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Upside-Down Judicial Review

Corinna Barrett Lain

University of Richmond, clain@richmond.edu

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Upside-Down Judicial Review

CORINNA BARRETT LAIN*

*The countermajoritarian difficulty assumes that the democratically elected branches are majoritarian and the unelected Supreme Court is not. But sometimes the opposite is true. Sometimes it is the elected branches that are out of sync with majority will and the Supreme Court that bridges the gap, turning the conventional understanding of the Court's role on its head. Instead of a countermajoritarian Court checking the majoritarian branches, we see a majoritarian Court checking the not-so-majoritarian branches, enforcing prevailing norms when the representative branches do not. What emerges is a distinctly majoritarian, upside-down understanding of judicial review. This Article illustrates, explains, and explores the contours of this understanding, using three classic cases of the countermajoritarian difficulty—*Brown v. Board of Education*, *Furman v. Georgia*, and *Roe v. Wade*—to anchor the discussion. Democracy never looked so undemocratic, nor (in an upside-down way) has it ever worked so well.*

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INTRODUCTION

One of the most vexing problems of constitutional theory is the countermajoritarian difficulty—the ability of nine unelected judges (five, really) to thwart majority will in the land of majority rule.¹ As Alexander Bickel famously explained, “[W]hen 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 . . . ; it exercises control, not in behalf of the prevailing majority, but against it.”² Little wonder that the countermajoritarian difficulty has dominated the discourse among constitutional law scholars.³ It is the great paradox of our constitutional democracy, our deepest discomfort with judicial review.⁴

1. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

2. *Id.* at 16–17.

3. For an insightful account of the countermajoritarian difficulty as an “academic obsession,” see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002). See also Jamal Greene, *The Anticanon*, 125 *HARV. L. REV.* 379, 467 (2011) (“We remain obsessed, for example, with the countermajoritarian difficulty.”); *infra* note 4 (documenting central importance of the countermajoritarian difficulty in constitutional law scholarship).

4. See David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *Geo. L.J.* 723, 727 (2009) (“[T]he notion that judicial review poses a ‘counter-majoritarian difficulty,’ in Alexander Bickel’s

Thus far, those scholars who have found a way around the countermajoritarian difficulty have done so by arguing that the Supreme Court is a good deal more majoritarian than commonly supposed. Empiricists and legal historians have shown the Supreme Court's proclivity to issue rulings consistent with national public-opinion trends.⁵ And "court and culture" scholars have demonstrated the awesome power of culture in general—and social movements in particular—to generate majoritarian constitutional change.⁶ Such efforts have been lauded as "the new center of academic work in constitutional theory"⁷ and are critical to our understanding of the Supreme Court and the role of judicial review. But another piece of the puzzle remains.

Largely beyond the world of constitutional theory, in the world of political science, scholarly preoccupation with the countermajoritarian difficulty has taken a different turn. Over the past several years, political scientists (and others who write at the intersection of law and politics) have shifted their attention from countermajoritarian courts to countermajoritarianism in other national institutions, producing an avalanche of work on the democratic failings of the democratically elected branches.⁸ Political polarization, monied special inter-

words, has become the foundation upon which contemporary American constitutional theory rests." (footnote omitted)); Edward Rubin, *Judicial Review and the Right To Resist*, 97 GEO. L.J. 61, 65 (2008) ("The countermajoritarian difficulty is probably the dominant theme in contemporary legal scholarship about judicial review."); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290, 1370 (2004) (noting that "the 'countermajoritarian difficulty' has long been considered the most fundamental issue in American constitutional law" and "the most debated issue of the last forty years of constitutional theory"); see also 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 302–11 (3d ed. 2000) ("[M]any of the most prominent, and most skillful, constitutional theorists [have] treated the question of the legitimacy of judicial review as itself the central problem of constitutional law.").

5. See *infra* note 208 (listing empirical studies); see also Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1750 (2001) ("On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation."); Law, *supra* note 4, at 729 ("As a historical matter, the Supreme Court's decisions have been, whether by coincidence or design, largely in sync with public opinion.").

6. For a sampling of the literature, see Jack M. Balkin & Reva B. Seigel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 949 (2006), and Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003). See also Theodore Ruger, *Response, Social Movements Everywhere*, 155 U. PA. L. REV. PENNUMBRA 18, 20 (2006), <http://www.pennumbra.com/responses/10-2006/Ruger.pdf> (viewing "social movement scholarship within the broader current of a decades-long constitutional law debate about the 'countermajoritarian difficulty,'" and asking "[w]hat is so countermajoritarian about judicial review—even by unelected judges—if judicial decisions track general changes in popular sentiment?").

7. Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439, 1441 (2006); see also Ruger, *supra* note 6, at 18 (describing popular constitutionalism in general, and social movement analysis in particular, as "the most important development in the constitutional law academy over the past decade").

8. See Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 362 (2008) (presenting literature review of how "scholarly concern with democratic deficits in American constitutionalism has shifted from the courts to electoral institutions," and noting that within the social sciences, "[t]he countermajoritarian difficulty is emigrating from the judiciary to the elected branches of government"). For a discussion of the literature, see *infra* section II.A.

ests, voting deficiencies, veto gates—there are a number of forces that push democratic decision making away from majoritarian outcomes, just as there are a number of forces that push Supreme Court decision making the opposite way.

Taken together, these two strands of scholarship suggest a world where institutional roles are sometimes flipped upside down: The branches most majoritarian in theory are least majoritarian in practice, and vice versa. In this upside-down world, a Supreme Court ruling may just *look* countermajoritarian because the base line against which it is judged—the ostensibly majoritarian stance of the legislative and executive branches⁹—is not majoritarian after all. Sometimes in a representative democracy, the representative branches *aren't*.

This recognition turns the countermajoritarian difficulty on its head, giving rise to a radically different understanding of judicial review. The countermajoritarian difficulty assumes that the elected branches are majoritarian and the unelected Supreme Court is not.¹⁰ But what happens when the opposite is true? Instead of a countermajoritarian Court checking the majoritarian branches, we see a majoritarian Court checking the not-so-majoritarian branches, enforcing prevailing norms when the representative branches do not. Here marks the start of a distinctly majoritarian, upside-down understanding of judicial review.

Others have recognized the phenomenon to which I am referring, noting that Supreme Court rulings are often more majoritarian than the legislation they invalidate.¹¹ Thus far, however, the discussion has not explored how deep the rabbit hole goes, or the separate, cross-cutting institutional forces that drive this phenomenon—or, perhaps most importantly, the dynamic way in which one set of institutional forces can influence another. As a result, our understanding of

9. See GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY, at xv (2003) (“The basic idea of th[e] conventional framework is that outcomes created by elected legislators form a democratic baseline against which to evaluate outcomes produced by other branches . . .”); THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 5 (1989) (lamenting the “ipso facto assumption that the policies of the popularly elected branches necessarily represent a nationwide public opinion majority.”).

10. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 630 (1993) (“The countermajoritarian difficulty posits that the ‘political’ branches are ‘legitimate’ because they further majority will, while courts are illegitimate because they impede it. . . . [C]ountermajoritarian theory rests explicitly on the notion that the other branches of government ‘represent’ majority will in a way the judiciary does not . . .”).

11. See, e.g., BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 368 (2009) (“It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people.”); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 4 (2006) (“How did we get to this odd moment in American history where unelected Supreme Court justices sometimes express the views of popular majorities more faithfully than the people’s elected representatives?”); Neal Devins, *The D’oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1347 (2007) (reviewing ROSEN, *supra*) (agreeing with Jeffrey Rosen that “the Supreme Court . . . may be more reflective of public opinion than Congress”); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 795 (1992) (reviewing BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)) (“Where legislative self-interest is that intense, judicial review is likely to be *more* majoritarian than legislative decisionmaking.” (emphasis in original)).

what is happening and why (let alone the how and when) remains remarkably impoverished.

This Article aims to enrich the discussion by illustrating, explaining, and exploring the contours of upside-down judicial review. The basic insight is this: When widespread attitudes change but the law does not, pressure builds to implement that change—to give force of law to the transformation of attitudes, values, and policy preferences occurring in larger society. Sometimes the Supreme Court is the most conducive outlet through which this change can occur. Free of the forces that stymie the representative branches and moved by majoritarian proclivities of its own, the Court responds to, and reflects, prevailing norms unable to find formal expression elsewhere. Indeed, the fact that those norms are unable to find formal expression elsewhere is what triggers this process in the first place. We are back to old-fashioned checks and balances, but in a completely newfangled way.

The implications are striking. As a descriptive matter, upside-down judicial review paints a picture of the Supreme Court that is much more complex than the conventional narrative allows. Its essence is that the Court can, at times, effectuate majoritarian change *better* than the representative branches designed for that very purpose. As a normative matter, upside-down judicial review is complicated. But this much is clear: It rejects the narrow conception of judicial review as inherently antidemocratic outside the realm of correcting malfunctions in the democratic process.¹² Sometimes judicial review supports democratic values not by protecting majoritarian process, but simply by producing majoritarian results.

To illustrate the point, this Article presents three classic cases of the counter-majoritarian difficulty—*Brown v. Board of Education*,¹³ *Furman v. Georgia*,¹⁴ and *Roe v. Wade*¹⁵—as case studies of upside-down judicial review, using these decisions to anchor a more conceptual discussion of the phenomenon. Why *Brown*, *Furman*, and *Roe*? First, they show just how deep the rabbit hole goes. These are three of history's most famously counter-majoritarian cases, paradigms of the counter-majoritarian difficulty and its critique of judicial review. Second, these cases can be viewed through the lens of legal history, allowing for a clarity we lack as we are living it. Third and finally, these cases present uniquely illustrative examples of upside-down judicial review. *Brown* provides the cleanest and clearest example of the phenomenon; *Furman* presents a case of *explicitly* upside-down judicial review (albeit one where the Justices may have gotten it wrong); and *Roe* adds a layer of complexity to the upside-down

12. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7 (1980); see also *infra* notes 351–354 and accompanying text (discussing Ely's process-oriented justification of judicial review and distinguishing it from the account I offer).

13. 347 U.S. 483 (1954) (invalidating de jure segregation in public schools).

14. 408 U.S. 238 (1972) (invalidating the death penalty as then administered).

15. 410 U.S. 113 (1973) (invalidating certain restrictions on a woman's decision to have an abortion).

dynamic that the other two do not. One might have examined other cases instead—*Reynolds v. Sims*,¹⁶ *Frontiero v. Richardson*,¹⁷ even *Lochner v. New York*¹⁸ come to mind. But the point is not the case studies. The point is the concept they illustrate and help to theorize: upside-down judicial review.

Before proceeding, a few clarifications merit mention. First is the tricky issue of what I (and everyone else who writes in this area) mean by the term “majoritarian.” By way of definition, I use the term to describe prevailing sentiment at the national rather than local level, consistent with the scholarly discourse in which I am writing.¹⁹ Beyond that, identifying majority will is notoriously difficult. Public-opinion-poll data can be skewed, depending on how questions are asked. Institutional support can reflect elite, rather than popular, opinion. The same can be said of the popular press. Yet each of these measures is vital to understanding the larger sociopolitical context in which the Supreme Court operates; each plays a part in gauging the majority view. To the extent majority will exists at all—and sometimes, perhaps even often, it does not²⁰—it is the product of a confluence of forces, each contributing to a sense of consensus in its own way. For this reason, I examine a variety of sociopolitical indicators in the case-study portion of my analysis, aiming to capture the zeitgeist of the moment in which each ruling was made.

Second, and relatedly, I concede at the outset that the account of judicial review I offer presupposes a particular conception of democracy, and that democratic theory is itself wrought with conflict over what the democratic ideal is and should be. For those who care more about process than results, our unelected Supreme Court is intrinsically, hopelessly antidemocratic, and the fact that it may represent the views of a majority of the populace more faithfully than elected representatives is of no consequence. Yet others take a different view, moving beyond the “self-evident and largely uninteresting” fact that the Court is unelected and asking how much that actually matters by the measure of

16. 377 U.S. 533 (1964) (articulating “one person, one vote” standard for legislative apportionment).

17. 411 U.S. 677 (1973) (plurality opinion) (invalidating sex-based classification in military-benefit policy).

18. 198 U.S. 45 (1905) (invalidating maximum-hour law based on “liberty of contract” found in the Fifth Amendment Due Process Clause). For an argument that the *Lochner* Court’s substantive due process decisions were supported by public opinion, see Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *BUFF. L. REV.* 7, 58–74 (2002).

19. See Friedman, *supra* note 3, at 174–75 (“For almost all academic commentators . . . the relevant question was whether a national majority supported a Court decision. . . . Among the broader public it also was the national majority that mattered . . .”); see also BICKEL, *supra* note 1, at 250 (“[E]ven if the task of the Court were, in Mr. Dooley’s phrase, to follow the election returns, surely the relevant returns would be those from the nation as a whole, not from a white majority in a given region. Fragmented returns cannot count, any more than early ones.”); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 *SUP. CT. REV.* 103, 117–20 (considering various formulations of majoritarian base line, all aimed at capturing prevailing sentiment at the national level).

20. See Justin Driver, *The Consensus Constitution*, 89 *TEX. L. REV.* 755, 777 (2011) (“A national consensus (even loosely defined) is simply nonexistent on many constitutional questions that reach the Court.”); Friedman, *supra* note 10, at 638–43 (discussing the transient nature of majoritarian preferences and the difficulty it poses for identifying majority will).

majority rule.²¹ Majoritarianism was Bickel's conception of the democratic ideal,²² and, taking the countermajoritarian difficulty as I find it, it is mine as well.

Third and finally, to the extent what I offer is a "theory" of judicial review, it is not a Grand Unifying Theory of judicial review. Sometimes the Supreme Court issues genuinely countermajoritarian rulings.²³ Thus, my point is not that judicial review can always, or even usually, be understood in this upside-down manner. My point is that *sometimes* it can, and our understanding of judicial review ought to reflect that fact.²⁴ My aim in this project is to provide a more robust, accurate account of judicial review by examining the way in which separate, cross-cutting institutional forces can generate constitutional change. That is a powerful point, and one particularly relevant in a world of growing democratic dysfunction, but it does not speak to every case.

The analysis proceeds as follows: Part I introduces the case studies, presenting *Brown*, *Furman*, and *Roe* as examples of upside-down judicial review. Part II turns to the theory behind the case studies—the host of forces that push our elected branches away from majoritarian outcomes, and our unelected branch the opposite way. Part III uses these insights to craft and explore the contours of an upside-down understanding of judicial review. Sometimes mounting majoritarian pressure for change can trigger Supreme Court intervention when the democratic channels of change are blocked. Democracy never looked so undemocratic—nor, in an upside-down way, has it ever worked so well.

I. COUNTERMAJORITARIAN CASE STUDIES

The Supreme Court's decisions in *Brown v. Board of Education*,²⁵ *Furman v. Georgia*,²⁶ and *Roe v. Wade*²⁷ present classic cases of the countermajoritarian difficulty. Yet a closer look reveals a dramatically different narrative—each is better understood as an example of upside-down judicial review. As others have noted, none of these decisions made sense as a product of the rule of law.²⁸

21. MARSHALL, *supra* note 9, at 5. For others using a majoritarian base line, *see supra* notes 5–6.

22. *See* BICKEL, *supra* note 1, at 16–23; *see also* Friedman, *supra* note 10, at 587 ("Majoritarianism was, for Bickel, the heart of democratic governance.").

23. *Citizens United v. FEC*, 130 S. Ct. 876 (2010), is a relatively recent example. For my own take on the decision, *see infra* note 248. *See also infra* note 348 and accompanying text (explaining why some decisions are genuinely countermajoritarian).

24. *See infra* notes 365–66 and accompanying text (discussing widely recognized disconnect between constitutional theory and how judicial review actually operates in our constitutional system).

25. 347 U.S. 483 (1954).

26. 408 U.S. 238 (1972).

27. 410 U.S. 113 (1973).

28. *See* Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 433 (2005) (noting that *Brown* was a difficult decision for the Justices because "[t]he sources of constitutional interpretation to which they ordinarily looked for guidance—text, original understanding, precedent, and custom—indicated that school segregation was permissible."); Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 9–12 (2007) (arguing that "nothing in the conventional sources of constitutional law dictated or even supported the result in *Furman*"); John Hart Ely, *The Wages of*

What, then, was driving the Supreme Court's decision making? In the discussion that follows, I argue that all three may be plausibly understood as a response to, and reflection of, mounting majoritarian pressure for change when the democratic process was blocked.

A. *BROWN V. BOARD OF EDUCATION*

It is difficult to imagine a case study of the countermajoritarian difficulty that does not include the Supreme Court's 1954 decision of *Brown v. Board of Education*.²⁹ After all, it was *Brown* that Alexander Bickel was writing about when he coined the term "countermajoritarian difficulty."³⁰ And it is *Brown* that remains the quintessential example of the Court's countermajoritarian capacity today.³¹

In part, this is because the Supreme Court in *Brown* took on the South. White Southerners were intensely committed to segregated primary education, and the Justices knew it.³² They knew that some jurisdictions would resist the ruling, most likely with violence.³³

Yet *Brown's* countermajoritarian clout also stems from the fact that when the Supreme Court took on the South, it was doing what neither of the elected branches wanted to do. Congress had long maintained segregated public schools

Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920, 935–37 (1973) ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. . . . [N]ever before has [the Supreme Court's] sense of an obligation to draw [inferences from the values of the Constitution] been so obviously lacking." (internal footnotes omitted)).

