank Act codified at 12 U.S.C. § 484(a) (2006)); Wyeth v. Levine, 129 S. Ct. 1187, 1204 (2009) (split decision) (holding that state-law tort claims relating to the labeling of a pharmaceutical drug were not preempted by federal law).

75 Citizens United v. FEC, 130 S. Ct. 876 (2010).

76 Adam Liptak, *A Justice Responds to Criticism from Obama*, N.Y. Times, Feb. 4, 2010, at A19; Posting of Evan McMorris-Santoro to TPMDC, http://tpmdc.talkingpointsmemo.com/2010/02/poll-two-thirds-of-americans-unhappy-about-citizens-united-decision.php (Feb. 8, 2010, 13:44 EST).

77 Bednar, *supra* note 2, at 1186.

78 Forbath, *supra* note 3, at 1201–02.

79 *See* Bednar, *supra* note 2, at 1186, 1189; *see also* Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 227–48 (2004) (worrying that the American population has accepted judicial decisions at the expense of the democratic debate); Rosen, *supra* note 60, at 8–10 (arguing the risk of the Court following popular opinion on constitutional matters leads to decisions based on politics and not on law); Strauss, *supra* note 6, at 899–907 (expressing worry over the Court's overly quick acquiescence in the democratic process); Wilkinson, *supra* note 6, at 1987 (arguing that splitting the difference is not the same as judicial restraint); Rosen, *supra* note 6, at 16 (discussing how Justice O'Connor aggrandized her own power at the expense of democratic governance by splitting the difference).

Observe first that the Court does not have to be under an obvious threat for the system of popular constraint to be working. The effect that political scientists call "anticipated reaction" or "anticipated response" means that if the system is in equilibrium, little will be observed in the way of overt struggle.[80] The Justices know their bounds; they stay away from trouble. Some empirical evidence certainly suggests that, for example, the Court majority tempers its actions when facing an ideologically hostile Congress.[81]

But it also unclear that we haven't had dustups in recent years. As chapter 10 of *The Will of the People* makes clear, the Rehnquist Court years were ones of great tumult, with interest groups going after the Justices constantly and persistent accusations of judicial activism.[82] The rulings on affirmative action, gay rights, and the federalism revolution (not to mention the-decision-that-cannot-be-named) all engendered hot responses.[83]

Moreover, Professor Forbath's concerns notwithstanding, many of these cases triggered discussions among a broad swath of the public, in which constitutional language was employed regularly. As the wonderful work of Professor Reva Siegel has made plain, social movements—often responding to Court decisions or other constitutional developments—often develop a constitutional language for their claims.[84] Think here of the suffragists,[85] but also of the gay rights

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80 *See* TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 136–58 (1999) (arguing that Justices may choose to follow the more passive strategy of "anticipated reaction" in light of formal and informal checks on the Court); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 27, 37–39 (1994) (explaining the "anticipated response" of the Court's decisions to avoid sanction); *see also* James A. Stimson, Michael B. Mackuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 544–45 (1995) (describing the phenomenon as "rational anticipation").

81 *See* Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125–39 (2003) (finding through empirical evidence that the Court is sensitive to the ideological composition of a sitting Congress, and it is more likely to overturn congressional statutes when faced with an ideologically similar Congress); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533 (2006) (empirical study providing evidence that the Court's certiorari decisions are constrained by congressional and presidential ideology).

82 FRIEDMAN, *supra* note 1, at 324–43.

83 *Id.* at 326–27, 339–41 (discussing the political turmoil following the Court's affirmative action decisions); *id.* at 339 (describing conservative opposition to *Lawrence v. Texas*, 539 U.S. 558 (2003)); *id.* at 330–32 (discussing the controversial federalism rulings).

