Justin Driver

WHY LAW SHOULD LEAD

THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION
By Barry Friedman
(Farrar, Straus and Giroux, 614 pp., $35)

In 1952, as the Supreme Court contemplated the set of cases that would eventually become known as *Brown* v. *Board of Education*, a law clerk named William H. Rehnquist wrote a memorandum modestly styled as "A Random Thought on the Segregation Cases." Far from a tangential observation regarding the Fourteenth Amendment's implications for racially segregated public schools, the two-page manifesto provided nothing less than a unified theory of American constitutional law. "One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind whether those of business, slaveholders, or Jehovah's Witnesses have all met the same fate," Rehnquist wrote. "One by one the cases establishing such rights have been sloughed off, and crept silently to rest." The memo further suggested that the Supreme Court elevates constitutional principle above majority preference only at its own peril: "To the argument . . . that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are."

Barry Friedman does not analyze the reasoning of Rehnquist's memo in his history of the Supreme Court, but no single document better—or more chillingly—encapsulates his book's argument. Friedman's book, like Rehnquist's memo, understands the judiciary to afford minorities protection almost exclusively on a theoretical level. "In theory," Friedman declares, "this desire to separate law and politics is an admirable one." But such a separation, he continues, remains unattainable in the real world: "the instinct to keep politics entirely separate from decisions about constitutional law is plainly impossible with regard to the Supreme Court. It simply is the case that the judiciary's capacity to give the Constitution meaning, to protect minority rights, always has been limited by popular support for those decisions."

This book represents the culmination of many years of study that Friedman has dedicated to the phenomenon that Alexander Bickel, in *The Least Dangerous Branch*, famously dubbed "the countermajoritarian difficulty." The core problem with judicial review, according to Bickel, stems from the ability of a body comprising just nine unelected people to invalidate actions undertaken by democratically elected representatives. Calling judicial review "a deviant institution in the American democracy," Bickel suggested that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it."

Friedman has come to suggest that, at least since the New Deal, Bickel's concern has proved unwarranted. According to Friedman, the Court has recently acted less as a check against majority rule than as its conduit. "The function of judicial review in the modern era," in Friedman's estimation, is "to serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of their Constitution." While the Court may have overstepped its bounds in the past and has periodically been chastened for doing so, Friedman believes that the fundamental flaw of judicial review—its undemocratic brake on popular will—has been remedied. "Now that the justices and the public understand how things work, the system tends to rest in a relatively quiet equilibrium," he observes. "Political scientists call this anticipated reaction. The justices don't actually have to get into trouble before retribution occurs; they can sense trouble and avoid it. The people do not actually have to discipline the justices; if they simply raise a finger, the Court seems to get the message." Friedman maintains that the Warren Court itself—in the popular imagination, the most celebrated defender of minority rights—generally issued decisions in accord with popular sentiment, noting that even *Brown* received approval from a narrow majority of Americans in the months after it was decided.

Apart from its intellectual debt to Bickel, Friedman's history can usefully be understood as a modified version of an approach known as popular constitutionalism, which is most prominently associated with Larry D. Kramer. Popular constitutionalists emphasize that Supreme Court justices are not the only citizens who should interpret the Constitution. Ordinary Americans, too, should reclaim an interpretive role, because the Constitution was written for the people. Although Kramer decries the way in which everyday Americans have been marginalized from the modern constitutional order, Friedman offers a more sanguine assessment. He suggests that the people's constitutional voice is now heard more clearly than ever by the Court, as justices almost invariably interpret the Constitution in accordance with popular views. Kramer and Friedman travel different routes, but they reach the same populist destination. Kramer ended the last chapter of his book, *The People Themselves*, by imploring: "The Supreme Court is not the highest authority in the land on constitutional law. We are." Friedman concludes *The Will of the People* by declaring: "In the final analysis, when it comes to the Constitution, we are the highest court in the land."

In Friedman's view, liberal commentators who fear that the Roberts Court could shift dramatically to the right in the coming years betray a lack of historical perspective. The Court will inevitably march to the tune that the American public plays. "The decisions of the justices on the meaning of the Constitution must be ratified by the American people," Friedman matter-of-factly explains. "That's just the way it is." A Supreme Court decision, on this understanding, bears a resemblance to an opening bid in a hand of poker. "It is through the process of judicial responsiveness to public opinion that the meaning of the Constitution takes shape," Friedman writes. "The Court rules. The public responds. Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public." In his account, the views of Supreme Court justices are, in comparison to the views of the American public, of trifling significance. "Ultimately, it is the people (and the people alone) who must decide what the Constitution means," Friedman proclaims. And so the left need not gnash

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its teeth over the replacement of Justice Sandra Day O'Connor with Justice Samuel A. Alito Jr., or about any other personnel decisions for that matter, because "the long-run fate of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line."