29. 347 U.S. 483 (1954).

30. See BICKEL, *supra* note 1, *passim*.

31. See Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 118 (2008) ("*Brown* is the archetypical case for the counter-majoritarian difficulty. It was Bickel's primary example, and has been understood as counter-majoritarian by scholars representing all points on the spectrum." (footnotes omitted)); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7 (1996) ("*Brown*, according to the usual story line, represents a paradigmatic example of the Supreme Court intervening to protect an oppressed minority from majoritarian overreaching."); Rebecca E. Zietlow, *Juriscentrism and the Original Meaning of Section Five*, 13 TEMP. POL. & CIV. RTS. L. REV. 485, 489 n.22 (2004) ("The paradigmatic example of the Court as protector of minorities against majority will is *Brown v. Board of Education* . . .").

32. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 39 (2000) (describing government-mandated school segregation as "the cornerstone of white supremacy" and adding that, "By challenging government-mandated segregation, the Court was challenging the foundations of the southern way of life").

33. See THE SUPREME COURT IN CONFERENCE (1940–1985), at 659 (Del Dickson ed., 2001) (quoting Justice Clark in *Brown* conference as stating, "Violence will follow in the South. This is a very serious problem. If segregation is unconstitutional, it must be handled very carefully, or we will cause more harm than good."); *id.* at 665 (quoting Justice Black in *Brown* conference as stating, "There is a great deal of stubbornness. People there are going to fight this. There will be a deliberate effort to circumvent the decree.").

in the District of Columbia³⁴ and had rejected every bill proposing civil rights legislation since 1875.³⁵ Justice Jackson had it right when he stated during oral argument, “I suppose that realistically the reason this case is here was that action couldn’t be obtained from Congress.”³⁶ The executive branch’s stance was more or less the same. Although his Department of Justice supported the result in *Brown*,³⁷ President Eisenhower took a dimmer view, privately criticizing the Court’s ruling,³⁸ publicly distancing himself from it,³⁹ and on several occasions refusing to provide federal enforcement.⁴⁰ Left to their own devices, neither of the representative branches would have ended “separate but equal” in 1954.

That said, *Brown* is hardly the countermajoritarian classic it seems. Thanks to the pioneering work of Michael Klarman,⁴¹ a number of scholars in recent years have recognized *Brown* as a modestly majoritarian decision that constitutional-

34. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 294 (2004) (“[T]he same Congress that wrote the Fourteenth Amendment and was responsible for its enforcement had segregated schools in the District of Columbia for nearly one hundred years . . .”). In *Bolling v. Sharpe*, the companion case to *Brown*, the Supreme Court ruled that the Fifth Amendment’s Due Process Clause prohibited segregated public education in the District of Columbia. 347 U.S. 497, 500 (1954).

35. See Jack M. Balkin, Essay, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1541 (2004) (“[N]o significant national civil rights legislation protecting blacks from discrimination was passed between 1875 and 1957, and it was not until 1964 that a real civil rights bill made it through Congress.”); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 959 (2005) (“From 1937 to 1950, a flood of civil rights legislation was introduced in Congress. Two hundred fifty two bills against discrimination were introduced during this era, with 72 presented in the 1949–1950 session alone. However, all of that legislation failed.” (footnote omitted)).

36. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952–55, at 244 (Leon Friedman ed., 1969).

37. See Brief for the United States as Amicus Curiae at 31–32, *Brown v. Board of Education*, 347 U.S. 483 (1954) (Nos. 1–5), 1952 WL 82045.

38. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 131 (1994) (“Privately, Eisenhower criticized the *Brown* decision in strong terms on numerous occasions.”); THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 670 (“President Eisenhower let it be known that he personally opposed the *Brown* decision, and Congress offered no real support for nearly a decade.”).

39. See KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 146, 148 (2007) (quoting Eisenhower as saying of *Brown*, “The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey” and “Our personal opinions about the decision have no bearing on the matter of enforcement”); Klarman, *supra* note 38, at 131 (“After the Court issued its ruling, Eisenhower repeatedly refused to publicly endorse it, observing that the president’s role extended only to enforcing, not to approving or disapproving, Supreme Court decisions. Simultaneously, he expressed repeated doubts as to the capacity of law to alter people’s attitudes on deeply felt subjects such as race relations.”).

40. See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 54 (1961) (“Eisenhower’s policy seemed to have been: ‘Thurgood Marshall got his decision, now let him enforce it.’”); Klarman, *supra* note 38, at 131 (“Moreover, in 1956 Eisenhower on more than one occasion refused to involve the federal government when mob protests and state obstructionism blocked the implementation of school desegregation orders.”).

41. See KLARMAN, *supra* note 34; Klarman, *supra* note 38.

ized an emerging national consensus against legally imposed racial segregation.⁴² Although *Brown* was undoubtedly unpopular in the South, the South itself was at odds with where the rest of the nation stood on race relations in 1954.

Several considerations support the point. First, the Supreme Court in *Brown* had the balance of public opinion on its side. A Gallup poll conducted within a week of *Brown* showed that slightly over half of the country—54%—agreed with the Court’s ruling.⁴³ Also revealing is the geographical breakdown. While 71% of Southerners disagreed with the decision, 57% of Midwesterners, 65% of Westerners, and 72% of Easterners thought the Supreme Court had gotten *Brown* right.⁴⁴

Granted, those figures do not tell the full tale. Southerners hated *Brown* with more intensity than Northerners liked it, and Northerners liked it more in theory than in practice.⁴⁵ Still, contemporary accounts described *Brown* as reflecting “a decisive popular majority”⁴⁶ and a “national moral consensus”⁴⁷ against legally imposed racial segregation, suggesting that despite such nuances, the country as a whole was indeed on the Supreme Court’s side.

Second, *Brown* invalidated a practice most states had already rejected on their own. When the Supreme Court decided *Brown* in 1954, twenty-one states allowed for racially segregated schools—a substantial minority, but a minority nonetheless. Of these, seventeen states—all in the South or on its border—required racially segregated schools, while the remaining four states allowed localities to segregate schools at their option.⁴⁸ Thus, among the states, formally segregated education was a minority, and distinctly regional, practice.

Third and more generally, *Brown* reflected deeper, tectonic changes in race

42. See, e.g., CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* 4, 41 (2009); Balkin, *supra* note 35, at 1539–40; ROSEN, *supra* note 11, at 59.

43. See GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1935–71*, at 1249 (1972); see also *id.* at 1332–33 (reporting public approval of *Brown* at 56% in April 1955).

44. See *id.* at 1249.

45. See Driver, *supra* note 20, at 807–10 (discussing Northern resistance to ending de facto, as opposed to de jure, segregation in public schools); *id.* at 811–13 (arguing that Northern support for *Brown* should be discounted because of the dramatically lower percentages of black residents in those states).

46. J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 196 (1959) (“[T]here is no responsible opinion to the effect that the Court’s position [in *Brown*] does not reflect the attitude of a decisive popular majority.”).

47. Anthony Lewis, *Historic Change in the Supreme Court*, N.Y. TIMES MAG., June 17, 1962, at 36; see also BICKEL, *supra* note 1, at 241 (“Even as of 1954, national consensus on the racial problem was immanent . . .”); Thomas W. Christopher, *Segregation in the Public Schools: Introduction*, 3 J. PUB. L. 5, 6 (1954) (describing *Brown* as reflecting “shifting public opinion” on the acceptability of de jure segregation in public schools); Charles Fairman, *Foreword: The Attack on the Segregation Cases*, 70 HARV. L. REV. 83, 91 (1956) (stating that “a quickened national conscience was being reflected in the decisions of the Supreme Court”).

48. Those four states were Kansas, Arizona, New Mexico, and Wyoming. See KLARMAN, *supra* note 34, at 311; POWE, *supra* note 32, at 52; Balkin, *supra* note 35, at 1539.

relations already well underway in the nation. By 1954, the military had been desegregated, as had the civil service.⁴⁹ Industrialization, urbanization, and the “Great Migration”⁵⁰ had brought substantial gains in black economic and political power by the 1940s,⁵¹ while World War II had both intensified existing pressures for racial change and created new ones of its own.⁵² For many Americans, the war against Nazi fascism brought with it an ideological revulsion against the premise that supported segregation in the first place—racial superiority.⁵³ The Cold War that followed only exacerbated this pressure for change as the nation’s racist practices at home became a liability to its image abroad.⁵⁴ In the fight for world influence and power, the United States could no longer afford to be racist. As Mike Klarman put the point, “Hitler gave racism a bad name.”⁵⁵

All of this mattered to the Justices in *Brown*. Justice Reed, who initially voted to uphold segregation, saw racial progress as a reason to stay the Court’s hand, noting, “Think of the advancements . . . Segregation is gradually disappearing. . . Segregation in the border states will disappear in fifteen or twenty years. Ten years in Virginia, perhaps.”⁵⁶ Justice Jackson initially took the same view, suggesting that the Court give the South time because segregation was “nearing an end.”⁵⁷ Ultimately, however, Justice Jackson concluded that the “spectacular” pace of racial progress cut the other way, suggesting that race “no longer afford[ed] a reasonable basis for a classification.”⁵⁸ Justice Minton

49. See KLARMAN, *supra* note 34, at 181.

50. See Klarman, *supra* note 38, at 30–37 (discussing the Great Migration of nearly five million blacks from the rural South to the urban North between 1910 and 1960 and its transformative impact on race relations). For an in-depth discussion of the Great Migration, see NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991).

51. See Klarman, *supra* note 38, at 30–71 (discussing developments and their transformative impact on race relations in both the North and South).

52. See Klarman, *supra* note 38, at 14–23 (discussing various ways in which World War II exacerbated existing pressures for racial change).

53. Justice Black made the connection explicitly, comparing “Hitler’s creed” to “what the South believed.” MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 142 (1994); see also Klarman, *supra* note 38, at 23–26 (discussing ideological revulsion against fascism and racism as a result of World War II).

54. For excellent discussions of the Cold War’s impact on pressure for racial change, see generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000), and Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61 (1988). See also KLARMAN, *supra* note 34, at 183 (noting that “[t]he importance of the Cold War imperative for racial change is hard to overstate and probably difficult to fully appreciate in our post-Cold War era.”).

55. Klarman, *supra* note 38, at 26 (quoting historian Morton Sosna) (internal quotation marks omitted); see also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 *U. PA. L. REV.* 419, 442 (2001) (“The Nazis, in short, gave racism and eugenics a bad name.”).

56. *THE SUPREME COURT IN CONFERENCE*, *supra* note 33, at 649 (quoting Justice Reed in conference).

57. *Id.* at 652 (quoting Justice Jackson in conference); see also TUSHNET, *supra* note 53, at 143 (quoting letter from Justice Jackson stating that “the segregation system is breaking down of its own weight . . . a little time will end it in nearly all States”).

58. KLARMAN, *supra* note 34, at 309 (quoting Justice Jackson’s draft concurring opinion); see Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 *Geo. L.J.* 433, 458 (1994) (reviewing TUSHNET, *supra* note 53) (“In a draft concurring opinion, which Jackson decided

agreed, noting that, “The only justification for segregation is the inferiority of the Negro. So many things have broken down these barriers.”⁵⁹ Justices Burton, Clark, and Frankfurter also made comments about racial progress in a number of areas.⁶⁰ Perhaps most telling, Justice Frankfurter later stated that he would have voted to uphold de jure segregation if *Brown* had come to the Supreme Court in the 1940s because “public opinion had not then crystallized against it.”⁶¹ The Justices in *Brown* viewed segregation in light of a larger sociopolitical context of racial change, and that context influenced their decision making.⁶²

But if *Brown* was a majoritarian decision, why didn’t the ostensibly majoritarian branches act instead? For Congress, the answer was easy: Southern segregationists controlled key committees and had an unbeatable filibuster in the Senate.⁶³ As a result, Congress was institutionally incapable of doing what the Supreme Court did in *Brown*, just as it had been incapable of passing antilynching legislation decades earlier, despite prevailing sentiment supporting it.⁶⁴ For President Eisenhower, the answer was a more complicated mix of personal predilections and a political sense for avoiding sectional battles whenever possible⁶⁵—but the result was the same. Neither of the representative branches

not to publish, his ultimate rationale for invalidating public school segregation was the ‘spectacular’ progress already made by blacks.”).

59. THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 660 (quoting Justice Minton in conference).

60. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 684 (1976) (quoting Justice Frankfurter as recognizing “great changes in the relations between white and colored people since the first World War,” and noting that “the pace of progress has surprised even those most eager in its promotion”); THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 658 (quoting Justice Burton as recognizing “a trend away from separation of the races in restaurants”); KLARMAN, *supra* note 34, at 309 (quoting Justice Clark as recognizing “much progress” in the areas of voting and education).

61. KLARMAN, *supra* note 34, at 310.

62. This is not to say that *Brown* was inevitable in 1954. For the decision to come out the way it did, a number of forces had to align, including, perhaps most importantly, the Supreme Court’s personnel. See POWE, *supra* note 32, at 23–28 (detailing how the death of Chief Justice Vinson, and appointment of Earl Warren in his place, moved the outcome in *Brown* from uncertain at best to 5–4 in favor of invalidating school segregation, which ultimately led to unanimity on the ruling).

63. See POWE, *supra* note 32, at 47–48 (discussing how congressional seniority system gave the South power to block legislative desegregation efforts); ROSEN, *supra* note 11, at 63 (noting that “Congress was inhibited from reflecting national opinion about segregation because of a seniority system that gave disproportionate power to white southerners”); GORDON SILVERSTEIN, LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 17–18 (2009) (discussing Senate filibuster rules and how they “blocked any chance that even a strong national majority could end segregation”); see also *infra* notes 228–32 and accompanying text (discussing congressional-committee structure and Senate filibuster as impediments to majoritarian change and citing *Brown* as an example of both).

64. See KLARMAN, *supra* note 34, at 451 (“Though national opinion plainly supported antilynching legislation in the 1930s and anti-poll-tax legislation in the 1940s, Senate filibusters regularly defeated such measures, as well as all other civil rights proposals until 1957.”).

65. See WILLIAM LASSER, THE LIMITS OF JUDICIAL POWER: THE SUPREME COURT IN AMERICAN POLITICS 166–67 (1988) (discussing Eisenhower’s resentment at “being ‘trapped’ by the Supreme Court ‘into taking a politically risky public stance on Southern segregation’”); KEVIN J. McMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 201 (2004) (discussing Eisenhower’s refusal publicly to endorse *Brown* as an attempt “to maintain his winning coalition”).

was willing to give force of law to changed racial norms in 1954, leaving the Court to do it instead.⁶⁶

In sum, *Brown* presents a striking example of the Supreme Court responding to, and reflecting, deep shifts in prevailing norms when the democratic process would not. Justice Jackson had it right when he declared, “If we have to decide this question, then representative government has failed.”⁶⁷ In *Brown v. Board of Education*, it had.

B. *FURMAN V. GEORGIA*

When it comes to upsetting the results of the democratic process, the Supreme Court’s 1972 decision in *Furman v. Georgia* stands as one of the strongest examples of all time.⁶⁸ In *Furman*, the Supreme Court abolished the death penalty as it then existed, invalidating the statutes of thirty-nine states and the federal government.⁶⁹ For the Burger Court, whose *raison d’être* was to “keep [the Court’s] hands off more decisions of other branches of government,”⁷⁰ it was an awesome display of judicial power. The nation balked. By 1976, thirty-five states had passed new death-penalty statutes, ending abolition almost as soon as it had begun and marking one of the strongest legislative backlashes in Supreme Court history.⁷¹ Little wonder that scholars cite *Furman*

66. I am not the first to recognize this dynamic in the context of *Brown*. For commentators at the time, see, for example, Lewis, *supra* note 47, at 38 (“[t]he national conscience had found no way to express itself except through the Supreme Court. The Court moved in only when the rest of our governmental system was stymied, when there was no other practical way out of the moral dilemma.”). For more modern commentators, see, for example, ROSEN, *supra* note 11, at 59 (“[S]outhern Democrats continued to control the rules committee in the House and were able to threaten filibusters in the Senate. Therefore, the Court at the time of *Brown* was arguably in a better position to represent the constitutional views of a majority of the country than Congress itself.”); POWE, *supra* note 32, at 47–48 (“Segregation was a massive blight on the United States, and yet our elected representatives were either unwilling or unable to do anything about it. . . . *Brown* promised a way of sidestepping legislative deadlock. When the representative branches would not act, the Court could”); WHITTINGTON, *supra* note 39, at 134 (“Entrenched and disproportionately powerful southern conservatives had gridlocked Congress. The Court became the alternative.”).

67. THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 658 (quoting Justice Jackson in conference).

68. 408 U.S. 238 (1972).

69. Forty states had death-penalty statutes in 1972, but Rhode Island’s statute was spared because it was (ironically) an obsolete “mandatory” death-penalty provision and thus not subject to the Court’s ruling. See *id.* at 417 n.2 (Powell, J., dissenting). It was struck down four years later by *Woodson v. North Carolina*, 428 U.S. 280 (1976).

70. *The Law: Toward a Burger Court*, TIME, Apr. 13, 1970, at 52; see also BARBARA HINKSON CRAIG & DAVID M. O’BRIEN, ABORTION AND AMERICAN POLITICS 3–4 (1993) (discussing Nixon’s promise “to appoint ‘strict constructionists’—that is, those who claim constitutional interpretation can be confined to literal readings of the text—and advocates of ‘judicial self-restraint’—who are deferential to the elected branches of government—to the Court”).