84 *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1980–2020 (2003); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 201–36 (2008) [hereinafter Siegel, *Dead or Alive*]; Reva B.

movement[86] and the opposition to the federalism revolution.[87] Some of those discussions happened more among elites; some involved broad mobilization in the streets. But Constitution-talk was predominant in all of them.[88]

In fact, it is not at all clear that the public has disappeared behind a cloud of polling. One does not want to overstate the virtue of the Internet. Nonetheless, the breadth of popular discussion may in some ways be greater today than during any other time in history.[89] Similarly, the world of elites, states, and parties that Professor Forbath depicts so well has given way to one in which a broader franchise means many more voices are taken into account.[90] To be sure, there are significant dysfunctions in American democracy, as is true in each age. But the story does not appear obviously to be one of entropy or loss. The people hardly seem to have lost their voice, and when they speak, it is often of the Constitution.

C. How Flexible Is the Constitution?

One of the important issues about the process of constitutional change involves how constrained it is. Professors Bednar and Forbath raise questions about this, coming from somewhat opposing directions. Professor Bednar asks: if the Court eventually comes into line with popular opinion, does the Constitution itself present any real limits on what the People might take it to mean?[91] Stated somewhat differently, though the People constrain the Court, what constrains the People? Professor Forbath, on the other hand, expresses concern that the Constitution will never be taken to include basic rights of eco-

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Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 968–76 (2002) [hereinafter Siegel, *She the People*].

85 *See* Siegel, *She the People*, *supra* note 84, at 968–76.

86 *See* FRIEDMAN, *supra* note 1, at 359–60.

87 *See id.* at 330–32.

88 *See id.* at 285–89, 295–99, 359–60 (showing the large-scale public response after *Furman*, *Roe*, and *Bowers* that engaged in constitutional debate); Post, *supra* note 17, at 8–9 (arguing that "constitutional culture"—the beliefs and values of nonjudicial actors—are present and engage the judiciary in a manner that ultimately affects the Court's decisions).

89 *See, e.g.*, Above the Law, http://www.abovethelaw.com (last visited June 28, 2010); Constitutional Law Prof Blog, http://lawprofessors.typepad.com/conlaw (last visited June 28, 2010); Health Care Law Blog, http://healthcarebloglaw.blogspot.com (last visited June 28, 2010); The Hill, http://thehill.com/blogs/congress-blog/judicial (last visited June 28, 2010); Legal History Blog, http://legalhistoryblog.blogspot.com (last visited June 28, 2010); SCOTUSblog, http://www.scotusblog.com (last visited June 28, 2010); The Volokh Conspiracy, http://volokh.com (last visited June 28, 2010).

90 *See* Forbath, *supra* note 3, at 1195–202.

91 Bednar, *supra* note 2, at 1187.

nomic security and opportunity,[92] as is the case with some later-drafted constitutions in other countries.[93] Professor Forbath has long been committed to such rights, and his oeuvre demonstrates how at other times in history—most notably during the Progressive Era and on into the early New Deal—there were moments when the Constitution might have been understood in this way.[94]

In a sense, Professor Forbath's regret about what has not been found in the Constitution offers some response to Professor Bednar's concern about whether there are limits on what the People can imagine the Constitution to mean. After all, though advocates for interpreting the Constitution to guarantee basic economic and social rights have long existed, those arguments have never prevailed. And one reason for this seems to be the implausibility of finding such rights in a Constitution that looks to be silent on the subject.[95]

In truth, the answer to Professor Bednar necessarily is an ambivalent and nuanced one. On the one hand, interpretation is not unbounded. The Constitution is a document of words, and those words look at times to impose hard stops on what it can be understood to mean. It is difficult to imagine a reasonable interpretation of the Constitution that would give some states more Senators than others.[96] History also constrains. Having done something for 200 years, changing direction is not so simple. These very real aspects of interpretation limit the range of possibilities.

Still, it is instructive to think of things the Constitution plainly did not mean that nonetheless are accepted today as proper interpretations of our foundational charter. It is very difficult, for example, to explain Supreme Court decisions assuring women's equality in formal interpretive terms.[97] This is evidenced by the fact that originalists are loath to deny such equality but cannot really explain it from the per-

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92 Forbath, *supra* note 3, at 1204–06.