Friedman's book admirably manages to distill more than two hundred years of constitutional history into a coherent narrative that attends both to continuity and to change. And a distressingly small number of legal academics can match his lucidity or his ability to turn a phrase. Friedman's articulation of Supreme Court history represents, moreover, a view that in recent years has become ascendant in legal academia and in the wider intellectual culture. A widespread view of the Supreme Court these days is that it acts as an instrument for transforming popular sentiment into law. Yet the popularity of this view is a disconcerting development, for it offers an impoverished conception of the Supreme Court's role in American democracy.

The analytical trouble with Friedman's book starts right away, with his imprecise use of "the people." "Typically, histories of the Supreme Court focus on the justices and their decisions," Friedman writes. "Here, however, the chief protagonists are the American people." Although Friedman briefly acknowledges the methodological difficulties in capturing the sentiments of "the people," he nonetheless asserts that elites generally articulate what the masses are thinking. The book repeatedly relies upon the words of newspaper and magazine journalists to give voice to "the people." "Many of 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," Friedman explains. "That is what long-serving politicians and successful journalists do. Sometimes they mold public opinion; more often they mirror it. In either case, they can be its embodiment."

Setting the accuracy of this assessment of politicians to the side, this is a strange notion of the journalistic endeavor. In Friedman's assessment, no journalist was more closely attuned to the sentiments of ordinary Americans in the latter half of the twentieth century than Anthony Lewis of *The New York Times*. "In a probing 1962 feature story," Friedman writes, "Lewis explained that the Supreme Court's rapid development of the law in the areas of race relations, legislative apportionment, and the rights of criminal suspects reflected 'a demand of the national conscience.' " Unburdened by data, Lewis unabashedly identified national trends that just happened to coincide perfectly with the Warren Court's jurisprudence. Lewis explained the Court's decision in *Brown* as follows: "Once again no complicated motive need be sought. The Supreme Court was reflecting a national moral consensus on segregation—perhaps anticipating a feeling that had not yet fully taken shape."

This assertion is historically inaccurate. A great deal more opposition and ambivalence greeted *Brown* than is revealed by such a tale of moral triumph. But Friedman's admiration for Lewis knows no bounds. "Though critics complained constantly that the Warren Court was running ahead of the crowd," he remarks, "at least one perceptive observer understood that the Court did what it did because the public supported these outcomes and no other organ of government would provide them. That was Anthony Lewis." In extolling Lewis's coverage of Bickel's Oliver Wendell Holmes Lectures at Harvard Law School, Friedman gushes: "Ultimately, it was Anthony Lewis who proved the Court's most perceptive spectator."

Whatever Anthony Lewis's other journalistic strengths, having his finger on the pulse of the common man is not among them. Lewis was born in New York City and attended an elite private high school followed by Harvard College. His first job took him to the *Times*. When Justice Frankfurter suggested to James Reston that the Gray Lady needed a Supreme Court correspondent, Reston personally tapped Lewis for the assignment and returned him to Cambridge, where he studied at Harvard Law School as a Nieman Fellow. Lucas A. Powe Jr. has accurately characterized Lewis's assessments of the Court as "both first drafts of history and explanations by one part of the Establishment of another part of the Establishment to other parts of the Establishment." Friedman promises Joe Sixpack, but he delivers Tony Martini.

The book's endorsement of Lewis's many national-consensus pronouncements is most egregious in the instance of the Warren Court's 1961 decision in *Mapp* v. *Ohio*, which required state courts to exclude evidence obtained in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures. "Although police complained [about *Mapp*]," Friedman writes, "the decision appears to have been in line with popular opinion, at least to the extent the public was paying attention. As Anthony Lewis wrote in *The New York Times*, the Court's decision reflected 'a national moral sentiment' that refused 'to tolerate police misbehavior in any state.' " It is worth observing that three justices dissented in *Mapp*, thereby rendering it difficult to believe that broad agreement existed in the entire nation when it did not even exist at the justices' conference table. In 1961, moreover, half of the states permitted what *Mapp* forbade, including such notorious backwaters as New York. Abe Fortas, a Washington lawyer who would soon be elevated to the Court by his old friend Lyndon Johnson, called *Mapp* "the most radical decision in recent times."