71. See *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976) (discussing and listing new death-penalty statutes); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267 (2002) (noting that *Furman* “touched off the biggest flurry of capital punishment legislation the nation had ever seen”); Jonathan Simon, *Why Do You Think They Call It CAPITAL Punishment? Reading the Killing State*, 36 LAW &

as an example of the Court's countermajoritarian capacity.⁷² Both before the decision and after, the people's representatives took a stand on the death penalty, and it went the opposite way.

Of the three case studies examined in this Article, *Furman v. Georgia* is the least majoritarian. Unlike *Brown*, the Supreme Court in *Furman* did not take the majority position among the states, nor did it have the most direct measure of public support—public-opinion-poll data—on its side. In March 1972, three months before *Furman* was decided, Gallup reported death-penalty support at an even 50%, with 41% of the public opposed to capital punishment and 9% undecided.⁷³ Gallup and Harris polls in 1970 and 1971 showed similar results, with support for the death penalty ranging between 47% and 49% and opposition at a steady 40% to 41%.⁷⁴ Thus, although the polling data supports the claim that *Furman* was not countermajoritarian as commonly supposed—no majority supported the death penalty at the time—it does not support the claim that the Court's ruling was majoritarian. Based on the polling data, that is a hard argument to make.

Yet the Justices in *Furman* saw things differently. As in *Brown*, the Justices saw the death penalty as a practice that society had by and large rejected, and once again, that view figured prominently in their decision making. Two of the five Justices in the *Furman* majority—Justices Brennan and Marshall—said so explicitly, claiming that society's rejection of the death penalty rendered it "cruel and unusual" under the Eighth Amendment's "evolving standards of decency" doctrine.⁷⁵ For concurring Justices Stewart and White, who tended

SOC'Y REV. 783, 795 (2002) (book review) ("Few other decisions of the Supreme Court have ever received a more rapid legislative response.").

72. See, e.g., Curt Bentley, *Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution*, 2007 BYU L. REV. 1721, 1761 (noting that *Furman* is "frequently cited as an example of counter-majoritarian decision-making"); Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 782 (2008) (noting the Court's capacity to act "at least subconsciously, as genuinely counter-majoritarian. For example, in *Furman v. Georgia*, the Court struck down all federal and state death penalty laws then on the books"); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1737–38 (2000) (listing *Brown*, *Miranda*, *Furman*, and *Roe* as the cases that rebut doubts about the Court's countermajoritarian capacity); Richard H. Pildes, *supra* note 19, at 105–06 (arguing that *Citizens United v. FEC*, 130 S. Ct. 876 (2010), is the most countermajoritarian case since the Court's flag-burning case of the 1980s or death-penalty decision of the 1970s, citing *Furman*).

73. See GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1972–1977, at 20 (1978).

74. See David W. Moore, *Americans Firmly Support Death Penalty*, GALLUP POLL MONTHLY, June 1995, at 25 (reporting results of 1971 poll); Humphrey Taylor, *Support for Death Penalty Down Sharply Since Last Year, but Still 64% to 25% in Favor*, HARRIS POLL (Aug. 2, 2000), http://www.harrisinteractive.com/harris_poll/index.asp?PID=101 (reporting results of 1970 poll).

75. See *Furman v. Georgia*, 408 U.S. 238, 291–300 (1972) (Brennan, J., concurring); *id.* at 360–69 (Marshall, J., concurring). *Furman* marked the first time a Justice claimed that a punishment could violate the "cruel and unusual punishments" clause just because it had become unpopular, although the phrase "evolving standards of decency" came from the Supreme Court's earlier decision in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). For the birth and evolution of the "evolving standards" doctrine, see Corinna Barrett Lain, *Lessons Learned from the Evolution of "Evolving Standards,"* 4 CHARLESTON L. REV. 661 (2010).

towards conservatism on criminal-justice issues,⁷⁶ the country's perceived stance on capital punishment also played a pivotal role. Justice Stewart voted against the death penalty in part because he thought a vote to affirm "would only delay its abolition."⁷⁷ Justice White's comments in conference that "[t]he community has made its judgment on the use of the death penalty" suggested that he felt the same way,⁷⁸ and his concurring opinion's observation that the death penalty had "for all practical purposes run its course" served as the basis for his deterrence-based rationale.⁷⁹ In short, four of the five Justices in *Furman*'s majority based their decision in whole or in part on the notion that the death penalty was already on its way out the door. The Supreme Court was just turning off the lights.

Contemporary commentators saw the death penalty the same way. *Time* twice wrote about "The Dying Death Penalty" in 1967,⁸⁰ and *U.S. News & World Report* (among others) reported growing sentiment to abolish the death penalty as late as 1971.⁸¹ While *Furman* was pending, supporters of capital punishment complained about "mounting zeal for its abolition" and the likelihood of its success.⁸² Even the 1972 *Supreme Court Review* gave *Furman* little more than a figurative yawn, writing that for the death penalty, "the inevitable came to pass."⁸³ Granted, state legislation did not show it, public-opinion-poll data either—but the *feel* of the death penalty in 1972, the zeitgeist of that historical moment, was that the abolition of capital punishment was just a matter of time.

76. See BANNER, *supra* note 71, at 260 (noting that Justice White "dissented at virtually every opportunity in the Warren Court's famous cases expanding the constitutional rights of criminal defendants"); MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 157 (1973) (describing Justice Stewart as "something of an enigma when it came to capital punishment" given that he had dissented frequently in the Warren Court's criminal-procedure decisions).

77. See THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 617 (quoting Justice Stewart).

78. See *id.* at 617–18 (quoting Justice White); see also *id.* at 618 (quoting Justice White as stating in conference discussions, "Judges and juries fight it. . . . We should not legalize the death penalty at this time in our history").

79. *Furman*, 408 U.S. at 313 (White, J., concurring); see also *id.* ("I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

80. See *The Dying Death Penalty*, TIME, Feb. 17, 1967, at 58; *Killing the Death Penalty*, TIME, July 7, 1967, at 57 ("By inches, the death penalty is dying in the U.S.").

81. See *Death Sentences for Manson Clan, but—*, U.S. NEWS & WORLD REP., Apr. 12, 1971, at 26 ("Sentiment to abolish the death penalty altogether appears to be growing throughout the United States."); *No Work for the Hangman*, THE NATION, Jan. 27, 1969, at 101–02 (noting growing opposition to the death penalty despite public concern over crime); *Signs of an End to "Death Row"*, U.S. NEWS & WORLD REP., May 31, 1971, at 37 ("Now a nationwide drive to do away with the death penalty is gaining momentum."); see also JAN GORECKI, CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION 9 (1983) (noting belief at the time of *Furman* that total abolition was just around the corner); Joseph L. Hoffmann, *Narrowing Habeas Corpus*, in THE REHNQUIST LEGACY 156, 161 (Craig M. Bradley ed., 2006) (noting that in the early 1970s, "[m]any observers believed that the end was near for the American death penalty").

82. Donald Atwell Zoll, *A Wistful Goodbye to Capital Punishment*, NAT'L REV., Dec. 3, 1971, at 1354.

83. Philip B. Kurland, 1971 Term: *The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 297.

What explains the zeitgeist? One answer is the death penalty's dwindling use. Executions had been steadily declining for decades, falling from an average of 167 per year in the 1930s to less than 10 per year by 1965.⁸⁴ In part, this was due to a drop in death sentences during that time,⁸⁵ but equally significant was the increasing reluctance of those responsible for the administration of capital punishment to carry those sentences out.⁸⁶ By late 1967, a massive capital-litigation campaign had brought a halt to executions altogether, resulting in a de facto moratorium on the death penalty's use.⁸⁷ As a result, the nation had survived nearly five years without actually employing the death penalty by 1972.

Another important piece of the puzzle is the decade-long abolition movement that preceded *Furman*. The 1960s civil rights movement and war on poverty fed an abolition movement at home that was sweeping nations worldwide, recasting the death penalty as the ultimate form of discrimination on the basis of class and race.⁸⁸ Although abolition fervor peaked in the mid-1960s—when support for the death penalty bottomed out around 38% to 42%⁸⁹ and a flood of national organizations, religious denominations, and prominent newspapers took a stand against it⁹⁰—abolitionist sentiment continued into the late 1960s and early 1970s despite the public's "law and order" mood.⁹¹ National commissions recommended abolition either outright or if

84. See Walter C. Reckless, *The Use of the Death Penalty: A Factual Statement*, in CAPITAL PUNISHMENT 38, 51 (James A. McCafferty ed., paperback ed. 2010) (charting executions).

85. From 1935 to 1942, courts imposed an average of 142 death sentences per year; by the 1960s, that number had dropped to 106 despite the fact that the number of murders had nearly doubled. Juries in the 1960s were returning death sentences only around 10–20% of the times they were asked to do so, a remarkably low figure considering that death-qualified "hanging juries" were not prohibited until 1968. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 21 (2007).

86. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967) ("[A]ll available data indicate that judges, juries, and governors are becoming increasingly reluctant to impose, or authorize the carrying out of a death sentence."); James A. McCafferty, *Attack on the Death Penalty*, in CAPITAL PUNISHMENT, *supra* note 84, at 225, 226–27 (noting growing opposition to the death penalty among governors, state attorneys general, correctional officers, and wardens); *Signs of an End to "Death Row," supra* note 81, at 38 (noting increasing reluctance to impose the death penalty in recent years and high number of commutations).

87. Although it is tempting to conclude that capital litigation, rather than larger societal trends, was also responsible for the extremely low number of executions in the early 1960s, the timing belies the claim. The NAACP and ALCU, which launched the litigation campaign, did not do so until early 1967. Indeed, the ACLU's stance before 1965 was that capital punishment did not present a civil liberties issue at all. Thus, although these so-called "moral elites" deserve the credit (or blame) for stopping executions entirely, they entered the fray too late to be responsible for the death penalty's dwindling use. See Lain, *supra* note 85, at 22 (discussing NAACP's moratorium strategy, the 1967 Ford Foundation grant that made it possible, and the ACLU's partnership in the campaign).

88. See Lain, *supra* note 85, at 26–31.

89. See GALLUP, *supra* note 43, at 2016; Taylor, *supra* note 74, at 3 tbl.1.

90. See BANNER, *supra* note 71, at 241–42.

91. See *infra* text accompanying note 103 (discussing public-opinion-poll data showing public's concern about crime and lawlessness in late 1960s and early 1970s).

substantial reform did not take place,⁹² lower courts resisted the death penalty,⁹³ and politicians became more willing to speak against it.⁹⁴ President Nixon supported the death penalty, but he did not campaign on the issue in 1968 or 1972.⁹⁵ Indeed, in the 1972 presidential election, the Republican Party platform was conspicuously silent on the death penalty, while the Democratic Party platform that year favored abolishing it.⁹⁶ Even three of *Furman's* four dissenters went out of their way to state their distaste for the death penalty on the merits.⁹⁷ The amicus briefs in *Furman* are equally revealing. Of the dozen organizations that filed briefs in the case, only one defended capital punishment—the rest urged the Court to abolish it.⁹⁸

Finally, the state legislative stance played a part in the mix. Between 1964 and 1969, six states passed legislation ending capital punishment within their borders, a move only one state had made since 1914.⁹⁹ Granted, for every state that chose to abolish capital punishment during this time, many more elected to keep it, and that still left forty death-penalty states in 1972.¹⁰⁰ But of those, five were considered de facto abolition states because their death-penalty statutes were so limited that they were almost never applicable, while another six had death-penalty statutes that were generally applicable but almost never used.¹⁰¹ Of the remaining twenty-nine states, few were actively employing capital punishment at the time, with the exception of one regional variant—the South.

92. See NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT TO THE PRESIDENT AND CONGRESS 311 (1971) (recommending abolition at the federal level); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *supra* note 86 (reporting that "the administration of the death penalty in many States is intolerable" and recommending abolition absent substantial reform).

93. See Lain, *supra* note 85, at 39–41 (discussing decisions by the California Supreme Court, New Jersey Supreme Court, Alabama Court of Appeals, and Fourth Circuit Court of Appeals invalidating the death penalty in whole or in part in the early 1970s).

94. Most, but not all, were lame ducks. See *id.* at 33–34, 38.

95. See *id.* at 38.

96. See DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS 1840–1972, at 809 (1973).

97. See *Furman v. Georgia*, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting) ("If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."); *id.* at 405 (Blackmun, J., dissenting) ("I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . ."); *id.* at 465 (Powell, J., dissenting) ("Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement."). Only then-Justice Rehnquist stood by the death penalty on the merits. See THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 619 (quoting Justice Rehnquist as saying, "As a legislator, I would keep it. I am not torn by the problem and I affirm").

98. See BURT HENSON & ROSS R. OLNEY, *FURMAN V. GEORGIA: THE CONSTITUTION AND THE DEATH PENALTY* 58–61 (1996) (discussing amicus positions in *Furman*); MELTSNER, *supra* note 76, at 255–57 (same); Leonard A. Stevens, *DEATH PENALTY: THE CASE OF LIFE VS. DEATH IN THE UNITED STATES* 112–13 (1978) (same).

99. See Lain, *supra* note 85, at 22–26.

100. See *id.* at 22–23.

101. See *Furman*, 408 U.S. at 298 n.53 (Brennan, J., concurring).

From 1935 to 1967, southern states conducted more executions than all other regions of the United States *combined*, and by the 1950s and 1960s, they alone accounted for nearly two-thirds of the nation's executions.¹⁰² A state count did not show it, but once again, the South was an outlier on the national scene. The country was moving away from capital punishment, leaving the South behind.

All this is to say that if the Supreme Court was wrong about where the country stood on the death penalty in 1972, the Justices at least had good reason for their mistake. Maybe the Justices discounted the polling data because of the "law and order" tenor of the times. After all, the public had named "crime and lawlessness" as the nation's top domestic problem in 1968, and it remained high on the list into the early 1970s¹⁰³—yet despite the country's punitive mood, support for capital punishment could barely muster 50%.¹⁰⁴ Or maybe the Justices discounted the polling data because they did not value John Q. Public's view. This was Justice Marshall's stance; he believed the public was badly misinformed about the death penalty and that if it knew what he did, it would take a dimmer view.¹⁰⁵ Or perhaps the Justices discounted the polling data because of the questions upon which it was based. The polling questions had asked about support for the death penalty in the abstract,¹⁰⁶ but the public's problem with the death penalty was not so much the abstract, but rather how the death penalty was applied¹⁰⁷—and that was the Justices' problem with it too.¹⁰⁸ Whatever the

102. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 30–32 (1986).

103. See GALLUP, *supra* note 43, at 2107 (reporting results of 1968 poll, and noting that crime and lawlessness were mentioned almost twice as often as any other problem); *id.* at 2304–05, 2311, 2324, 2338 (reporting similar results from various polls in 1971); GALLUP, *supra* note 73, at 48, 64 (listing crime and lawlessness as one of the top five most important problems facing the country in 1972).

104. See *supra* notes 73–74 and accompanying text (discussing support for the death penalty in 1970–1972 polls). The point is even stronger when one considers the fact that death-penalty support in the early 1970s was actually four points *lower* than it had been in 1967, when it had spiked 12% in the wake of the highly publicized Robert DeSalvo (the Boston Strangler) trial. See Moore, *supra* note 74, at 25 (reporting death-penalty support for Gallup at 42% in 1966 and 54% in 1967); *CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY* 112 (Bryan Vila & Cynthia Morris eds., 1997) (discussing timing and salience of the DeSalvo case in relation to Gallup's 1967 poll on the death penalty).

105. This is the famous "Marshall Hypothesis" and it has largely proven to be true. See *Furman*, 408 U.S. at 369 (Marshall, J., concurring) ("Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice."); Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 190, 190–207 (Hugo Adam Bedau & Chester M. Pierce eds., 1975) (reporting substantial empirical support for the Marshall Hypothesis).

106. See, e.g., GALLUP, *supra* note 73, at 20 (reporting results for 1972 survey question "Are you in favor of the death penalty for persons convicted of murder?").

107. See, e.g., *Clark Calls for End of Death Penalty*, N.Y. TIMES, July 3, 1968, at 1 (quoting Attorney General Ramsey Clark as stating that "it is the poor, the weak, the ignorant, the hated who are executed" in his request to Congress to abolish the death penalty); *Death Row Survives*, N.Y. TIMES, May 6, 1971, at 42 ("The death penalty is, in practice, inflicted only on the black, the brown and the poor."); *Death Row: A New Kind of Suspense*, NEWSWEEK, Jan. 11, 1971, at 23–24 (noting that "[t]o be sure, disproportionate numbers of blacks are arrested for capital crimes[;] [b]ut that does not suffi-

reason, this much is true: The Justices in *Furman*'s majority saw their ruling in fundamentally majoritarian terms, and the polling data did nothing to shake that view.

