Poll-Tergeist

Why the Supreme Court shouldn't care what you think.

By Howard Bashman

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Two months ago, the U.S. Supreme Court handed down a decision of sweeping legal consequence, relying not on the Constitution's text but on national public opinion polls. In declaring the death penalty for mentally retarded inmates to be cruel and unusual punishment, the high court rooted its decision in a recent trend among states to spare the retarded from execution. It was not the first time the court had considered this issue. Just 13 years earlier, the court reached exactly the opposite outcome on precisely the same question, holding that executing the mentally retarded didn't violate the Eighth Amendment.

Whether one believes that the meaning of the Constitution is static and immutable or continuously evolving, turning to the blunt instrument of opinion polls to derive constitutional principles is the worst way to go about making law. Where the majority's support for a principle is weak and easily subject to change, reliance on polls produces a Constitution whose meaning is always in flux. And when the public's support for a principle is strong and enduring, removing the issue from the political process only serves to empower beyond its size the vocal minority opposed to the right in question.

Convenience is the principal benefit of the "opinion poll method" of constitutional adjudication. As the court explained in the case about killing the mentally retarded, "polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong." And because 16 pro-death-penalty states had exempted the retarded from the death penalty since the court last addressed the issue in 1989, the majority felt confident that a trend was established. Based mainly on these two considerations, executing the retarded is now unlawful as a matter of constitutional law, despite the fact that the Constitution itself said precisely the same thing about executing the retarded in 2002 as it said in 1989—not much.

The ease with which a mere nod to "public opinion" allows for a sea change in the Constitution's meaning contrasts starkly with the arduous amendment process the framers prescribed in the document itself. Actually amending the Constitution's text requires two-thirds approval from both the U.S. House and Senate, followed by ratification from the legislatures of three-quarters of the states. But a constitutional amendment would not have been required to reach the result the court achieved by

banning the execution of the retarded with a stroke of its pen. The same national trend noted by the court would surely have led the other pro-death-penalty states to pass statutes prohibiting the death penalty for retarded inmates. But the court didn't wait to allow public opinion to drive the political machinery that would have brought about that change. Instead, it pre-empted the democratic process with a bold statement that the practice violated a Constitution that 13 years earlier allowed precisely such executions.

Here in the United States—where an unelected federal judiciary is responsible for resolving the most politically and socially divisive issues of our time—it is not surprising that the term "unconstitutional" has become colloquially synonymous with "very, very bad thing." In the public's mind, all matters fervently opposed either are unconstitutional or should be. Yet caution should guide those who approve of having the Constitution's meaning determined by referendum. For public opinion can, and does, change.

If some mentally retarded person committed a horrific offense next week, a majority of Americans might abandon their opposition to executing the retarded. Such a shift in opinion would mirror how the country has—within the past 30 years—trended first against and then in favor of *any* death penalty. And if public opinion once again permitted execution of the retarded, presumably the court would have to flop back to the 1989 ruling from which it so recently flipped.

The public opinion method of constitutional adjudication presents an even more serious risk than the appearance of a Supreme Court driven by unprincipled vacillation: When a controversial right the public supports is "constitutionalized" without any clear basis in the document's text, the majority can end up being harmed more than helped.

Take, for example, abortion. In 1973, the Supreme Court recognized a limited federal constitutional right to abortion services, just as many states were already in the process of discarding the most opprobrious of the abortion restrictions then in existence. The Supreme Court pre-empted the battle over abortion from being resolved by the elected branches of government, although the public's majority support for abortion rights would have produced essentially the same legal landscape we have today.

Instead, constitutionalizing the right to abortion has caused a national trend to become a national lightning rod. Those passionately opposed to abortion have banded together to concentrate as much support as possible in favor of anti-abortion candidates for public office. And it has produced results. Various state legislatures have enacted abortion restrictions (most of which the courts have struck down) in the years since *Roe v. Wade*, and during that same period more occupants of the White House have been pro-life than pro-choice.

The poll numbers back up this hypothesis. The Gallup Organization earlier this year published an in-depth analysis of the public's views on abortion. Gallup's polling confirmed the majority's preference for abortion rights. Yet the results also showed that, in the 2000 general election, those for whom abortion, pro or con, was one of the single most important issues favored George W. Bush by a 17 percent margin. According to Gallup's analysis, the bottom line impact of these single-issue voters in the 2000 presidential election was a net abortion vote of +2.4 percent in favor of Bush. In an election as close as Bush versus Gore, *Roe v. Wade* may have determined the presidency.

Why do abortion opponents hold more sway at the polls than the majority which supports abortion rights? Once the right to abortion became constitutionalized, supporters of that right could afford to base their votes on other issues. Opponents continue to vote on this single issue. Removing the right to abortion from the legislative process has thus made anti-abortion activists more politically powerful than they otherwise would have been had abortion rights been up for grabs each time citizens trekked to the voting booth.

Yet if the Supreme Court, following a change in membership, were to overrule *Roe v. Wade*, the politically powerful anti-abortion minority could produce several years during which the abortion laws of the United States are more restrictive than the national majority prefers. And if that happens, *Roe v. Wade* will be correctly seen as responsible for the majority's lack of political influence on the abortion issue.

Allowing the Constitution's meaning to be determined by public opinion polls not only devalues that historical document, but it also ends up undermining the majority's preferences by allowing a vehemently opposed minority to become much more influential than it would otherwise be. Recent history has shown just how tempting it can be to constitutionalize the public's preferences. Instead of celebrating that result, both the Supreme Court and the public should recognize that it is in the majority's own interest to reject constitutional adjudication by opinion poll in favor of pursuing change through the political process. After all, it is the legislative process—and not the courts—which exists to serve the majority's wants and needs.