93 *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 49 (guaranteeing citizens the right to health); INDIA CONST. art. 21 (conferring a right to life and livelihood); S. AFR. CONST., 1996 §§ 7–39 (providing expansive protections to civil and political rights).

94 *See, e.g.*, William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 62–75 (1999) (arguing that the basis for social rights during the New Deal was rooted in the federal government's ability to promote the "general welfare").

95 *See* Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 4 (1999) (noting that the U.S. Constitution is silent on gender and age discrimination, pregnancy and reproduction, and the rights of parents and families).

96 *See* U.S. CONST. amend. XVII.

97 *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

spective of original interpretation.[98] Similarly, the entire administrative state finds little basis in any serious interpretation of the original Constitution.[99] Yet, that administrative apparatus is now deeply embedded in our understanding of what the Constitution is. Robert Bork, the patron saint of originalism, concedes it is just implausible to take on the post–New Deal understanding of the national government's powers (though he claims he is reluctant to accept the fact).[100] Only a very small minority would argue otherwise.[101] It is difficult to justify *District of Columbia v. Heller*[102] as an originalist matter, but there is evidence of social acceptance of the decision.[103]

That broad shifts in public understandings have changed the Constitution in ways that once seemed unimaginable no doubt has been the product of necessity. The American Constitution is very old and very difficult to amend. Accordingly, as a matter of constitutional practice, the public simply has signed on to judicial decisions that are extremely hard to square with the text and ratifying history of the document.[104] Love it or hate it, the Constitution has changed in ways great and small in response to shifting understandings regarding our foundational values.[105]

Thus, whether the Constitution will ever be interpreted the way Professor Forbath hopes largely is a function of whether the American people come to see it that way. Advocates such as Forbath—and those more active in the public sphere on the same issues—will make constitutional claims. Circumstances and the evolving views of the

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98 *See* Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (and Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1214 (2009) (contending that originalists arguing in favor of women's rights are largely "swimming upstream"); *see also* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. REV. 549, 550, 569–74 (2009) (attempting to reconcile originalism with gender equality by arguing that "framework originalism" is compatible with women's rights because "constitutional construction" legitimately builds on the original text).

99 *See* Lawson, *supra* note 23, at 1233–49.

100 *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 129–32 (1990).

101 *See* Forbath, *supra* note 23, at 165 (discussing restorationist scholars' view that the New Deal revolution exiled the Constitution).

102 District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

103 *See* Siegel, *Dead or Alive*, *supra* note 84, at 236–45 (arguing that *Heller* is a product of recent social movements promoting gun rights); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254, 264–75, 311–22 (2009) (arguing that *Heller*, though lauded by conservatives, is in effect a departure from the Constitution's text and a rejection of the principles of federalism).

104 *See supra* note 103 and accompanying text.

105 *See supra* notes 26–28 and accompanying text.

American people will come to see them as sympathetic—or not. Should the American people come to see the Constitution in the way Forbath favors, it is fair to speculate that the courts ultimately will ratify those understandings. As with women's equality, the implausible becomes plausible.

D. Should Judges Take Account of Popular Views?

This last comment may raise eyebrows—and perhaps it should. Can it really be that judges should just follow popular understandings regarding constitutional meaning? What about traditional tools of interpretation? Are judges simply supposed to (or entitled to) cast them aside in favor of the latest Gallup poll?