Thus far, the discussion has focused on the winds of majoritarian change that were driving the Supreme Court's decision making in *Furman*, but upside-down judicial review is about the not-so-majoritarian features of legislative decision making too. Here again, the upside-down dynamic in *Furman* was explicit. The core claim of the petitioners in *Furman* was that the death-penalty statutes on the books had lost their barometric function as a measure of societal values and that the democratic process was unlikely to fix it. The death penalty was tolerated only because of its sporadic use, petitioners argued, "steriliz[ing] the ordinary political processes that keep . . . legislation reflective of the public conscience."¹⁰⁹ As the talented Anthony Amsterdam explained at oral argument:

[A] penalty can be repudiated by public opinion every bit as thoroughly by legislatures making it optional and nobody's ever applying it as by the legislature's repeal of it It simply falls into disuse. And when it falls into disuse, when there are only a very, very few people and those [are] predominantly poor, black, personally ugly and socially unacceptable, there simply is no pressure on the legislature to take it off.¹¹⁰

A few states had responded to the zeitgeist, but many more had not—and the South, where the death penalty's application was most problematic, probably never would.¹¹¹

ciently explain the inordinately high percentage of Negroes on death row"); *The Administration: Negating the Absolute*, TIME, July 12, 1968, at 17 (noting that the "great majority of those awaiting execution are Negroes" and that "[f]ew well-to-do prisoners are ever executed"); *The Ultimate Question*, NATION, May 17, 1971, at 610 (noting that only "abject, unknown, friendless, poor, rejected specimens of the human race" are sentenced to death and that "the character of the condemned constitutes one of the best arguments for abolition"); see also ELY, *supra* note 12, at 176–77 n.* (describing insistence on procedural regularity in the imposition of death as "something respecting which I have trouble envisioning responsible disagreement").

108. See *Furman*, 408 U.S. at 247 (Douglas, J., concurring); *id.* at 294 (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 364–71 (Marshall, J., concurring); see also *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

109. 73 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 838 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS AND ARGUMENTS]; see also Brief for Petitioner at *6, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027), 1971 WL 134168 ("The penalty remains on the statute books only to be—and because it is—rarely and unusually inflicted."); *id.* at *22–23 ("[T]here is nothing in the political process by which public opinion manifests itself in legislated laws that protects the isolated individual from being cruelly treated by the state. . . . Legislators neither must nor do take account of such individuals.").

110. LANDMARK BRIEFS AND ARGUMENTS, *supra* note 109, at 862.

111. See *id.* at 861, 872; Brief for Petitioner, *supra* note 109, at 38–55; see also Lain, *supra* note 85, at 24–26 (discussing entrenchment of the death penalty in the South and capital punishment's unique legacy there as a tool of racial control).

The Justices bought it. Justice White wrote that the “past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury,” which was refusing to impose death.¹¹² Justice Marshall wrote that the death penalty’s disuse “undercuts the argument that since the legislature is the voice of the people, its retention of capital punishment must represent the will of the people,”¹¹³ concluding instead that “[s]o long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo.”¹¹⁴ Even Justice Powell, who ultimately voted with the dissenters in *Furman*, lamented in conference discussions that “our legislative guardians have abdicated their responsibilities, hoping that this Court would take the problem off of their backs.”¹¹⁵ The dissenting Justices demanded “unambiguous and compelling evidence of legislative default,”¹¹⁶ but the Justices in the majority had heard enough. Justified or not, the majority Justices concluded that the democratic process was broken, once again rendering the Court’s intervention necessary.¹¹⁷

None of this is to deny that the Supreme Court’s decision in *Furman* brought massive backlash that set back the very cause it was intended to promote, a theme I return to in Part III.¹¹⁸ Whether that backlash was sure-fire proof that the Justices had misread public opinion on the death penalty—or whether instead the Justices got it right but unwittingly reversed a majoritarian trend¹¹⁹—is hard to say. For present purposes, it matters not either way. One can disagree with the Justices’ assessments but not with the substance of what those assessments were or the way in which they mattered. The Justices in *Furman* may have gotten the application wrong, but it was clear what they were applying: upside-down judicial review.

112. *Furman*, 408 U.S. at 314 (White, J., concurring).

113. *Id.* at 361 n.145 (Marshall, J., concurring).

114. *Id.* at 366 (Marshall, J., concurring).

115. THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 618; *see also Furman*, 408 U.S. at 465 (Powell, J., dissenting) (“Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness.”).

116. *See Furman*, 408 U.S. at 384 (Burger, C.J., dissenting).

117. *See id.* at 464–65 (Powell, J., dissenting) (“[T]he sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process.”).

118. *See supra* note 71 and accompanying text (discussing backlash to *Furman*); *infra* note 407 and accompanying text (same).

119. Contemporary observers took this view. *See, e.g.,* James Q. Wilson, *The Death Penalty: Is It Useful? Is It Just? Or Is It Only Cruel?*, N.Y. TIMES, Oct. 28, 1973, at 27 (noting that “in a curious way, [*Furman*] has had the opposite effect of what many who favor abolishing the death penalty had hoped” and that “[f]or decades, the death penalty was slowly withering away”); *Death Row Returns*, NATION, Oct. 15, 1973, at 356 (noting that “[f]or two decades up to June 29, 1972, the movement to abolish capital punishment seemed to be making slow but steady progress” and that *Furman* had reversed that trend by causing a “retrogression” of death-penalty support); *Dusting Off “Old Sparky,”* NEWSWEEK, Nov. 29, 1976, at 35 (noting that “[j]ust a decade ago, capital punishment in the U.S. seemed on the way to extinction” and describing *Furman* as “the high-water mark” of the abolition movement, with momentum now going the opposite way).

Years later, in *Democracy and Distrust*, John Hart Ely would describe *Furman* as a classic case of the Supreme Court addressing “failures of representation”—instances where the political process was not likely to be effective because the laws at issue were controlled by the haves but applied almost exclusively against the have-nots.¹²⁰ Ely saw the process side of democratic failure; what he did not see (or at least did not write about) were the majoritarian implications of that failure and the importance of those implications as a trigger for judicial review. The death penalty’s application had always been deeply problematic.¹²¹ So what moved the Court from hands-off to hands-on? For four of *Furman*’s five majority members, the larger sociopolitical context played a pivotal role.¹²² The country had moved on the death penalty, but the legislatures by and large had not, and there was reason to doubt they would do so. As in *Brown*, the democratic process was not working, so the Court became the channel of majoritarian change instead.

C. ROE V. WADE

In terms of the countermajoritarian difficulty, the Supreme Court’s 1973 decision in *Roe v. Wade*¹²³ is like *Brown* and *Furman* on steroids. As in *Furman*, the Supreme Court in *Roe* invalidated virtually every statute on point—here, the abortion laws of forty-six of the fifty states¹²⁴—and provoked a legislative backlash of epic proportions.¹²⁵ But legislative backlash was just the beginning of what others have called “*Roe* Rage.”¹²⁶ Backlash to *Roe* also has been

120. ELY, *supra* note 12, at 177; *see also id.* at 173 (“[I]f the system is constructed so that ‘people like us’ run no realistic risk of such punishment, some nonpolitical check on excessive severity is needed. In 1972 in *Furman v. Georgia*, the Supreme Court, at least a plurality of it, took this underlying theory of the amendment very seriously indeed.”).

121. *See* HUGO ADAM BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 71 (1977) (discussing Clarence Darrow’s efforts to abolish capital punishment in the 1920s).

122. *See supra* notes 75–79 and accompanying text.

123. 410 U.S. 113 (1973).

124. When the Supreme Court decided *Roe*, only four states allowed “abortion on demand” in the first trimester—Alaska, Hawaii, New York, and Washington. *See id.* at 140 n.37. It is worth noting, however, that three of these four states had residency requirements that the Court struck down in *Roe*’s companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), so technically, only one state survived the Court’s 1973 abortion rulings.

125. Between 1973 and 1975, thirty-two states adopted sixty-two abortion statutes, the vast majority of which were designed to undermine *Roe*’s holding. *See* LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 211 (1992); *see also* FRIEDMAN, *supra* note 11, at 298 (“Over the intervening years, states sought to regulate where abortions were performed, how they were performed, when they were performed, what women were told before they obtained abortions, how long women had to wait to get them, and who in addition to the woman had to consent.”); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?*, 185–87 (1991) (discussing flurry of legislative activity to curtail abortion rights in the wake of *Roe*, including proposals for a constitutional amendment in Congress, efforts to ban federal funding of abortions, and state legislation restricting abortion rights).

126. *See, e.g.*, Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

credited with spawning the right-to-life movement,¹²⁷ inspiring the formation of the Moral Majority,¹²⁸ and ultimately ushering Ronald Reagan (and his conservative revolution) into the White House.¹²⁹ Moreover, the conventional understanding of *Roe* is that it crowded out legislative reform moving in the same direction, perversely shutting down a political process that had just begun.¹³⁰ It should come as no surprise that Robert Bork considers *Roe* “the greatest example and symbol of the judicial usurpation of democratic prerogatives in this century,”¹³¹ or that the decision stands as one of history’s most famous examples of countermajoritarian judicial review.¹³² Like *Brown*, it is hard to imagine a case study of the countermajoritarian difficulty that does not include *Roe v. Wade*.

Yet once again, placing *Roe* in historical context turns the conventional understanding of the decision on its head. A few scholars have viewed *Roe* as a majoritarian decision,¹³³ a few have viewed it as a response to legislative dysfunction,¹³⁴ and a few have viewed it as both, albeit implicitly or in

127. See, e.g., Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 *FORDHAM L. REV.* 1739, 1751 (1997) (describing the conventional understanding of *Roe v. Wade* as “spawn[ing] a right-to-life opposition which did not previously exist”); Cynthia Gorney, *Imagine a Nation Without Roe v. Wade*, *N.Y. TIMES*, Feb. 27, 2005, <http://www.nytimes.com/2005/02/27/weekinreview/27gorn.html> (“Indeed, *Roe* created the national right-to-life movement, forging a powerful instant alliance among what had been scores of scattered local opposition groups.”).

128. See, e.g., FRIEDMAN, *supra* note 11, at 305 (noting that *Roe* “stirred a sleeping behemoth, what became known as the Religious Right” and discussing Jerry Falwell’s efforts to organize conservatives for political action as the Moral Majority in 1978); Post & Siegel, *supra* note 126, at 374 (noting general belief that *Roe* “gave birth to the New Right”); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 *CALIF. L. REV.* 751, 766 (1991) (“[T]he decision [in *Roe*] may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women’s movement by spurring opposition and demobilizing potential adherents.”).

129. See, e.g., Balkin, *supra* note 35, at 1560 (“*Roe* energized social and religious conservatives who eventually reshaped the Republican Party and helped elect Ronald Reagan to the Presidency.”).

130. See Eskridge, *supra* note 55, at 519 (“[A] standard critique of *Roe v. Wade* is that it was not only countermajoritarian, but that it preempted the normal operation of politics, which was in the process of reforming or repealing abortion laws state by state.”); Post & Siegel, *supra* note 126, at 377 (“Conventional legal scholarship has it that *Roe*’s rage was a response to judicial overreaching and that legislative reform might have liberalized access to abortion without backlash if only the Court had stayed its hand.”).

131. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 116 (1990).

132. See David R. Dow et al., *Judicial Activism on the Rehnquist Court: An Empirical Assessment*, 23 *ST. JOHN’S J. LEGAL COMMENT.* 35, 39 (2008) (describing *Roe* as “perhaps the most famous example in constitutional history” of the Justices “thwart[ing] the will of the majority by imposing their own beliefs on the populace”); Trevor W. Morrison, *Lamenting Lochner’s Loss: Randy Barnett’s Case for a Libertarian Constitution*, 90 *CORNELL L. REV.* 839, 840 (2005) (book review) (citing *Roe* as one of two “paradigm cases of a countermajoritarian judicial activism”).

133. See, e.g., FRIEDMAN, *supra* note 11, at 297; ROSENBERG, *supra* note 125, at 182; Balkin, *supra* note 35, at 1544–45; Klarman, *supra* note 31, at 10–11.

134. See, e.g., Mark A. Graber, *Constructing Judicial Review*, 8 *ANN. REV. POL. SCI.* 425, 447 (2005); see also *infra* notes 188–90 and accompanying text (discussing Mark Graber’s use of *Roe* as an example of legislative deferral).

passing.¹³⁵ But the commentary thus far has yet to provide a focused account of the upside-down dynamic at issue in *Roe* or to appreciate the implications of that account for the countermajoritarian difficulty and our broader understanding of judicial review. Rather than a Supreme Court thwarting majority will, *Roe* shows a Supreme Court vindicating it—again responding to, and reflecting, deep shifts in public opinion when change through the democratic process was blocked.

What suggests *Roe* was majoritarian? Public-opinion-poll data provide one indication, as a number of polls specifically asked about support for elective abortions in the 1960s and early 1970s. Gallup's August 1972 poll, six months before *Roe* was decided, showed that 64% of the public supported abortion as a matter of personal choice.¹³⁶ A similar poll six months earlier showed 57% support,¹³⁷ while other polls likewise showed majority support for elective abortions in the early 1970s.¹³⁸ Polling data from the 1960s confirms a decade-long, strong majoritarian trend. From the early 1960s to January 1973, when *Roe* was decided, public support for the prochoice position rose thirty points.¹³⁹ The Justices were not oblivious to these developments. Justice Blackmun, author of *Roe*, had a 1972 *Washington Post* clipping on the record-high support for elective abortions in his *Roe* file.¹⁴⁰

As in *Brown* and *Furman*, understanding the polling data in *Roe* requires understanding the larger historical context in which it was gathered. Here, that context starts a decade earlier, in the 1960s. Coming into the 1960s, abortion was illegal in every state with a few limited exceptions, mostly where the mother's life was at stake.¹⁴¹ A Thalidomide scare in 1962 and a rubella (German measles) epidemic from 1962 to 1965 brought these statutory prohibi-

135. David Garrow, in his exhaustive thousand-page historical account of the road to *Roe*, *could have made the argument I do here*, but he did not (although he documented it plenty and I rely heavily on his work). See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994). See also NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 4* (1996) (noting that “‘imperfections in the political marketplace,’ in the form of intense pro-life lobbying . . . ‘thwart[ed] the vindication of majority preferences’” (some alterations in original) (quoting Sullivan, *infra*)); Kathleen M. Sullivan, *Law's Labors*, *NEW REPUBLIC*, May 23, 1994, at 42 (reviewing Garrow's book).

136. See GALLUP, *supra* note 73, at 54 (reporting public response to the statement, “The decision to have an abortion should be made solely by a woman and her physician.”). See also GARROW, *supra* note 135, at 562 (discussing August 1972 poll and contemporary commentary predicting that trend in favor of abortion on demand would continue).

137. See GARROW, *supra* note 135, at 562 (discussing January 1972 poll).

138. See ROSENBERG, *supra* note 125, at 260–62 (discussing polling data).

139. See David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 *J. POL.* 652, 659 (1985) (charting public support for legalized abortion in the eight-year period preceding *Roe*).

140. See FRIEDMAN, *supra* note 11, at 297; George Gallup, *Abortion Seen Up to Woman, Doctor*, *WASH. POST*, Aug. 26, 1972, at A2. In 1972, the record-high support for elective abortions made the front page of the *New York Times* as well. See Jack Rosenthal, *Survey Finds Majority, in Shift, Now Favors Liberalized Laws*, *N.Y. TIMES*, Aug. 24, 1972, at 1.

141. See *Roe v. Wade*, 410 U.S. 113, 139 (1973).

tions—which had been passed in the mid- to late-1800s¹⁴²—into the public discourse as tens of thousands of women sought abortions to avoid the prospect of babies with profound birth defects.¹⁴³ From rubella alone, over 2,000 babies died in early infancy during this time, and another 15,000 were born deaf, blind, or mentally disabled.¹⁴⁴

The law gave way. By the mid-1960s, existing abortion statutes were “widely and flagrantly violated,”¹⁴⁵ and the problem was no longer just their inadequacy—it was their uneven application as well. Well-to-do women went to doctors for abortions; for those with connections, clout, or plenty of cash, the law was malleable.¹⁴⁶ Those without such advantages went to back-alley abortionists or performed the abortion themselves,¹⁴⁷ resulting in 500–1,000 abortion-related deaths annually.¹⁴⁸ In the midst of the civil rights movement and war on poverty, this state of affairs struck many as particularly unjust—the country was rejecting inequalities based on class and race, and access to abortion appeared to rest on those very distinctions.¹⁴⁹ Abortion laws by the mid-1960s were consid-

142. See DEVINS, *supra* note 135, at 58 (discussing history of antiabortion statutes).

143. See GARROW, *supra* note 135, at 285–91, 300–01.

144. *Public Health Burden of Rubella and CRS*, EPI NEWSL., Aug. 1998, at 2–3, available at <http://www.paho.org/english/ad/fch/im/sne2004.pdf>. Contemporary accounts pegged the numbers even higher. See Albert Q. Maisel, *The Growing Battle over Abortion Reform*, READER'S DIG., June 1969, at 153 (“[P]erhaps as many as 30,000 infants were born dead or died in early infancy, and more than 20,000 others suffered major abnormalities.”).

145. Maisel, *supra* note 144, at 152; see also *The Desperate Dilemma of Abortion*, TIME, Oct. 13, 1967, at 42 (noting that abortion prohibitions are “flouted throughout the country—in the same pattern, though not in the same numbers, as Prohibition was decades ago”); *Progress Report on Liberalized Abortion*, TIME, Nov. 15, 1968, at 89 (noting the “patent, wholesale flouting of old punitive laws” prohibiting abortion).

146. See *Abortion and the Law*, NEWSWEEK, Dec. 2, 1968, at 82 (“[L]egal abortions are largely for the rich.”); Phil Kerby, *Abortion: Laws and Attitudes*, NATION, June 12, 1967, at 755 (“[A]bortions are performed in American hospitals for reasons other than to protect the life of the mother. The law is broken to accommodate the well to do.”).