More dubious still than Friedman's identification of newspaper journalists as the embodiment of popular sentiment is the frequency with which disputes within legal academia occupy center stage. Given that the book expressly purports to chronicle the shifting constitutional views of "the people," the reader can only conclude that law professors comprise a shockingly large percentage of the population. By Friedman's lights, the *Harvard Law Review* enjoyed a cultural prominence roughly equivalent to *Time*'s, and the Holmes Lectures delivered by Alexander Bickel and Herbert Wechsler were followed with an intensity usually reserved for major sporting events. Rather than covering law talk on the street corners, Friedman repairs to the comforts of the faculty lounge.

The conflation of the popular press with popular opinion leads Friedman to misdiagnose the causes of constitutional change. This analytical imprecision is vividly illustrated by the book's account of the Supreme Court's dramatic shift during the 1940s regarding the constitutionality of requiring schoolchildren to recite the Pledge of Allegiance. In *Minersville School District* v. *Gobitis,* a Jehovah's Witness schoolgirl sought exemption from the pledge requirement on the ground that participation conflicted with her religious beliefs. Writing for an 8-1 Court in 1940, Justice Frankfurter found that school districts could in fact require students to recite the pledge without violating the First Amendment.

Just three years later, however, the Supreme Court abruptly reversed course in *West Virginia State Board of Education* v. *Barnette*. There, in another challenge from a Jehovah's Witness student, the Court invalidated the pledge require-

ment, holding that the freedom of speech included a right not to speak. Justice Robert H. Jackson, writing for the Court, instructed that the judiciary should guard against sheer majority rule: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

But here is Friedman's account of the shift from *Gobitis* to *Barnette*:

> The Court's decision [in *Gobitis*] was a major disappointment for editorialists. More than 150 periodicals chastised the Court. *The New Republic* complained bitterly: "[W]e are in great danger of adopting Hitler's philosophy in the effort to oppose Hitler's legions." When the Court reversed position in *Barnette* following this barrage of criticism, critics charged that the Court had changed direction in "recognition of the unpopularity of the *Gobitis* decision."

This conceptualization of "unpopularity" is a curious one. The commentary contained in the pages of this magazine, for better or worse, has never been a reliable proxy for the views of ordinary folk. Indeed, however else one might care to disparage *Gobitis*, popularity was its long suit. Schools in fifteen states sought to expel Jehovah's Witnesses for failure to recite the pledge before the Court's decision in 1940. Yet after the Supreme Court placed its imprimatur on the practice, schools in all forty-eight states sought to do so. Moreover, violence against Jehovah's Witnesses increased substantially after *Gobitis*. Two Department of Justice attorneys examined the anti-Witness vigilantism and determined that "almost without exception, the flag and the flag salute can be found as the percussion cap that sets off these acts." This popular reception, which makes no appearance in Friedman's account, serves only to confirm the intuition that, in the midst of World War II, many Americans would have applauded *Gobitis* as an affirmation of core American values.

Although Friedman describes citizens and the Supreme Court as engaging in a "dialogue" regarding constitutional interpretation, the book depicts a thoroughly one-sided conversation, in which the people do the talking and the Supreme Court does the listening. The book's subtitle, *How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, all too accurately represents its limited depiction of the nation's constitutional conversation. As the public's violent response to *Gobitis* demonstrates, however, the Supreme Court sometimes shapes, rather than merely reflects, public opinion. Friedman's disregard of narratives in which the Supreme Court has altered public opinion results in a distorted view of constitutional history.

This distortion is perhaps most evident in Friedman's truncated treatment of the Court's jurisprudence regarding the right against self-incrimination. In his chapter on the Warren Court, Friedman characterizes *Miranda* v. *Arizona* as a paradigmatic instance of judicial overreach, where the Court was chastened for getting too far out in front of society regarding criminal-procedure requirements just as society was becoming increasingly concerned about crime. "Between 1965 and 1968, polls showed a jump from 48 percent to 63 percent of Americans who thought the courts were too lenient with criminal defendants," Friedman writes. "Some two-thirds thought *Miranda* was wrong, and if the polls themselves misrepresented what the decision actually said, the verdict was still in."