Professor Primus argues that judges should take account of popular opinion.[106] Although he is extremely praiseful of *The Will of the People* on its own terms, he stresses that it is an externalist account of how constitutional law has evolved and gently criticizes the book for offering little suggestion for (or apparently showing little interest in) how judges should decide cases.[107] Primus argues that, as a normative matter, popular opinion has an important role to play in constitutional law, and judges are as good at discerning popular opinion as they are at understanding history, a seemingly vital part of their jobs.[108]

I concede Primus's understanding that *The Will of the People* is primarily an external account, though I disagree that it is uninterested in how judges do resolve cases.[109] To the contrary, the entire concluding chapter is concerned about whether those judges will be overly influenced by popular opinion in deciding constitutional issues.[110] The paradigm case here is *Korematsu v. United States*,[111] in which the Court can be understood as too tentative in declaring unconstitutional the unwarranted detention of thousands and thousands of loyal citi-

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106 Primus, *supra* note 3, at 1218.

107 *Id.* at 1213–15.

108 *Id.* at 1218–22.

109 It is true that on the issue of interpretation, *The Will of the People* does not have a lot to say, in part because Supreme Court Justices are less constrained by doctrine than other judges. In general, this period has the most fruitful collaboration to date of political scientists and legal academics in understanding how the judiciary decides cases, as well as how it should. But Supreme Court Justices simply are different from their colleagues in the lower courts. Vertical constraint applies not at all. And how much horizontal stare decisis should apply is always a matter of contest. The simple fact is that Supreme Court Justices are relatively unconstrained in their decisionmaking. That is why the external forces identified in *The Will of the People* matter so.

110 FRIEDMAN, *supra* note 1, at 372–85.

111 Korematsu v. United States, 323 U.S. 214 (1944).

zens and residents of Japanese descent.[112] Even at the time of decision, the evidence was thin as to the security need driving the internment, and, by the same token, the racism evident in the decision to detain was apparent.[113] In light of decisions like *Korematsu*, one might be wary of Primus's assertion that "the strongly held view of the public . . . can be an ingredient in the right answer to a constitutional question."[114]

Ultimately, the question is not *whether* "authentic constitutional reasoning can include consideration of strongly held public opinion,"[115] but *how* it does and should do so. Though Primus is surely right that judges could read public opinion as well as they can interpret constitutional history—neither being an easy task—it does not follow that an acceptable judicial decision would read "fifty-seven percent of the country disagrees with our decision in *United States v. Primus*; hence, we relent." Constitutional liberty might be fragile indeed if it were held hostage in the short term to public approval. But it is not at all clear this is what Primus means. As it happens, public opinion does play an important role, not just in constitutional decisionmaking, but also in constitutional law.

Deference to public understanding is immanent in the doctrine of constitutional law itself, albeit mediated through government institutions and constitutional practice. As an example of the former, take the divide—in place at least since 1937—between cases subject to rational basis review and those that warrant strict scrutiny. In the vast run of constitutional challenges, courts adopt a stance deeply respectful of the decisions made by government actors.[116] Note that that is

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112 *Id.* at 223–24; *see also* FRIEDMAN, *supra* note 1, at 372–73.

113 Subsequent inquiry revealed that the government had suppressed further evidence of lack of military necessity as well as the racism inherent in the decision. *See* FRIEDMAN, *supra* note 1, at 372; DAVID J. O'BRIEN & STEPHEN S. FUGITA, THE JAPANESE AMERICAN EXPERIENCE 45 (1991) (noting that the Munson Report, prepared several months before the Pearl Harbor attack, found no danger of collaboration between Japanese Americans and the Japanese in Hawaii or on the West Coast).

114 Primus, *supra* note 3, at 1218. For another account of why strongly held disagreement with Supreme Court decisions should matter, see Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007).