147. See *The Desperate Dilemma of Abortion*, *supra* note 145 (“Equally sobering are the slum women who cannot afford even amateurs and do it themselves with hatpins, coat hangers and putrid soap solutions, which are often followed by lethal infection.”); Linda Greenhouse, *After July 1, an Abortion Should Be as Simple To Have as a Tonsillectomy, but—*, N.Y. TIMES MAG., June 28, 1970, at 34 (noting “the gap between rich and poor, which has always meant the difference between a relatively safe or frightfully dangerous illegal abortion”); *Respect for Privacy*, N.Y. TIMES, Jan. 24, 1973, at 40 (“The effect of these [antiabortion] laws has been to force women, especially the young and the poor, to resort to abortion mills instead of expert hospital care when they are determined not to have an unwanted child.”); see also *Abortion on Demand*, TIME, Jan. 29, 1973 (“Proponents of abortion argue that anti-abortion laws not only abridge women’s rights but abridge them unequally.”).

148. See *Abortion and the Changing Law*, NEWSWEEK, Apr. 13, 1970, at 53, 54 (noting that illegal abortion operations “take an estimated 500 to 1,000 lives each year, making them a major cause of maternal mortality in the nation. . . . The toll, not surprisingly, is highest among the poor and disadvantaged”).

149. See FRIEDMAN, *supra* note 11, at 297 (quoting commentator in mid-1960s as lamenting the fact that poor and minority groups were “forced into the underworld of abortion, into the grasp of hacks and butchers”).

ered “archaic” and “badly out of step with life.”¹⁵⁰ Pressure mounted to change them.

Back in 1962, the American Law Institute (ALI) had promulgated a Model Penal Code provision that expanded the circumstances under which a woman could get an abortion,¹⁵¹ and in 1967, state legislatures began adopting it. Between 1967 and 1969, fourteen states passed reform statutes based on the ALI’s model, allowing “therapeutic” abortions in cases of rape, incest, birth defects, and where the mother’s physical or mental health was seriously threatened.¹⁵²

But the push to pass such measures was short lived. Although the reform statutes did liberalize legal abortions somewhat, it quickly became apparent that they were too narrowly drawn to come anywhere close to meeting the demands of existing abortion practice. By the late 1960s, most women were having abortions for reasons not covered by the reform statutes, leaving the vast majority of illegal abortions untouched.¹⁵³ “[S]tacked up against the million or more criminal abortions, the aggregate of therapeutic abortions makes an imperceptible dent,” wrote one commentator.¹⁵⁴ Across the country, others agreed.¹⁵⁵ The passage of reform statutes had simply revealed their inadequacy, shifting the national discourse from reforming abortion restrictions to repealing them altogether.¹⁵⁶ The legislatures had moved, but the public had moved faster—the reform statutes were old even when they were new.

150. *The Desperate Dilemma of Abortion*, *supra* note 145, at 42 (“The way to deal with the problem forthrightly is on terms that permit the individual, guided by conscience and intelligence, to make a choice unhampered by archaic and hypocritical concepts and statutes.”); Editorial, *New Proposals on Abortion*, LIFE, Mar. 3, 1967, at 4 (noting that proposed bills to permit therapeutic abortions “reflect a conviction that present laws are badly out of step with life”); *see also* THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 806 (quoting Chief Justice Burger in conference discussions on *Roe* as describing the Texas statute at issue as “certainly archaic and obsolete”).

151. *See* MODEL PENAL CODE § 230.3(2) (1962) (“Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse.”).

152. *See* *Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973) (noting that “[f]ourteen states have adopted some form of the ALI statute” and listing those statutes); *see also* GARROW, *supra* note 135, at 335–88 (providing detailed account of the legislative reform movement from 1967 to 1969).

153. *See* ROSEMARY NOSSIFF, *BEFORE ROE: ABORTION POLICY IN THE STATES* 43 (2001).

154. Theodore Irwin, *The New Abortion Laws: How Are They Working?*, TODAY’S HEALTH, Mar. 1970, at 80.

155. *See, e.g., Abortion and the Changing Law*, *supra* note 148, at 56 (“But many reformers believe that the new laws don’t go far enough in answering the needs of U.S. women. For one thing, they have made only a small dent in the number of illegal out-of-hospital abortions performed.”); *Abortion Reform*, TIME, Apr. 20, 1970, at 62 (“Even so, the new laws have hardly made an appreciable dent in the number of illegal abortions, estimated to be as high as 1,500,000 annually.”); Irwin, *supra* note 154, at 22 (quoting doctor as stating “The Law’s effect on criminal abortion is just a drop in the bucket”); *Progress Report on Liberalized Abortion*, *supra* note 145, at 89 (“In fact, the increase in numbers has been too small even to make an appreciable dent in the number of illegal, dangerously septic abortions, as some proponents of the laws had hoped they would.”).

156. *See* GARROW, *supra* note 135, at 342, 349.

By 1970, yet another force was pushing the country towards the prochoice position on abortion: the ascendant women's rights movement.¹⁵⁷ It is difficult to overestimate the impact of the women's rights movement in *Roe*, just as it is difficult to overestimate the impact of the Cold War in *Brown*.¹⁵⁸ On the eve of *Roe*, the women's rights movement was a powerful engine of majoritarian change. Congress had just passed "a bumper crop of women's rights legislation—considerably more than the sum total of all relevant legislation that had been previously passed in the history of this country,"¹⁵⁹ and the Equal Rights Amendment was well on its way towards ratification (or so it seemed).¹⁶⁰ For many feminists, access to abortion was not a matter of how poorly the reform statutes were working; it was a matter of principle.¹⁶¹ No woman should have to convince a panel of men that she ought to be allowed to have an abortion, they argued.¹⁶² The decision to abort, like the decision to use contraceptives, was an essential component of a woman's reproductive autonomy,¹⁶³ and the state needed to "keep its cotton-pickin' hands" out of it.¹⁶⁴ "Probably no other issue is so critical for women today," *Redbook* printed in 1971, "[t]he right to equality in jobs, educational opportunity and pay, or simply the right of a housewife to develop her individual potential, all pivot around her right of choice in childbearing through contraception and abortion."¹⁶⁵ For many in the wake of the sexual revolution, women's rights meant the right to abortion too.

In the early 1970s, these forces combined to create strong, widespread support for abortion as a matter of choice. Some seventy-five national organiza-

157. For an excellent discussion of the women's rights movement and its relationship to the abortion debate, see FRIEDMAN, *supra* note 11, at 290–96; NOSSIFF, *supra* note 153, at 56–76; and ROSENBERG, *supra* note 125, at 202–46.

158. See *supra* note 54.

159. JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS* 202 (1975).

160. See H.R. J. Res. 208, 92d Cong. (as passed by House, Oct. 12, 1971) ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."). At the time, it was widely anticipated that the ERA would be quickly ratified; thirty states had signed on in the first year. See FRIEDMAN, *supra* note 11, at 292. But it was not meant to be. See Marjorie Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. TIMES, June 25, 1982, at A13 (noting that the ERA was ratified by thirty-five states, three short of the number necessary for ratification).

161. See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 140 (1990).

162. See GARROW, *supra* note 135, at 456 (quoting one scholar as arguing that "[t]he goal of a permissive law . . . should be that of removing the necessity that a woman convince others, who in effect thus sit in judgment upon her, that she ought to be allowed to have an abortion"); Kerby, *supra* note 146, at 756 (quoting one woman's reference to an "underground of resentment among married women who find it dreadful, under such circumstances, to be brought before a panel of men for judgment" and another woman as stating, "For a state to force a woman to bear a child against her will is outrageous.").

163. In 1967, the National Organization for Women (NOW) adopted a "Bill of Rights" that included "[t]he right of women to control their own reproductive lives by removing from the penal codes laws limiting access to contraceptive information and devices and by repealing penal laws governing abortion." See EPSTEIN & KOBYLKA, *supra* note 125, at 146 (alteration in original) (discussing and quoting NOW's Bill of Rights provision on reproductive freedom).

164. Shana Alexander, *The Politics of Abortion*, NEWSWEEK, Oct. 2, 1972, at 29.

165. Lawrence Lader, *A Guide to Abortion Laws in the United States*, REDBOOK, June 1971, at 56.

tions endorsed the repeal of existing abortion laws by 1972, including the American Bar Association, two presidential advisory commissions, and dozens of prominent, mainstream religious and medical associations.¹⁶⁶ The conservative American Medical Association, which endorsed abortion-reform statutes in 1967 (its first policy change on the issue since 1871) changed its position again a mere three years later, moving to a repeal stance in 1970.¹⁶⁷ Also taking a repeal stance was the Uniform Abortion Act of 1971.¹⁶⁸ The national media was likewise strongly supportive of the prochoice position, and gave the abortion issue substantial attention during this time.¹⁶⁹ Whether these elites were following larger shifts in public opinion, or leading the way, is hard to say.¹⁷⁰ Support for elective abortions in the early 1970s was not a matter of public opinion versus elite opinion. In *Roe*, the Supreme Court had both.

In 1970, legislatures once again responded to shifting public opinion on the abortion issue. Four states repealed their abortion statutes that year, and no state chose the reform route instead.¹⁷¹ Where, then, was the legislative failure?

The answer lies in the emergence of a powerful right-to-life lobby following the slew of abortion-reform legislative victories from 1967 to 1969. The official position of the Catholic Church was that abortion was murder,¹⁷² and as reform bills gained momentum, a Catholic-led lobby arose to vigorously oppose all progressive abortion legislation.¹⁷³ In the two years preceding *Roe*, it was wildly successful. Despite strong majority support for abortion-repeal measures, none passed in 1971 or 1972.¹⁷⁴

166. See Balkin, *supra* note 35, at 1545; see also EPSTEIN & KOBYLKA, *supra* note 125, at 187 (listing prominent examples); ROSENBERG, *supra* note 125, at 183–84; *Free Abortions for All?*, TIME, Mar. 27, 1972, at 71 (same); Maisel, *supra* note 144, at 158 (same).

167. See *Roe v. Wade*, 410 U.S. 113, 141–44 (1973) (discussing evolution of AMA position); see also *Abortion Law Reform*, EDITORIAL RES. REP., July 24, 1970, at 9 (describing AMA's change of position in 1970 as "surprising in light of the association's over-all conservatism").

168. See UNIF. ABORTION ACT (1971).

169. See EPSTEIN & KOBYLKA, *supra* note 125, at 147, 150 (examining media coverage of abortion in the *Readers' Guide to Periodical Literature* and other indices from 1965 to 1973); ROSENBERG, *supra* note 125, at 229–34 (documenting and discussing media coverage on abortion from 1970 to 1972).

170. See ROSENBERG, *supra* note 125, at 260 (considering both possibilities).

171. See *id.* at 262–63; EPSTEIN & KOBYLKA, *supra* note 125, at 151–54.

172. See Second Vatican Ecumenical Council, Pastoral Constitution on the Church in the Modern World (Dec. 6, 1965) § 51, reprinted in THE DOCUMENTS OF VATICAN II 199, 256 (Walter M. Abbott, S.J. ed., Very Rev. Msgr. Joseph Gallagher trans., 1966) ("[F]rom the moment of its conception life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes."); see also Post & Siegel, *supra* note 126, at 412 n.194 (discussing Pope Paul VI's issuance of *Humanae Vitae* in 1968, reaffirming the Catholic Church's longstanding opposition to artificial contraception and abortion). Many Catholics at the time disagreed with this view. Indeed, both of Gallup's 1972 public-opinion polls showed majority support for elective abortions not only among the general public, but among Catholics as well. See *supra* notes 136–37 (citing polls).

173. For news coverage of the emergence, and rise, of the Catholic Church's antiabortion lobby, see, for example, *The Anti-Abortion Lobby*, COMMONWEAL, May 1, 1970, at 154; *The Anti-Abortion Campaign*, TIME, Mar. 29, 1971, at 92; *Fathers and Sons*, NEWSWEEK, Apr. 20, 1970, at 77; *The Rights & Wrongs of Abortion*, TIME, Feb. 10, 1967, at 49.

174. See EPSTEIN & KOBYLKA, *supra* note 125, at 151–53 ("Yet by 1970 it became apparent that pro-choice forces had reached an impasse; no other states were willing to repeal their restrictive laws")

Many attributed the lobby's success to the means by which the prolife message was delivered. Legislators recounted stories of being confronted with grisly pictures and aborted fetuses in jars,¹⁷⁵ picketed wherever they went,¹⁷⁶ denounced in their churches,¹⁷⁷ lobbied in their homes,¹⁷⁸ and threatened with excommunication, political payback, or both.¹⁷⁹ The problem, as one state legislator explained, was not opposition to the repeal of abortion restrictions on the merits—"It's the political repercussions they fear from the Catholic opposition. Minorities, if they are militant enough, and determined enough, can stop things."¹⁸⁰ And they did.

Across the country, the right-to-life lobby made its mark on the legislative process. In Washington State, a repeal referendum bill was the most the legislature was willing to pass, leaving voters to rescind the state's abortion statute themselves (which they did).¹⁸¹ In Michigan, polls showed public support for repeal at 59%, yet when pro-life activists mobilized with photos of

mostly because "by 1970 serious organized opposition to pro-choice forces began to emerge."); GARROW, *supra* note 135, at 578 (noting that by 1972 "[a]nti-abortion forces now had repeal advocates badly outgunned despite the countervailing national public opinion poll numbers").

175. See, e.g., *The Anti-Abortion Campaign*, *supra* note 173 (discussing methods of antiabortion campaign, noting that "[o]ften there is picketing and a dramatic—to some, shocking—display" and recounting instances of abortion foes carrying bags of aborted fetuses and showing up with a fetus in a bottle); Fred C. Shapiro, "Right to Life" Has a Message for New York State Legislators, N.Y. TIMES MAG., Aug. 20, 1972, at 36–38 (discussing antiabortion organization's use of photographs, film strips, and posters in lobbying campaign); see also EPSTEIN & KOBYLKA, *supra* note 125, at 154 (discussing strategies of right-to-life movement and concluding, "These strategies proved effective—every time a state legislature considered reform or repeal in the early 1970s, pro-lifers turned up with their literature and pictures. Wherever they went, the laws were defeated" (citation omitted)).

176. See Shapiro, *supra* note 175, at 10, 38 (relaying story of how one legislator was targeted, and quoting antiabortion advocate as saying, "We got together a group of women to picket him wherever he went on his campaign, telling everybody who came to hear him that [he] was proabortion.").

177. See *The Anti-Abortion Lobby*, *supra* note 173, at 154 ("Objection, of course, was not to the fact or purpose of the lobbying, but to the methods employed. A Brooklyn assemblyman, who favored abortion reform, resentfully heard himself described as a 'murderer' from the pulpit, as his young daughter sat beside him in church."); *id.* (quoting another assemblyman as stating, "My church saw fit to have my name called as one who had acted improperly. . . . [a]nd had it printed in the parish newspaper.").

178. See *Backlash on Abortion*, NEWSWEEK, May 22, 1972, at 32 (reporting on lawmakers "besieged in the corridors of the capitol and lobbied at their homes and offices" by abortion opponents).

179. See *The Anti-Abortion Campaign*, *supra* note 173, at 72 (discussing Catholic Bishops' warning to those in the medical profession that "participation in an abortion would earn them automatic excommunication"); Shapiro, *supra* note 175, at 38 (quoting one state legislator as saying he was told, "If you don't stand with us on the abortion law, we'll have your scalp.").

180. GARROW, *supra* note 135, at 369 (quoting state legislator); see also *id.* at 491 (quoting another state legislator as saying that "the overwhelming feeling in the Senate is for the [abortion reform] bill philosophically, but politically it's a different matter").

181. See GARROW, *supra* note 135, at 371, 411, 465–66 (recounting details of Washington State's repeal of abortion restrictions in 1970 by popular referendum); see also *Abortion: How It's Working*, NEWSWEEK, July 19, 1971, at 52 ("In the state of Washington last year, anti-abortion groups campaigned so vociferously that an intimidated legislature decided to duck the abortion issue and put it directly into the hands of the voters.").

aborted fetuses, not even a repeal by popular referendum was passable.¹⁸² And in New York, where support for elective abortions was over 60%, only the governor's veto saved the state's 1970 repeal of abortion restrictions from itself being repealed.¹⁸³ Justifying his veto, the governor stated,

[T]he extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reform represented the will of a majority of the people of New York State. . . . I do not believe it right for one group to impose its vision of morality on an entire society.¹⁸⁴

Others echoed this sentiment, lamenting the Catholic Church's success in preventing "popular will from being expressed in law."¹⁸⁵

In short, the state legislative stance on abortion in the early 1970s was more a testament to the power of an intensely committed right-to-life lobby than a reflection of majority will. So viewed, *Roe* is a striking example not of the countermajoritarian difficulty, but of the key insight of public-choice theory—determined minorities can thwart majority preferences.¹⁸⁶ With legislation at an impasse, abortion policy in the United States was the worst of both worlds—prochoice advocates lacked the votes necessary to repeal existing abortion restrictions, while prolife advocates lacked the support necessary to

182. See GARROW, *supra* note 135, at 562–63, 567, 576–77 (discussing Michigan's failure to repeal abortion restrictions by popular referendum and role played by antiabortion activists); TRIBE, *supra* note 161, at 50 (same); see also Sullivan, *supra* note 135, at 43 ("A grassroots anti-abortion campaign in Michigan succeeded in stopping a referendum in 1972 seeking the repeal of abortion laws. Photos of aborted fetuses proved an effective tactic in the campaign.")