But the public's view of *Miranda* is a good deal richer and more complex than Friedman's tidy narrative allows. To be sure, many people initially loathed the decision, but over time (aided perhaps by police shows on television) the public came to embrace the notion that arrested citizens should be informed of certain rights. Indeed, in stark contrast to the polling data cited by Friedman, a survey taken in 2000 revealed that 86 percent of the public agreed that police should be required to comply with *Miranda*. There can be little doubt, then, that the Supreme Court in this instance expanded the public's conception of criminal defendants' rights. And this expansion would not have occurred had the Court immediately reversed course in the face of the vigorous dissent that initially greeted the decision.

The Supreme Court itself demonstrated an awareness of the way it can institutionally shape the larger society in a significant case decided ten years ago. Here is Friedman's exploration of the case in its entirety: "In 2000 the Court declined, in *Dickerson* v. *United States*, a clear chance to overrule *Miranda*. The decision was a bit of a shock, not the least because Chief Justice Rehnquist, an unyielding opponent of the *Miranda* ruling, authored the opinion for the Court." But the Court in *Dickerson* did not grudgingly decline to overrule *Miranda*. Instead, the case expressly reaffirmed *Miranda*'s vitality in light of public acceptance. "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," Rehnquist's opinion for the Court observed. As if to underscore the point, Rehnquist did not open his oral delivery of the opinion in *Dickerson* by providing a factual summary or offering an overview of the legal question presented, as is typical. Instead, he began by intoning in his unmistakable baritone: "You have the right to remain silent." For a book that is centrally concerned with the relationship between public opinion and Supreme Court decisions, Friedman's meager treatment of *Dickerson* is perplexing.

It is certainly remarkable that Chief Justice Rehnquist wrote the Court's opinion in *Dickerson*, but for reasons that are of greater significance than his capitulation to *Miranda*. Shortly after Rehnquist first appeared on the national stage (as a nominee for the position of associate justice in 1971), he received a crash course in how Supreme Court decisions can fundamentally alter the public's understanding of the Constitution. The infamous "Random Thought" memorandum that he authored as a law clerk, in addition to its abstract ruminations regarding the futility of judicial efforts to protect minorities, contained the following concrete conclusion: "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy* v. *Ferguson* was right and should be reaffirmed." Such a view was not decisively outside of mainstream understandings of the Equal Protection Clause in 1952. A mere nineteen years later, however, that view had become so unacceptable that an aspiring Supreme Court justice could not hold it (or even confess to having held it in 1952) and expect to be confirmed. So, backed into a corner, Rehnquist admitted that he wrote the damning words, but claimed (rather incredibly) that the words captured not his own thoughts on school segregation, but those of Justice Jackson.

Wherever one comes down on the burning academic question of whether *Brown* served to hasten or to retard racial progress, it is beyond dispute that the Supreme Court's decision (and the ultimate acceptance of that decision as legitimate by the public) served to create a new understanding of the Equal Protection Clause's commitment to racial equality.

This chronological sequence—the Court decides, and then the public eventually accepts the decision—merits discussion, as it broaches perhaps the most confounding assertion in Friedman's book. Friedman appears to believe that it is insignificant that the Court, say, struck down school segregation laws in 1954 rather than re-affirming *Plessy*'s doctrine of separate but equal. "The magic of the dialogic system of determining constitutional meaning," he asserts, "is that it works whether the judges rule properly or not—precisely because everything important happens after they render their decision. What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*." Extolling the importance of "dialogue," Friedman makes it clear that he conceives of a Supreme Court decision largely as a conversation piece, a starting point to get the people talking. "What matters most about judicial review … is not the Supreme Court's role in the process, but how *the public reacts* to those decisions," Friedman explains. "This is the most important lesson that history teaches."

This argument not only belies history, it also clashes with political science and, at the risk of appearing woefully naïve, with law. Friedman's argument runs afoul of political science because it is predicated on the notion that citizens actually follow the decisions that the Court issues. After all, it is difficult for public debate to arise if the Court's decisions are unknown to many citizens. And everything that we know about public awareness of the Supreme Court's decisions suggests that it is abysmal.