115 Primus, *supra* note 3, at 1209.

116 *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (holding that when local economic regulation is challenged only as a violation of the Equal Protection Clause, the Court will defer to the legislature); McGowan v. Maryland, 366 U.S. 420, 444–45 (1961) (holding that laws with religious origins are not per se unconstitutional if they have a secular purpose); Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 110–11 (1949) (upholding a city regulation prohibiting businesses from advertising on their delivery vehicles except when promoting their own products).

not simply a reflection of the constitutionalism/democracy divide. Many of the decisions to which judges defer are not in fact the product of democratic decisionmaking, but instead the judgment of bureaucratic officials.[117] Still, there is a logic to courts being respectful of other government agencies as reflecting public decisions, at least when fundamental constitutional values are not at stake. When they are, the level of scrutiny is ratcheted up sharply.[118]

Even when strict scrutiny is in order, the content of constitutional law is often determined with reference to longstanding public practices. Deference to such practice can be seen throughout constitutional law, including determining what is "cruel and unusual" under the Eighth Amendment, "reasonable" under the Fourth Amendment, and "due process" under the Fourteenth Amendment.[119] Once again, existing state laws will often mediate this determination by serving as a barometer of what is longstanding. Even here, though, the Court will compare actual practice to laws on the books.[120] In this way, the Court tries to tap into existing traditions.[121]

When public opinion influences courts in ways other than through the doctrine, the question of legitimacy might depend on how precisely this influence is exercised. The conclusion of *The Will of the People* examines the various pathways of influence, about which much

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117 *See, e.g.*, N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 592–94 (1979) (upholding the New York City Transit Authority's policy of refusing to employ methadone users).

118 *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973) (holding that benefits given by the U.S. military could not be given out differently based on gender); Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding that strict scrutiny should be applied to discrimination against aliens).

119 *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 367–88, 395–97 (2009) (showing that in these domains of law, the Supreme Court looks to state law and policy and has ruled in accordance with the majority of states); *see also* Roper v. Simmons, 543 U.S. 551, 567 (2005) (giving deference to states' irregular use of the death penalty on juveniles); Lawrence v. Texas, 539 U.S. 558, 573 (2003) (giving deference to the unusual practice of enforcing sodomy laws).

120 *See, e.g.*, *Roper*, 543 U.S. at 567 (referencing the numerous states that had already legislated a ban on the death penalty for juveniles, as well as its infrequent use in states still permitting it, in affirming the lower court's decision to ban capital punishment for juveniles); *Lawrence*, 539 U.S. at 573 (basing the reconsideration of *Bowers v. Hardwick*, 478 U.S. 186 (1986), on the limited practice of enforcing sodomy laws even when they are still on the books).

121 *See* Friedman, *supra* note 5, at 603 (citing the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990), as an example of the Court relying on state legislatures and interests to find that the Confrontation Clause does not inherently prohibit a child witness from testifying via closed-circuit television); Friedman & Smith, *supra* note 26, at 34–67 (describing the process of sedimentary interpretation, which draws from a wide variety of sources); Lain, *supra* note 119, at 370–400 (discussing the Court's reliance on state policies to reach constitutional decisions).

is still unknown.[122] For example, public opinion might influence the courts because the judges that sit on them crave popular approval.[123] It is difficult to countenance this sort of influence, all the more so when those judges are sitting on trial courts charged with determining facts as well as law.[124] Closely related are judges who depend on electoral approval to retain their jobs.[125] How the public feels about this sort of accountability might depend on the court on which those judges sit and how accountable the judges are for individual decisions.[126] There is nothing very comforting for the rule of law in studies that show judges decide death penalty cases differently as they approach an election.[127]

It pays to emphasize that the primary claim in *The Will of the People* is not that judges and judicial decisions are (or should be) driven by public opinion. It is, rather, that public opinion *constrains* what judges can do.[128] Because of this constraint, the claim is that over the long haul, in salient cases, judicial decisions will converge with public opinion.[129] This is the process of constitutional change. When it operates properly, the Court does not follow immediate and transient opinion, but the "considered judgment" of the American people.[130]

What is important about the constraint hypothesis is that here, too, public opinion is mediated. The constraint rests in the fact that there are mechanisms for holding the Justices accountable, such as Court packing and jurisdiction stripping.[131] These are devices that operate in a wholesale way. They are difficult to muster and subject to many veto gates. It would take a very aroused public to discipline the Court, and it is rare that this would occur in response to one single decision.[132] In fairness, as Professor Bednar points out, the public can

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122 FRIEDMAN, *supra* note 1, at 370–76.