183. See GARROW, *supra* note 135, at 546–47 (discussing near repeal of New York's prochoice statute).

184. Shapiro, *supra* note 175, at 40 (quoting New York Governor Rockefeller).

185. *Should Abortion Laws Be Liberalized?*, GOOD HOUSEKEEPING, Mar. 1970, at 92, 262 (quoting abortion repeal advocate); see also Maisel, *supra* note 144, at 157 (quoting sponsor of abortion reform bill as saying, "We are not telling Catholics they have to get abortions. We're only asking them not to dictate to the rest of the population what they can and cannot do."); Richard J. Neuhaus, *Figures & Fetuses*, COMMONWEAL, Nov. 24, 1972, at 175, 178 (quoting antiabortion advocate lamenting the claim by "pro-abortion forces" that "a small and sinister minority of clerical minions is trying to overthrow the will of the overwhelming majority").

186. In her review of David Garrow's book, Professor Kathleen Sullivan made this point explicitly, writing in the *New Republic*:

By 1972, spearheaded by the Catholic leadership, 'anti-abortion forces had repeal advocates badly outgunned despite the countervailing national public opinion poll numbers.' . . . The reason is that, as public choice theorists have long argued, imperfections in the political market may thwart the vindication of even majority preferences. . . . Garrow convincingly depicts the legislative success of the Catholic Church leadership and its disciplined parishioners as a textbook case of this phenomenon.

Sullivan, *supra* note 135, at 43–44; see also DEVINS, *supra* note 135, at 62–63 ("The methodology of the pro-life movement was simple: intensity of interest—particularly at early stages of the political process—is more powerful than majority sentiments.").

enforce them.¹⁸⁷ The cogs of democratic change were stuck.

This, in turn, gave rise to a second layer of democratic dysfunction in *Roe*. In his influential work on legislative deferrals, Mark Graber presents *Roe* as a textbook case of what political scientists call “displacement of conflict” theory: When politicians find it too costly to take a stand one way or the other, the stand they *most* prefer to take is no stand at all.¹⁸⁸ In *Roe* and other cases, Graber writes, “the justices cannot be criticized (or praised) for defeating the will of the legislature; the will of the legislature in each instance was that the justices take the responsibility for deciding what policy should be the law of the land.”¹⁸⁹ By this view, the Justices are not thwarting legislative policy preferences by deciding an issue, but vindicating them.

Contemporary accounts suggest Graber is right in recognizing this dynamic in *Roe*. A number of politicians at the time confided that they wished the Supreme Court would take the abortion issue off their hands.¹⁹⁰ As Republican Senator Bob Packwood shared in 1971, “[M]ost of the legislators in the nation I have met and certainly many members of Congress would prefer the Supreme Court to legalize abortion, thereby taking them off the hook and relieving them of the responsibility for decision-making.”¹⁹¹ In this regard, one *New York Times* headline seemingly said it all: “Opponents of the Abortion Law Gather Strength in Legislature, but Many Lawmakers Would Prefer To Let the Courts Settle Controversy.”¹⁹² Surveying the political scene in the wake of *Roe*, John Hart Ely wrote that the Court’s ruling brought “sighs of relief as this particular

187. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 55 (1993); CRAIG & O'BRIEN, *supra* note 70, at 42.

188. See Graber, *supra* note 187, at 53–61. For a general discussion of displacement-of-conflict theory, see generally Michael McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives*, in *THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST PERSPECTIVES* 63, 70 (Howard Gillman & Cornell Clayton eds., 1999).

189. Graber, *supra* note 187, at 46.

190. See *id.* at 55–56 (“Two studies of abortion politics indicate that by the end of the sixties, politicians in many states were eager to have the judiciary remove that divisive issue from electoral politics.”); SILVERSTEIN, *supra* note 63, at 114 (noting an unwillingness among state legislators in 1970 “to become embroiled in the issue” and quoting one assemblyman as saying, “[I]f the courts could solve the problem it would be both preferable and faster”); GARROW, *supra* note 135, at 491 (quoting state senator as saying, “Some members of the Legislature would love to have the Supreme Court decide this for us.”); see also Keith Monroe, *How California's Abortion Law Isn't Working*, *N.Y. TIMES MAG.*, Dec. 29, 1968, at 20 (quoting contemporary observer as predicting that “progress in abortion will follow the same course as progress in birth control: the public will insist, the states will hesitate and the court—ultimately—will command.”).

191. SILVERSTEIN, *supra* note 63, at 114 (quoting Senator Bob Packwood).

192. William E. Farrell, *Opponents of the Abortion Law Gather Strength in Legislature, but Many Lawmakers Would Prefer To Let the Courts Settle Controversy*, *N.Y. TIMES*, Jan. 26, 1970, at 19. Although not discussed in Graber’s case study, the same dynamic could be said to characterize the executive branch during this time—in the 1972 presidential election, both candidates avoided the abortion issue as much as possible and took a decidedly ambiguous stance. See EPSTEIN & KOBYLKA, *supra* note 125, at 187–88; ROSENBERG, *supra* note 125, at 183.

albatross was cut from the legislative and executive necks.”¹⁹³ The Supreme Court in *Roe* had indeed taken an issue from the legislature—but it was not an issue that the legislature wanted to keep.

How much these legislative dynamics mattered to the Supreme Court in *Roe* is hard to say; the Court’s deliberations and opinion turned on the state interests supporting existing abortion restrictions, not democratic dysfunction.¹⁹⁴ Yet it is unlikely that the Justices were oblivious to the prolife lobby and legislative calls for help in light of the attention they received in the popular press.¹⁹⁵ And democratic dysfunction may help explain why *Roe* was a 7–2 decision supported by three of Nixon’s four self-avowed supporters of judicial restraint, including Chief Justice Burger himself.¹⁹⁶ Given the majoritarian winds pushing the Court and the legislative dynamics at work, Justice Blackmun had it exactly right: “*Roe against Wade* was not such a revolutionary opinion at the time.”¹⁹⁷

None of this is to deny the massive backlash following *Roe*, but it does provide a few things to say about it. First, it is not the case, as conventional wisdom would have it, that *Roe* short-circuited legislative efforts moving in the same direction.¹⁹⁸ *Roe* did not kill legislative reform—by 1973, it was already dead.¹⁹⁹ Second, this is not to deny that *Roe* had a deleterious effect on the prochoice movement; it did. In the aftermath of *Roe*, prolife advocates rallied against the Supreme Court’s decision while prochoice advocates, content to rest under the cloak of judicial protection, went home.²⁰⁰ That leads to a third, and largely overlooked point: The abortion laws passed in the immediate aftermath of

193. Ely, *supra* note 28 at 947; see also Graber, *supra* note 187, at 56 (noting that “most elected officials were privately pleased” when the Court issued its *Roe* ruling).

194. See *Roe v. Wade*, 410 U.S. 113, 147–52 (1973); THE SUPREME COURT IN CONFERENCE, *supra* note 33, at 804–13.

195. See *supra* notes 173, 175–79, 190–92, and accompanying text.

196. See *Roe*, 410 U.S. at 113. The irony was not lost upon those who remembered President Nixon’s pledge to appoint justices committed to judicial restraint. See George Will, “*Strict Construction*”: An Interpretation, WASH. POST, Mar. 2, 1973, at A18.

197. See GARROW, *supra* note 135, at 599 (quoting Justice Blackmun). See also Balkin, *supra* note 35, at 1545 (noting that in light of its larger context, “*Roe* does not seem all that surprising”).

198. See *supra* note 130 and accompanying text.

199. I am not the first to recognize this point, although it remains underappreciated in the legal academy. See GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 227–28 (2005) (“The state-level reform process had exhausted itself . . . Given how often claims about the need for ‘judicial restraint’ have *Roe* in mind, it is striking how incorrect are the empirical assertions that often form the basis of such a critique of *Roe*.”). For a fascinating account of post-*Roe* backlash as the fruition of a conservative strategy that began *before Roe* to bring about party realignment, see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

200. See CRAIG & O’BRIEN, *supra* note 70, at 43 (“Following *Roe*, individuals and groups that had participated in the crusade to legalize abortion turned to other concerns . . . [As] one leader explained the problem: ‘It is hard to get people whipped up when the “law” reflects your perspective.’ With the highest court in the land behind them, supporters thought they had little to fear.” (footnote omitted)); EPSTEIN & KOBYLKA, *supra* note 125, at 205–07 (quoting prochoice advocate as saying, “Too many of us thought we had won the fight with *Roe v. Wade* and went on to other issues, or just went home.”); FRIEDMAN, *supra* note 11, at 298 (“Pro-life advocates, caught off guard, began quickly to organize. (On the other hand, the pro-choice forces were lulled into quiescence).”).

Roe may well have been, like those before it, a poor proxy for majority will. Public-opinion-poll data supports this assessment; after *Roe*, a solid majority of the public continued to support liberalized access to abortion, despite the plethora of restrictions passed in *Roe's* wake.²⁰¹

In sum, *Roe* provides yet another intriguing example of the Supreme Court effectuating majoritarian change when the representative branches would not. Few people supported the century-old, draconian abortion statutes that were principally at issue in *Roe*, and even the more recently adopted reform statutes had lost public support by 1973. Public opinion on abortion had moved faster than legislative reform, which after 1970 had stopped moving altogether. In the end, the Court's decision in *Roe* only *looks* countermajoritarian because the ostensibly majoritarian branches *weren't*.

Writing in the 1960s, Archibald Cox observed, "[I]f one arm of government cannot or will not solve an insistent problem, the pressure falls upon another."²⁰² *Brown*, *Furman*, and *Roe* provide rich examples of this phenomenon. In each case, legislative logjams left the Court better able to effectuate majoritarian change than the democratic branches ostensibly designed for that very purpose. The question then becomes whether the upside-down dynamic at work in those cases has continued relevance today.

II. EXPLAINING THE UPSIDE-DOWN DYNAMIC

Scholars have long recognized that the democratic branches are less majoritarian than commonly assumed, and the Supreme Court more.²⁰³ But this nuance has not altered what has long stood as a pillar of truth: Between the two, the democratic branches reflect majority will *better*.²⁰⁴ As Larry Kramer put the point, "Legislatures do not perfectly mirror or translate popular will, and courts

201. See Sandra Stencel, *Abortion Politics*, in EDITORIAL RESEARCH REPORTS ON NATIONAL HEALTH ISSUES: TIMELY REPORTS TO KEEP JOURNALISTS, SCHOLARS AND THE PUBLIC ABREAST OF DEVELOPING ISSUES, EVENTS AND TRENDS 21, 36 (1977) (discussing several public-opinion polls in 1976 showing support for legalized abortion ranging from 67% to 81%); see also DEVINS, *supra* note 135, at 143-44 ("That an avalanche of abortion restrictions were enacted may only mean that legislators saw no disadvantage in responding to pro-life interest groups, for pro-choice concerns were content to leave it to the courts to protect their interests.").

202. ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 87 (1968). Or, as they say in geology circles, "water always wins."

203. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 10 (1980); Friedman, *supra* note 10, at 590-630; Klarman, *supra* note 11, at 794 & n.209; Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 999 (2004).

204. See CHOPER, *supra* note 203, at 58 ("[T]he Supreme Court is not as democratic as the Congress and President, and the institution of judicial review is not as majoritarian as the lawmaking process."); MARSHALL, *supra* note 9, at 4 ("Admittedly, the election and decision-making procedures of popularly elected legislatures and executives are by no means purely majoritarian, but the Supreme Court is even more remote from public opinion and majority control."); Owen Fiss, *Between Supremacy and Exclusivity*, 57 SYRACUSE L. REV. 187, 200 (2007) ("Admittedly, Congress is an imperfect institutional embodiment of the democratic ideal Yet, Congress is a closer approximation of the democratic ideal than the judiciary"); see also *supra* note 10 and accompanying text (stating basic assumption of the countermajoritarian difficulty).

are to some extent responsive to democratic pressures. But it would be ludicrous to treat the two as comparable in this respect.”²⁰⁵

Maybe. Then again, maybe not. The last several years have seen an avalanche of work—primarily from political scientists, but from others as well—detailing the democratic failings of the democratically elected branches.²⁰⁶ Within this genre of scholarship, one political scientist writes, “[T]he idea that legislative outcomes should serve as a paragon of democracy or a proxy for the will of ‘majorities’ seems almost bizarre.”²⁰⁷ Meanwhile, cutting-edge constitutional law scholarship has continued to demonstrate the Supreme Court’s majoritarian proclivities, buttressing longstanding empirical evidence (again, from political scientists) that the Court is more majoritarian than not.²⁰⁸ What happens when the insights from these disparate strands of scholarship are considered together?

As previously noted, scholars have begun to recognize that Supreme Court rulings are often more majoritarian than the legislation they invalidate.²⁰⁹ But they have not theorized as to why that might be so, nor have they recognized the profound impact that recognition might have on our understanding of judicial review. In this Part, I turn to the theory behind the case studies, showing that *Brown*, *Furman*, and *Roe* are not just historical anomalies. The same dynamics that drove upside-down review in the past are alive and well today—more so now than ever. The discussion that follows aims to capture these dynamics, exploring a host of reasons why the branches most majoritarian in theory may

205. Kramer, *supra* note 203, at 999; see also ELY, *supra* note 12, at 67–68 (“[W]e may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures. . . . [T]he theory that the legislature does not truly speak for the people’s values, but the Court does, is ludicrous.” (footnote omitted)).

206. See *supra* note 8 and accompanying text.

207. LOVELL, *supra* note 9, at 22.

208. For classic empirical studies establishing the Court’s majoritarian nature, see MARSHALL, *supra* note 9; Barnum, *supra* note 139; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). For more recent empirical work, see, for example, THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 2–3 (2008) (“Prior to the Rehnquist Court, if a clear poll majority (or plurality) existed, three-fifths (63%) of Supreme Court decisions agreed with public opinion. . . . This book suggests that the Rehnquist Court was consistent with public opinion in three-fifths to two-thirds of its decisions—roughly as often as were earlier Courts since the 1930s.” (internal citation omitted)); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (but We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 279 (2010) (“What is surprising is that even after taking into account ideology, *Public Mood* continues to be a statistically significant and seemingly non-trivial predictor of outcomes.” (emphasis in original) (internal citation omitted)); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004) (“We set out trying to determine whether the Supreme Court responds directly to movements in public opinion and whether the data used in prior analyses undercut accurate estimation of this relationship. We have unusually clear answers to both. . . . [W]e have found that the Court’s policy outcomes are indeed affected by public opinion, but to a degree far greater than previously documented.”); see also *supra* notes 5–7 and accompanying text (discussing cutting-edge constitutional law scholarship).

209. See *supra* note 11 and accompanying text.

be least majoritarian in practice, and vice versa.

A. WHY THE BRANCHES MOST MAJORITARIAN IN THEORY MAY BE LEAST
MAJORITARIAN IN PRACTICE

In this section, I draw from the work of political scientists and like-minded scholars in exploring a variety of reasons why the stance of the ostensibly majoritarian, democratically elected branches may not reflect majority will. Some reflect structural impediments to majoritarian change; others, how the representative branches operate within that structure. Still other reasons stem from the off-center pull of today's politics, or the unique challenges that arise when an issue is particularly hot or cold. Standing alone, each represents a distinct impediment to majoritarian change through the democratically elected branches. Taken together, they explain half of the upside-down dynamic.

1. Structural Impediments to Majoritarian Change

Although majority rule is considered to be the cornerstone of democratic governance,²¹⁰ it turns out that America's Founders had a different sort of democratic governance in mind. The Founders worried about tyrannical majorities, not stymied ones, so they structured our governing institutions to make change difficult, even when backed by majority will.²¹¹ By creating a number of veto points—opportunities to block change—the Founders formed a democracy that requires the assent of not one, but multiple representative bodies to alter the status quo.²¹²

Within this system, the president is one veto point, Congress another—and within Congress, our co-equal, bicameral legislature presents its own structural impediment to majoritarian change. In the Senate, equal representation among the states has been called “the least defensible and most harmful aspect” of our constitutional structure²¹³—states with large populations get no more votes than

210. See *infra* note 341 and accompanying text.

211. See SILVERSTEIN, *supra* note 63, at 266 (“The American system is fragmented and divided—intentionally. The constitutional system . . . was designed to make change possible, but very difficult.”); Terri Peretti, *An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY* 123, 137 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) [hereinafter *THE JUDICIARY AND AMERICAN DEMOCRACY*] (“[T]he countermajoritarian features of American democracy . . . were deliberately adopted by the Framers precisely because of their antimajoritarian effects. *Federalist 10* clearly expresses the Framers' strong fears of majority tyranny.”).

212. See CHOPER, *supra* note 203, at 12–25 (discussing various veto points in legislative process); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 29–38 (2006) (same).