Turning to the law, no serious person—except one whose job prospects entail testifying before the Senate Judiciary Committee—would contend that the Supreme Court simply applies existing law to facts in order to derive legal conclusions. Almost as risible, however, is Friedman's contention that Supreme Court decisions principally function to spark conversations regarding the Constitution's meaning. Determining what the Constitution permits and requires is a topic of continual debate, and the understandings of some of its provisions have no doubt changed over time. Acknowledging this reality, however, does not require acquiescing to the belief that constitutional law is utterly divorced from text and precedent and principle, or that it almost invariably is coterminous with what even an overwhelming percentage of people say that it means. Moreover, the most salient fact about popular opinion is not its reliability regarding difficult and even arcane matters of law, but its manipulability and its volatility. Constitutional interpretation cannot simply sway to the vagaries of public opinion.

ANTHONY RUSSO

Friedman consistently argues that the Court should not deviate from public opinion if it values its reputation: "If the Court engenders widespread resistance, it threatens its legitimacy; even lower levels of defiance eat away at its credibility." Contrary to Friedman's view, some initial public defiance might serve to enhance rather than decrease the credibility of the Supreme Court, provided that the defiance eventually yields to acceptance of the Court's decision as just. In other words, the massive resistance in the face of *Brown* may have elevated the Court's status in the eyes of the public precisely because the Court was perceived as having led the nation in the march toward racial justice. To the extent that people today are inclined to disagree with Supreme Court decisions at the outset, they may well silence themselves so as to avoid resembling the opponents of racial integration in the 1950s—both in their own eyes and in the eyes of others. Under this view, the Court can at least sometimes gain legitimacy when it is perceived not as saying "yes" to the people, but as saying "no."

Although Friedman contends that Supreme Court decisions will almost inexorably reflect public sentiment, constitutional law is considerably more indeterminate than this view allows. Consider, for example, how unrecognizable the contours of contemporary constitutional law would be had George H. W. Bush won re-election over Bill Clinton's challenge in 1992. Instead of Justice Ruth Bader Ginsburg and Justice Stephen G. Breyer, we might well have Justice Kenneth W. Starr and Justice Laurence H. Silberman. Those two personnel changes would surely mean that many 5-4 and 6-3 decisions in vital areas of law would have been decided with very different results.

Apart from the ideology of the particular justices, moreover, the book's conception of the Court as a body that ineluctably issues decisions that reflect public opinion unduly diminishes the role that courage plays in judging. It was not easy for the justices to issue *Brown*, even if that decision was favored by a narrow majority. Neither was it easy, say, for the justices more recently to invalidate anti-sodomy laws. To view these decisions as somehow foreordained by the zeitgeist negates the significance of judicial character.

Perhaps no recent case better illustrates the public's acceptance of even unpopular decisions than the lack of outcry generated by *Kennedy* v. *Louisiana*, a 5-4 case decided in 2008, which deemed it unconstitutional to execute a defendant who raped (but did not kill) a child. Viewed through Friedman's prism, it is tempting to understand *Kennedy* as yet another instance of the Court reining in an outlier. After all, Louisiana was one of only six states to permit capital punishment for child rape. Left to a popular vote, however, it is difficult to believe that a majority would not want—at least in certain circumstances—to reserve the right for juries to impose the death penalty in such cases. Imagine the response to a poll question that asked people whether they agreed that the Constitution prohibited capital punishment for child rapists—regardless of how many times the defendant rapes a child, regardless of how young the rape victim is, and regardless of the rape's brutality. But we need not imagine the public's response to a poll question to appreciate that the decision would not garner support from a majority of citizens. A Quinnipiac University poll taken in the wake of *Kennedy* revealed that 55 percent of respondents favored the ability of juries to impose the death penalty for persons convicted of child rape and only 38 percent opposed it.

Kennedy nicely exposes a problem with the view that public opinion nearly always guides the Court, because one cannot contend that the decision simply did not possess the raw ability to capture the public's attention. For one thing, the decision was issued in the midst of a historic presidential race with the attendant media glare, and was denounced by both

John McCain and Barack Obama. For another, the case was a potent cocktail composed of equal parts crime, sex, youth, violence, and death. Yet *Kennedy* did not kick up a firestorm of protest. Instead, as is often the case, the public slept.