123 *See id.* at 371.

124 *See* Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 9, 29 (Stephen B. Burbank & Barry Friedman eds., 2002) (arguing that public opinion should not influence trial judges' findings of fact).

125 *See id.* at 26 (stating that judges are more likely to respond to influences that determine their future fates on the bench).

126 *See id.* at 29–30 (arguing for different treatment of appellate and trial court elections).

127 *See id.* at 29.

128 *See* FRIEDMAN, *supra* note 1, at 370, 375.

129 *Id.* at 382–84.

130 *Id.* at 368.

131 *Id.* at 106–07.

132 *See id.* at 379–80 (discussing the public's reluctance to discipline the Court even after it issues an unpopular decision).

use carrots as well as sticks.[133] The Court also needs to see its decisions enforced. Here too, however, rule-of-law values will constrain most public actors to obey judicial decisions absent an aroused public at their side. If anything is the case, the Supreme Court is probably less constrained than its members believe.[134]

It remains to be understood precisely how constrained the Court is, as well as how constrained it ought to be. What is the length of the public leash on the Court, Professor Bednar would like to know.[135] Although the issue is ripe for further study, I will venture a word beyond what I said in *The Will of the People*. Looking at the run of history, one notices two different relationships between public opinion and the Court: the immediate and the gradual. The gradual relationship is depicted through the long passage of time and extensive public debate between *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[136] or between *Bowers v. Hardwick* and *Lawrence v. Texas*.[137] The quick turnaround on the death penalty from *Furman v. Georgia* to *Gregg v. Georgia*[138] serves as an example of the former.[139] Here is a tentative hypothesis that is positive and perhaps normative as well. Perhaps the Court follows (and should follow) sustained public opinion on an issue, even when the public is deeply split; when the shift in public opinion is rather rapid, however, then the Court follows (and should only follow) public opinion if it is extremely lopsided. Even yet, there is room to worry that the New Deal Court's "switch in time" came rather abruptly.

Whether one agrees or disagrees with Professor Primus ultimately depends on more specification of his theory than he has given us, either here or in his excellent standalone piece on the subject.[140] How precisely does he expect judges to take account of public opinion? And are there limits to judges deciding cases consistent with the

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133 *See* Bednar, *supra* note 2, at 1186–87.

134 The mediated nature of the Court's public accountability can be problematic. As Professor Forbath properly observes, opportunistic Court majorities can manipulate the practice to achieve their goals in subtle ways. Forbath, *supra* note 3, at 1201. These practices, once again, raise concerns about decisions in nonsalient areas or things such as stealth overruling. *See supra* note 72 and accompanying text.

135 *See* Bednar, *supra* note 2, at 1184–87.

136 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

137 *See* FRIEDMAN, *supra* note 1, at 380–82; 359–60.

138 Gregg v. Georgia, 428 U.S. 238 (1976).

139 *See* FRIEDMAN, *supra* note 1, at 285–88.

140 *See* Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 2–3 (2007) (arguing that judges should consider strongly held public opinion as an ingredient that informs correct constitutional interpretation).

will of what might be transient majorities? These are important questions as a descriptive and normative matter both.

Conclusion

The Will of the People was written to change the nature of the conversation about judicial review, from the overly simplistic premises of the countermajoritarian difficulty, to a more nuanced and accurate view that sees judicial decisionmaking as symbiotic with other aspects of constitutional democracy. As the concluding chapter of *The Will of the People* makes clear, this perspective on judicial review raises numerous questions that scholars might pursue.[141] Professors Bednar, Forbath, and Primus have given *The Will of the People* as much credit as one could hope by raising and pursuing these questions.

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141 FRIEDMAN, *supra* note 1, at 373–74, 381.