213. LEVINSON, *supra* note 212, at 58. For excellent discussions of the issue, see generally FRANCIS E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999); William N. Eskridge, Jr., *The One Senator, One Vote Clauses* (1995), reprinted in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 35 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); Suzanna Sherry, *Our Unconstitutional Senate*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra*, at 95.

those with small ones, resulting in disproportionate power for the least populated states.²¹⁴ Indeed, at numerous times over the years, the states having a majority in the Senate have represented a minority of the population at large,²¹⁵ leading Sanford Levinson to conclude that the Senate's position on an issue "has literally nothing to do with measuring national majority sentiment."²¹⁶ Even if the system were functioning as it should (and it is not, as detailed below),²¹⁷ the Senate's position would bear "only a random relationship" to majority will at the national level.²¹⁸

The presidential-election process presents another chasm in our structure of democratic governance. Presidents are considered "the people's choice"—the one elected official with a mandate from the nation (or at least a majority of it) to rule.²¹⁹ By structural design, however, presidents are chosen by the Electoral College, not the people, and the difference matters. The Electoral College is determined by the number of senators and representatives in each state; thus it repeats the distorted representation in the Senate. More importantly, the Electoral College is a winner-take-all system not intended to proportionally transmit the popular vote.²²⁰ As a result, a presidential candidate can win the election without winning a majority of the popular vote; indeed, this is exactly what happens in around one of every three presidential elections.²²¹ On most of these occasions, the winning candidate at least wins a *plurality* of the popular vote. But on four occasions throughout history (including, most recently, the 2000 presidential race) the winning candidate did not even have a plurality of votes

214. Wyoming, for example, has the same representation in the Senate as California, which has a population seventy-times larger. See LEVINSON, *supra* note 212, at 51, 57; see also *id.* (noting that "almost a full quarter of the Senate is elected by twelve states whose total population, approximately 14 million, is less than 5 percent of the total U.S. population.").

215. See *id.* at 58 (noting that at least seven times over a sixty-eight-year period, "the notional 'majority party' in control of the Senate was elected from states with less than a majority of the population").

216. *Id.* at 53; see also *id.* at 58 (concluding the Senate's equal-vote rule "makes an absolute shambles of the idea that in the United States the majority of people rule").

217. See *infra* section II.A.2-4 (discussing various functional, political, and issue-specific impediments to majoritarian change).

218. LEVINSON, *supra* note 212, at 53.

219. *Id.* at 82; see also ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 112-13 (2001) (noting that as early as Andrew Jackson, "presidents had already begun to make the audacious claim that by virtue of their election, they alone represented the *entire* people, or at least a majority. Some would even assert that their election endowed them with a 'mandate' for their policies" (emphasis in original)).

220. In all but two states (Maine and Nebraska), the winner of a given state, even in a close election, receives all of that state's electoral votes, whereas the loser receives none. As Sanford Levinson explains, this leads to fierce competition for battleground states whereas "predictable states" get written off, rendering the vast majority of states and the nation's population "utterly irrelevant" on the national political scene. See LEVINSON, *supra* note 212, at 87-88. For a critique of the Electoral College, see GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (2004).

221. See DAHL, *supra* note 219, at 80; LEVINSON, *supra* note 212, at 87.

supporting him; the loser did.²²² In fact, on one of these four occasions, the losing candidate actually had a *majority* of the popular vote²²³—the election had a winner, but the “people’s choice” was someone else.

To be sure, these are not the only structural impediments to majoritarian change. Others in this category include the supermajority requirements for overriding the president’s veto and amending the Constitution.²²⁴ But the basic point is this: The very structure of our governing institutions places significant obstacles in the way of their ability to vindicate majority preferences.²²⁵ For those wondering why the representative branches do not better reflect national sentiment, one answer is that they were not designed that way in the first place.

2. Functional Impediments to Majoritarian Change

A second category of impediments to majoritarian change concerns not constitutional structure, but rather how our democratically elected branches function within it. Social-choice theorists, for example, have long cast doubt on the ability of collective decision-making processes to accurately identify majority preferences. According to Arrow’s Theorem and other social-choice concepts, majority preferences are hopelessly obscured by the sequence in which voting occurs and thus are inevitably dependent on the agenda-setting abilities of particular constituencies.²²⁶ Other impediments to majoritarian change in this category include the congressional committee system, the Senate filibuster, and the gerrymandered drawing of electoral districts.

Within the legislative branch, both houses of Congress make extensive use of the committee system to conduct business, embedding an additional layer of veto points into the lawmaking process.²²⁷ Chairs of these committees have enormous power over whether, how, and in what form legislation is considered—and with it, the ability to frustrate majorities in their respective chambers and

222. See DAHL, *supra* note 219, at 79–80 (discussing presidential elections of John Quincy Adams in 1824, Rutherford B. Hayes in 1876, Benjamin Harrison in 1888, and George W. Bush in 2000).

223. See *id.* at 80 (discussing 1876 presidential election).

224. Others include staggered elections and six-year senatorial terms.

225. See LEVINSON, *supra* note 212, at 26 (“Significant distortions and outright failures of American politics are produced because of—and not merely in spite of—the structure of the government imposed by the Constitution, whatever the contribution of other factors like the mode of campaign financing.”); Peretti, *supra* note 211, at 130 (“Finally, American elections and government structure distort the transmission of majority preferences and impede their translation into government policy.”).

226. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46–60 (1951); ALFRED F. MACKEY, *ARROW’S THEOREM: THE PARADOX OF SOCIAL CHOICE* (1980); see also Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 *J. ECON. THEORY* 472 (1976) (expanding Arrow’s Theorem to suggest that majority rule is inherently unstable and arbitrary).

227. The Senate and House have over twenty committees each, providing numerous opportunities to block majoritarian change. See *HOW CONGRESS WORKS* 141 (4th ed. 2008); see also THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 45 (2006) (“[I]ndependent, unrepresentative, and constituency-controlled committees can distort legislative outcomes and frustrate chamber majorities and national interests.”). The notion of veto points was first discussed at *supra* text accompanying note 212.

the nation at large. *Brown* is the quintessential example of this phenomenon. In the 1950s, southern segregationists controlled five of the eight most important committees in the Senate and had a reliable ally controlling the sixth.²²⁸ That kind of power meant they had considerable influence in the remaining committees as well, making it virtually impossible for progressive racial-reform measures to make it to the Senate floor.²²⁹ As political scientist Gordon Silverstein explains, the congressional-committee structure operating in the backdrop of *Brown* “only made it more difficult for a national majority to impose its will.”²³⁰

The Senate filibuster takes the notion of veto points even further, allowing a minority of senators to block legislation that has majority support by preventing it from coming to a vote.²³¹ Here again, *Brown* provides a pristine example—southern segregationists prevented Congress from enacting progressive racial-reform measures not only by controlling key committees, but also by threatening an unbeatable filibuster in the Senate.²³² Indeed, Strom Thurmond carried out that threat three years after *Brown* when he filibustered the Civil Rights Act of 1957,²³³ except by that time, the southern-led filibuster was no longer unbeatable. Texan Lyndon Johnson, then Senate majority leader, had his eye on the presidency and knew that the southern position was out of line with where the rest of the country stood on race relations.²³⁴ In one of the more fascinating turns in American politics, Johnson watered down the bill, moderated his views, and brought the southern coalition with him.²³⁵ Congress moved, but it took a true “Master of the Senate”²³⁶ to do it—and that meant overcoming operational features of the Senate that stood in the way of majority rule.

Not to be left out, the House of Representatives has uniquely antimajoritarian features as well, and the strategic drawing of districts by which representatives are chosen—gerrymandering—is chief among them. Now more than ever, sophisticated computer algorithms allow for the creation of voting districts with equal population and just about any political configuration.²³⁷ As a result, the

228. See ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE*, at xiv (2002).

229. See *id.*; Zietlow, *supra* note 35, at 959.

230. SILVERSTEIN, *supra* note 63, at 271; see also *supra* note 63 and accompanying text (discussing southern segregationists' role in preventing majoritarian change in *Brown*).

231. See LEVINSON, *supra* note 212, at 52–53 (explaining Senate filibuster); see also Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 *LAW & INEQ.* 1, 15 (2005) (“The existence of the filibuster also means that a minority in Congress can subvert majoritarian interests.”).

232. See *supra* note 63 and accompanying text.

233. Thurmond's filibuster remains the longest one-man filibuster in the history of the Senate, lasting twenty-four hours and eighteen minutes. See CARO, *supra* note 228, at 998.

234. See *id.* at xiv–xvi.

235. Robert Caro's Pulitzer Prize-winning book, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE*, *supra* note 228, at 910–1012, provides an intriguing, detailed account of this story.

236. *Id.*

237. See Michael Kent Curtis, *Judicial Review and Populism*, 38 *WAKE FOREST L. REV.* 313, 324 (2003).

party that controls congressional redistricting can maximize its chance of electoral success by “packing” like-minded voters into particular electoral districts to minimize their influence elsewhere and “cracking” the voting strength of those who do not get packed by spreading them thin over a number of electoral districts.²³⁸ Either way, gerrymandering turns democracy on its head—rather than voters choosing their representatives, it allows representatives to choose their voters, creating safe seats that further insulate the representative branches from the influence of majority will.²³⁹ Gerrymandering is, to borrow from Mike Klarman, “indefensibly antimajoritarian,”²⁴⁰ and that is without even considering its corrosive effect on partisan politics, discussed in the next section.

3. Political Impediments to Majoritarian Change

A third set of impediments to majoritarian change are political in nature. Some are timeless. Are elected representatives delegates of the people, duty bound to represent their views—or are they trustees, elected to do what they think is right, regardless of whether it comports with constituency preferences? The answer is who knows,²⁴¹ allowing for substantial discrepancies between the people and their elected representatives from the start.

Other political impediments to majoritarian change are more dynamic in nature and have grown stronger over time, contributing to a strong sense among social scientists that our system of representative democracy is not working. The incumbency reelection rate is one example. Although the congressional rate of reelection has always been high, it has steadily risen over the last fifty years and today is at over ninety-eight percent, due in part to various incumbency advantages that elected officials themselves ushered into place.²⁴² With incumbency advantages that strong, social scientists are correct in concluding that

238. See Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 561, 567 (2011) (discussing packing and cracking strategy); see also *id.* at 556 (discussing alternative “matching slices” approach to gerrymandering).

239. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 588 (1993) (“In a democratic society, the purpose of voting is to allow the electors to select their governors. Once a decade, however, that process is inverted, and the governors and their political agents are permitted to select their electors. Through the process of redistricting, incumbent office holders and their political agents choose what configuration of voters best suits their political agenda.”).

240. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997).

241. For an attempt to empirically answer this question, see Justin Fox & Kenneth W. Shotts, *Delegates or Trustees? A Theory of Political Accountability*, 71 J. POL. 1225 (2009).

242. Patrick Basham & Dennis Polhill, *Uncompetitive Elections and the American Political System*, POL’Y ANALYSIS, June 2005, at 1, 2–3; see also *id.* at 1–2 (reporting that 99.3% of “unindicted congressional and state legislative incumbents” won reelection in the 1980s and recommending that elected officials be disconnected from campaign and election rule making and regulation); Klarman, *supra* note 240, at 498, 509–28 (discussing various entrenchment measures adopted by policymakers and concluding, “In [none of these entrenchment contexts] is legislative decisionmaking likely to be majoritarian; judicial review quite plausibly would be more so” (footnote omitted)).

voters lack meaningful say in who represents them²⁴³—and that, in turn, has antimajoritarian implications of its own. As one pair of economists concludes, “incentives to respond to the public’s wishes are stronger when the public can more easily strip [elected representatives] of their power,” and today that ability is weak.²⁴⁴

Another example is the influence of special-interest groups. As public-choice theory has long recognized, a small but intensely interested minority can exert more influence than a large but diffusely interested majority.²⁴⁵ *Roe* presents a textbook case of this phenomenon. Although the Catholic-led right-to-life lobby espoused the minority position, it was intensely committed to its cause and enormously successful in preventing the passage of abortion-reform and -repeal measures that enjoyed majority support.²⁴⁶ In *Roe* and countless other contexts, Rebecca Brown is correct—the disproportionate influence of special interests has “widely undermined . . . any confidence that the system of representative government is doing the work that we count on it to do.”²⁴⁷

The Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*²⁴⁸ only exacerbates this influence. Money talks. And where money talks to elected officials, elected officials are prone to listen. *Citizens United* ushered in a world of super PACs able to accept unlimited contributions and make unlimited political expenditures.²⁴⁹ Whatever else one might say about the decision, it undeniably allows monied special interests to influence both elections and the elected representatives who benefit as a result.²⁵⁰

243. Basham & Polhill, *supra* note 242, at 2 (quoting political scientist Ross Baker).

244. *Id.* (quoting economists Pranab Bardham and Tsung-Tao Yang).

245. See generally James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE—II*, at 11 (James M. Buchanan & Robert D. Tollison eds., 1984) (providing a summary of “the emergence and the content of the ‘theory of public choice’”); but see *infra* note 287 (acknowledging that the Supreme Court may be influenced by special interests as well).

246. See *supra* notes 172–85 and accompanying text.

247. Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23, 23–24 (2006).

248. 130 S. Ct. 876, 916 (2010) (recognizing First Amendment right of interest groups to make unlimited expenditures in support, or opposition, of a candidate so long as they are independent of the campaign or candidate). *Citizens United* appears to be a genuinely countermajoritarian decision, albeit not a particularly surprising one given the majority Justices’ policy preferences. See Deborah Tedford, *Supreme Court Rips up Campaign Finance Laws*, NPR (Jan. 21, 2010), <http://www.npr.org/templates/story/story.php?storyId=122805666> (quoting NPR’s Nina Totenberg as saying, “[*Citizens United*] will undoubtedly help Republican candidates since corporations have generally supported Republican candidates more,” and characterizing the decision as “just the latest in a series of decisions by a conservative court”). The majority Justices were Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas.

249. See *Citizens United*, 130 S. Ct. at 896–914. These expenditures must be “independent” of a candidate and his or her campaign. See *id.*

250. See David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES, Jan. 22, 2010, <http://www.nytimes.com/2010/01/22/us/politics/22donate.html> (“The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.”); Press Release, Statement from the President on Today’s Supreme Court Decision (Jan.

Yet another antimajoritarian force is the increasingly polarized nature of today's political parties, attributed in large part to perfections in the art of gerrymandering and the exceedingly high percentage of safe seats—around ninety percent—that result.²⁵¹ Because its very point is to create one-party “safe seat” districts, gerrymandering eliminates competitive elections as a mechanism by which representatives are held accountable to mainstream public opinion.²⁵² Politicians pander to their partisan base, not the median voter,²⁵³ resulting in what political scientists Jacob Hacker and Paul Pierson describe as “policymaking that starkly and repeatedly departs from the center of public opinion.”²⁵⁴ As a practical matter, representatives today do not represent the people; they represent the ideological activists that form their party base.

How much gerrymandering (as opposed to a host of other forces strengthening party power and control over the last several decades) is responsible for the current political landscape is hard to say,²⁵⁵ but this much is not: Congress today is marked by acute party polarization and the demise of party

21, 2010), available at <http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0> (“With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.”); see also *Citizens United*, 130 S. Ct. at 931 (Stevens, J., dissenting) (“The Court’s ruling threatens to undermine the integrity of elected institutions across the Nation.”).

251. See Basham & Polhill, *supra* note 242, at 6 (“[A]lmost 90 percent of Americans live in congressional districts where the outcome is so certain that their votes are irrelevant.”). For discussions of how technological advances have resulted in gerrymandering with more precision (and success), and the connection between gerrymandering and party polarization, see generally ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 145 (2010); LEVINSON, *supra* note 212; STEPHEN MACEDO ET AL., *DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION, AND WHAT WE CAN DO ABOUT IT* (2005); Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75 (2006); Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POL. RES. 878 (2007); J. Gerald Herbert & Marina K. Jenkins, *The Need for State Redistricting Reform To Rein in Partisan Gerrymandering*, 29 YALE L. & POL’Y REV. 543 (2011); Cox & Holden, *supra* note 238.

252. See JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* 9, 16–17 (2005).

253. See LEVINSON, *supra* note 212, at 28 (noting that gerrymandering results in “ever more representatives who need to appeal only to ‘the base’ of their own parties rather than to more ‘centrist’ voters in the middle”); ROSEN, *supra* note 11, at 4 (noting that gerrymandering results in a system where “incumbents are guaranteed easy reelection simply by catering to the interest groups that represent their ideological base. As a result, Democrats and Republicans in Congress no longer have an incentive to court the moderate center in general elections.”); see also HACKER & PIERSON, *supra* note 252, at 9–10 (“The base is the party’s most committed, mobilized, and deep-pocketed supporters: big donors, ideological activist groups, grassroots conservative organizations, and, increasingly, party leaders themselves. The base has always had power, but never the kind of power it has today.”).

254. HACKER & PIERSON, *supra* note 252, at 16, 19.

255. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 312 (2011) (doubting that gerrymandering is a significant cause and offering a number of other explanations for the phenomenon).

moderates.²⁵⁶ “In 1976,” Rick Pildes writes, “moderates constituted 30% of the House; by 2002, this proportion had shrunk to 8%. Similarly, in 1970, moderates constituted 41% of the Senate; today, that proportion is 5%.”²⁵⁷ If it seems as though Congress has lost its mainstream, centrist views, that is because it has.