Friedman frames his book as a description of judicial review as it has actually evolved, and generally eschews consideration of the normative implications that might be drawn from this history. But the distinction between the positive and the normative cannot be drawn so neatly. Indeed, at times Friedman seems to issue warnings to Supreme Court justices about the dangers of issuing decisions that conflict with public sentiment: "The most telling reason why the justices might care about public opinion … is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics." Friedman then proceeds to list the myriad ways in which the public has disciplined the Court throughout history. "Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction," Friedman explains. "If the preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices." If the justices know what is good for them and for the institution that they serve, Friedman seems to admonish, they would presumably do well to spend less time reading precedents and more time parsing polling data. But it does not much matter whether the justices gauge the polls accurately, because the people will—somehow—rectify the constitutional interpretations that they deem erroneous.

By the time the reader arrives at this near-total absorption of the Court into "the people," one might be forgiven for asking precisely what "institutional power" the Supreme Court is purported to possess. The book's anemic notion of "power" drains the word of all meaning. "If anything should be evident by the conclusion," Friedman writes, "it is that the Supreme Court exercises the power it has precisely because that is the will of the people." In his discussion of the Court during Reconstruction, Friedman observes that "by abandoning blacks and embracing corporations, the Court rose to the pinnacle of power." If this represents judicial power, one shudders to contemplate judicial weakness.

Let us hope that the justices do not heed Friedman's warnings. Justices of the Supreme Court most assuredly are not umpires, as Chief Justice Roberts has continually demonstrated in his brief time on the Court. But neither are they spectators at a game whose primary responsibility is to alter their judicial interpretations so as to cheer on whichever team happens to be winning. The popularity of a view tells us—and the justices—nothing about its merit. Scholarship that encourages the justices to conduct themselves in such a conformist manner seems unwise and even dangerous, not least because the justices on the current Court seem particularly ill-equipped to divine the preferences of a majority of Americans.

When majorities are permitted to dictate the rights of minorities, which groups will have their rights sacrificed? Religious minorities, racial minorities, sexual minorities, illegal immigrants, terrorism suspects, defendants in capital cases, and even garden-variety criminal defendants: none of them should have their constitutional rights determined by a show of hands. The only hope for many of these groups, and for others, is often to be found behind courthouse doors. None of this is to say that these groups should win every time that they appear before the Court; it is only to suggest that they should not lose if the Constitution favors them but a majority of the American people opposes them. Ruling for Goliath when legitimate methods of constitutional interpretation merit siding with David is not judicial statesmanship. It is judicial abdication.

The Warren Court's prominent decisions attracted a generation of law students beginning in the 1950s. Many of those students sought to use the law to re-shape society in a more just fashion. Today, in contrast, many public-minded individuals view it as a mark of deep sophistication to dwell upon the law's inherent limitations. Indeed, so widespread are the arguments regarding what law cannot achieve that too many have lost sight of what law can affirmatively accomplish.

The biggest threat to the Court's legitimacy is not, as some would have it, scorn from large segments of the public, or even from elected representatives. It is abject defeatism about law's ability to protect the powerless. The Court's legitimacy would be truly imperiled if the justices were widely understood as issuing opinions with the primary aspiration that their rulings would be ratified by popular opinion. Even if the Court should occasionally be rebuked in an effort to protect minority rights over the opposition of a majority, there are worse fates. The judicial rationalization of power is one of them. When the judiciary invariably sides with winners, it is the people who lose. ◆

Emily Wilson
STOICISM AND US

MARCUS AURELIUS: A LIFE
By Frank McLynn
(Da Capo Press, 684 pp., $30)

A GUIDE TO THE GOOD LIFE: THE ANCIENT ART OF STOIC JOY
By William B. Irvine
(Oxford University Press, 314 pp., $19.95)

Barbara Ehrenreich's latest book, *Bright-Sided*, offers a damning indictment of the ideology of positive thinking, which she sees as the fundamental flaw in American life. When she found herself diagnosed with breast cancer, Ehrenreich was shocked to discover that doctors, fellow patients, and counselors all urged her to treat the diagnosis as a blessing in disguise and an opportunity to enjoy a range of infantilizing consumer products (such as teddy bears adorned with pink ribbons)—to embrace the idea that cancer might be "the best thing that ever happened to her," rather than respond with any of the emotions that Ehrenreich herself found natural, such as horror, grief, and anger. Ehrenreich suggests that the problem of relentless positive thinking, and the corresponding refusal to acknowledge reality, is largely responsible for all kinds of social ills, including our current financial mess. She argues that only if we begin to recognize hard facts—such as the presence in our society of poverty, inequality, unemployment, and debt, as well as cancers

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