With the shrinking number of party moderates, Congress has also seen the shrinking prospect of political middle ground. “[T]o grizzled veterans like us, with more than thirty-five years of Congress-watching, the differences are palpable and painful,”²⁵⁸ write two prominent Congressional scholars. Today’s Congress has “the most rancorous and partisan atmosphere . . . in 35 years.”²⁵⁹ Party loyalists have little to gain by working with their counterparts across the aisle,²⁶⁰ resulting in off-center policymaking or, just as likely, no policymaking at all. In a world of divided government, where one party controls the presidency and another controls at least one chamber of Congress, legislative gridlock reigns.²⁶¹

256. See *id.* at 273, 312 (“Over the last generation, American democracy has had one defining attribute: extreme partisan polarization. We have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century.”). For excellent discussions of this phenomenon, see generally ABRAMOWITZ, *supra* note 251; RONALD BROWNSTEIN, *THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA* (2007); HACKER & PIERSON, *supra* note 252; NOLAN McCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006); *POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA* (Jon R. Bond & Richard Fleisher eds., 2000); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* (2006); JEFFREY M. STONECASH ET AL., *DIVERGING PARTIES: SOCIAL CHANGE, REALIGNMENT, AND PARTY POLARIZATION* (2003). For a discussion of this phenomenon focusing on the Republican Party, see generally GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* (2012).

257. Pildes, *supra* note 255, at 277 (internal footnote omitted). Pildes goes on to explain that “virtually the entire growth of polarization in the Senate over the last generation is accounted for by senators who have two characteristics—they are Republican former House members elected to the House after 1978—the year Newt Gingrich, the architect of the unified Republican Party strategy, was first elected.” *Id.* at 323–24.

258. MANN & ORNSTEIN, *supra* note 227, at 212.

259. HACKER & PIERSON, *supra* note 252, at 7 (citing Norman Ornstein, *GOP's Approach to Continuity: Not Just Unfortunate. Stupid.*, ROLL CALL, June 9, 2004).

260. Conservative analyst William Kristol’s 1993 strategy memo to Republicans made this point explicitly. In it, Kristol advised Republicans to oppose any health-care proposal from the Clinton Administration “sight unseen” because success on health care would present a “serious *political* threat to the Republican Party.” See Memorandum from William Kristol, Chairman, Project for a Republican Future, to Republican Leaders (Dec. 2, 1993), available at <http://www.scribd.com/doc/12926608>; see also LEVINSON, *supra* note 212, at 28, 65 (discussing Kristol memorandum); Devins, *supra* note 11, at 1343 (asking whether Congress represents the views of the people and answering, “No way. Ideological polarization in Congress . . . has made today’s Congress more likely to reflect political extremes—not the interests of the median voter”).

261. See DAHL, *supra* note 219, at 110–11 (“[D]uring the past half-century, control of the presidency and both houses of Congress by a single party has become a rarity. . . . From 1946 to 2000, the three branches have been divided between the two parties more than six years out of every ten.”); Pildes, *supra* note 255, at 326–32 (noting that divided government produces “confrontation, indecision, and deadlock” and that this is true more so now than in the past because there is no center to bridge party lines). Admittedly, legislative gridlock is a much more complex phenomenon than this brief discussion

The public's input into the political process has become an increasingly important source of democratic dysfunction as well. Voter turnout in the United States has been low for decades; today, only half of all eligible voters participate in presidential elections, and the turnout in Congressional elections is even lower—often below 35%.²⁶² Equally problematic, those who vote are not representative of the country at large; they are (among other things) older, wealthier, and whiter.²⁶³ American voters also have extremely low levels of political knowledge.²⁶⁴ As others have recognized, they are “rationally ignorant” in this regard, concluding that the cost of obtaining political information is greater than the benefit of a well-informed, single vote.²⁶⁵ In short, today's voters “know little and care less.”²⁶⁶ Even assuming that a vote for a particular candidate is a vote for each of that candidate's policy preferences (a dubious assumption at best),²⁶⁷ low levels of voter knowledge and participation suggest that Ilya Somin is right—“large portions of legislative output cannot be considered products of ‘majoritarian’ will in any meaningful sense”²⁶⁸

In sum, a number of political dynamics work to prevent the representative branches from being truly representative. Even more disconcerting, the problems discussed in this section are getting worse. As one political scientist surveying the literature observed, “countermajoritarian policymaking is being enabled by almost every trend in American politics.”²⁶⁹

suggests, although divided government plays a role even in the more complicated “pivotal politics” political-science model. *See generally* KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* (1998) (modeling legislative gridlock as a function of the relationship between the position of the president, median senator, median member of the house, and filibuster pivot point).

262. *See* U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 2012, at 244 (2012) (reporting voter participation in presidential election years ranging from 49.0% to 57.1% since 1972, and voter participation in off-term congressional elections ranging from 33.1% to 37.7% since 1972); *see also* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 *Geo. L.J.* 897, 914–15 (2010) (discussing voter turnout).

263. *See* Peretti, *supra* note 211, at 128.

264. *See* Somin, *supra* note 4, at 1371.

265. *See id.* at 1324–29 (supporting “rational ignorance” theory of low voter knowledge with empirical evidence). Interestingly, politicians tend to be “rationally ignorant” themselves. Given the volume and technical detail of proposed legislation, legislators rarely have the time to ponder the bills they are voting on, turning instead to party leadership or political allies to tell them how to vote. *See* Jason T. Burnette, Note, *Eyes on Their Own Paper: Practical Construction in Constitutional Interpretation*, 39 *GA. L. REV.* 1065, 1093 (2005).

266. *CHOPER*, *supra* note 203, at 15.

267. *See id.* at 13–14 (“[I]t is inherent in the system of representative government that the electorate must buy its political representation in bulk form. The voter is invariably offered only a few candidates (rarely more than two who have any realistic chance of being elected) to reflect his will on the myriad issues, large and small, that must be resolved in the operation of day-to-day government. Hardly ever will a candidate share all the preferences of an individual elector.”).

268. Somin, *supra* note 4, at 1294; *see also* Hutchinson, *supra* note 231, at 14 (noting that the reality of low levels of voter participation “immediately problematizes claims that political outcomes represent majority will”).

269. Graber, *supra* note 8, at 374.

4. Topic-Specific Impediments to Majoritarian Change

Thus far, the discussion has focused on impediments to majoritarian change without considering how particular topics might affect the analysis. But the issue under consideration can, and often does, create impediments to majoritarian change of its own. One way this can happen is if support for a policy is correlated with a particular demographic, but that demographic is underrepresented in the legislature. Recent polling data on the issue of gay marriage suggests that this is more than just a theoretical possibility. A 2011 poll showed that fifty-seven percent of women support gay marriage compared to forty-five percent of men, leading one reader to comment, "Given that women are under-represented in legislatures, it is understandable that Congress and state legislatures would be slow to pass any laws permitting gays and lesbians to marry."²⁷⁰

Other, perhaps more common, possibilities in this category are issues that are too hot, or cold, for the political process to handle. An issue can be too hot—too salient and polarized—to trigger a response from the political branches for a number of reasons. As Mark Graber has discussed in his path-breaking work on legislative deferrals, sometimes elected officials find it too costly to take a stand on an issue, and sometimes even when they are willing to take a stand, they find the issue too costly to resolve through the political branches.²⁷¹ Unwilling or unable to decide the issue themselves, legislators facilitate, invite, solicit, and even plead for the Supreme Court's involvement.²⁷² *Roe* is one of Graber's textbook examples of this phenomenon—and for good reason. Legislators in the early 1970s avoided the abortion issue as much as they could and explicitly called for the Supreme Court to take it.²⁷³ What political scientists call legislative deferral, legislators called common sense—the abortion issue was too hot for the political process to handle, and they knew it.

270. Micah Cohen, *Reads & Reactions*, FIVETHIRTYEIGHT BLOG (Apr. 22, 2011, 5:20 PM), <http://fivethirtyeight.blogs.nytimes.com/2011/04/22/reads-reactions-2> (reacting to CNN poll available at <http://i2.cdn.turner.com/cnn/2011/images/04/19/re16h.pdf>). For empirical backing of the claim, see JENNIFER L. LAWLESS & RICHARD L. FOX, *MEN RULE: THE CONTINUED UNDER-REPRESENTATION OF WOMEN IN U.S. POLITICS* (2012), available at <http://www.american.edu/spa/wpi/upload/2012-Men-Rule-Report-web.pdf>. On this score, women have not come such a long way after all. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (discussing underrepresentation of women in the legislature and other political positions).

271. See Graber, *supra* note 187, at 37. One might expect this phenomenon to trigger a renewed interest in referenda and other forms of direct democracy, and indeed that appears to be the case. For a sampling of the literature, see generally BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (2004); DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000); THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1999); and JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004).

272. See SILVERSTEIN, *supra* note 63, at 33; Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 *LAW & SOC. INQUIRY* 511, 516 (2007) (book review).

273. See *supra* notes 190–92 and accompanying text.

An issue also may be too cold—too low priority—to trigger a response from the political branches. So-called “dead letter” statutes provide a prime example. These statutes are rarely, if ever, enforced because they are out of step with prevailing social standards, but the very fact that they are rarely, if ever, enforced is what keeps them on the books.²⁷⁴ The phenomenon is called desuetude, and it explains why the political process may be ill-suited to remedy the problem—lack of enforcement means lack of political pressure for change.²⁷⁵ As Alexander Bickel explained,

[N]ormal law enforcement indicates the continuity of will . . . Only through normal enforcement can the effects of a law be generally felt, with the consequence that there is a chance of mustering opposition sufficient to move the legislature. When the law is consistently not enforced, that chance is reduced to the vanishing point.²⁷⁶

Taking the point one step further, Cass Sunstein has argued that dead-letter laws lack “democratic pedigree,” so judicially invalidating them “is not radically inconsistent with democratic ideals. In a sense, it helps to vindicate them.”²⁷⁷ When Sunstein wrote those comments, he was writing about *Lawrence v. Texas*²⁷⁸ and same-sex-sodomy statutes.²⁷⁹ When Bickel wrote his, he was writing about *Griswold v. Connecticut*²⁸⁰ and anticontraceptive laws.²⁸¹ But both scholars *could have been* writing about *Furman* and the death penalty instead. Desuetude was essentially what the petitioners in *Furman* were arguing—the public had lost confidence in the death penalty, juries were refusing to enforce it, and underenforcement had taken the pressure off of legislatures to do anything about it.²⁸² The whole point of the petitioners’ claim in *Furman* was

274. See BICKEL, *supra* note 1, at 146–56 (analyzing Connecticut anti-birth-control statute as an example of this phenomenon); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 50–58 (analyzing same-sex-sodomy statutes as an example of this phenomenon).

275. See Sunstein, *supra* note 274, at 57 (“[W]hy not require people to resort to their political remedies? I believe that the idea of desuetude provides a partial answer. If legislation is infrequently enforced, most citizens can treat it as effectively dead. They have nothing to worry about.”); see also George I. Lovell & Scott E. Lemieux, *Assessing Juristocracy: Are Judges Rulers or Agents?*, 65 MD. L. REV. 100, 107 (2006) (“[R]epeal campaigns never develop much momentum because lack of enforcement makes the campaign seem mostly symbolic and thus less important than fights over more consequential laws.”).

276. BICKEL, *supra* note 1, at 152.

277. Sunstein, *supra* note 274, at 54, 58.

278. 539 U.S. 558 (2003).

279. See Sunstein, *supra* note 274.

280. 381 U.S. 479 (1965).

281. See BICKEL, *supra* note 1, at 147–56. Ultimately, Bickel thought the Supreme Court should have left Connecticut to deal with its anachronistic statute itself. See *id.* at 156 (“[I]t is quite wrong for the Court to relieve [the state] of this burden of self-government.”).

282. See *supra* notes 109–11 and accompanying text (discussing petitioners’ claim in *Furman*). For further comparisons, see BICKEL, *supra* note 1, at 152 (“The unenforced statute is not, in the normal way, a continuing reflection of the balance of political pressures. When it is resurrected and enforced,

that the legislative process was unresponsive to majoritarian change.

Considered as a whole, the above discussion provides a plethora of reasons why the stance of the democratically elected branches may not reflect the public's views. Some of these reasons suggest that the representative branches may enact legislation that is not representative of the people in the first place.²⁸³ Most, however, favor inertia, rendering it difficult both to pass majoritarian legislation and to repeal legislation that has later lost majoritarian backing.²⁸⁴ The latter is particularly problematic because even majoritarian legislation may not stay majoritarian for long. Public opinion is relatively fluid; it ebbs and flows over time. Legislation, by contrast, is relatively rigid, *even when democracy is working as it should*. Legislative action requires effort, coordination, and process—things that make it resistant to change one way or the other, despite changes in majority will. The question then becomes how Supreme Court decision making compares, to which the discussion turns next.

B. WHY THE BRANCH LEAST MAJORITARIAN IN THEORY MAY BE MOST MAJORITARIAN IN PRACTICE

In the present context, Supreme Court decision making differs from legislative- and executive-branch decision making in at least two key respects. First, Supreme Court decision making is relatively fluid; the Court can change the status quo whenever a majority of the Justices decide to do so. Granted, in theory the force of precedent acts as an impediment to change, but the Court has long adhered to the view that “[s]tare decisis is not an inexorable command.”²⁸⁵ With five votes, it is not a command at all.

Second, Supreme Court decision making is free of the electoral pressures

it represents the *ad hoc* decision of the prosecutor, and then of the judge and jury, unrelated to anything that may realistically be taken as present legislative policy.”); Sunstein, *supra* note 274, at 45 (characterizing *Lawrence* as responding to “an emerging national awareness, reflected in a pattern of nonenforcement” that those statutes had lost public backing); *id.* at 49 (characterizing *Lawrence* as responding to “evolution in public opinion—something like a broad consensus that the practice at issue should not be punished”).

283. See *supra* notes 242–50 and accompanying text (discussing electoral entrenchment measures and the influence of special-interest groups). I did not discuss the deal making and quid pro quos that are an intrinsic part of a well-functioning legislative process, although these dynamics, too, may lead to legislation that does not reflect majoritarian sentiment from the start.

284. See CHOPER, *supra* note 203, at 26–27 (“[M]ost of the antimajoritarian elements that have been found in the American legislative process . . . are negative ones, i.e., they work to *prevent* the translation of popular wishes into governing rules rather than to *produce* laws that are contrary to majority sentiment. . . . [T]he same inertia in the lawmaking system that operates to block the passage of new statutes supported by the people may also work to hinder the repeal of existing laws despite their loss of majoritarian backing.”).

285. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *accord* *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). Indeed, the power of precedent is so weak that we now have something called “superprecedent,” which, as far as I can tell, is just what precedent was supposed to mean in the first place. See Michael Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); Jeffrey Rosen, *So, Do You Believe in “Superprecedent?”*, N.Y. TIMES, Oct. 30, 2005, <http://www.nytimes.com/2005/10/30/weekinreview/30rosen.html> (discussing origin of the term).

that mark the legislative and executive decision-making process. Supreme Court Justices are appointed for life, not elected for a term—hence the well-trod notion of an independent judiciary.²⁸⁶ In theory, the fact that the Court is not subject to electoral politics suggests it should be *less* majoritarian than the democratically elected branches. But as discussed above, electoral politics are one reason why the representative branches are less than representative. Absent the partisan pull of elections (ironically, the very mechanism designed to make the representative branches accountable to majority will in the first place), Supreme Court Justices are free of at least one impediment to majoritarian change: the democratic process itself.²⁸⁷

Of course, the fact that Supreme Court decision making is relatively fluid and free from the pull of partisan elections does not mean it will lean in a majoritarian direction. And yet decades of empirical work show that it does²⁸⁸—the only question is *why*. As others have noted, the answer is elusive; the mechanisms by which majoritarian influences infiltrate the Court's decision making are not yet well understood.²⁸⁹ In this section, I catalog the possibilities, explaining the other half of the upside-down dynamic.

1. The Judicial Appointments Process

Ever since Robert Dahl's watershed 1957 article on Supreme Court decision making,²⁹⁰ the judicial-appointments process has stood as the primary explanation for the Court's majoritarian proclivities within the academy.²⁹¹ Supreme

286. See THE FEDERALIST NO. 78 (Alexander Hamilton). For an in-depth discussion, see generally SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787 (2011).

287. This is not to say that the Supreme Court is free of every impediment to majoritarian change that burdens the representative branches. Prior scholarship has argued that the Justices, too, are subject to the influence of special interests, see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991), although with the advent of super PACs, even here there is an appreciable difference. Of course, the same cannot be said where judges are elected.

288. See *supra* note 208 (citing numerous empirical studies).

289. See Kramer, *supra* note 203, at 971 (“[T]here is now a general consensus among social scientists that courts have not been a strong or consistent countermajoritarian force in American politics. No similar consensus yet exists about why this should be so, but that it *is* so seems hard to deny.” (emphasis in original) (footnote omitted)); McGuire & Stimson, *supra* note 208, at 1020 (“Few dispute that public opinion is reflected in the choices of the Court. The mechanism by which it takes place, though, has been subject to considerable disagreement.”); see also Pildes, *supra* note 19, at 156 (“More precise argument and analysis concerning the mechanisms by which the Court is constrained is important not only to understand and assess majoritarian theories, but to gauge whether the key mechanisms are likely to remain as robust going forward as they purportedly have been in the past. Majoritarian theories at this stage thus raise as many questions as they answer.”).

290. See Dahl, *supra* note 208.

291. See William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 171 (1996) (recognizing judicial-appointments process as the “conventional explanation of the relationship between public opinion and Supreme Court decisions”); Peretti, *supra* note 211, at 132 (noting that “[m]ost scholars agree that the appointment process is the dominant path through which public opinion influences Supreme Court decisions”); Pildes, *supra* note 19, at 139–40 (noting that “most majoritarians rely

Court Justices are not elected, but the presidents who nominate them and the senators who confirm them are—and presumably these political actors favor the appointment of Justices with ideological leanings similar to their own and the constituents who elected them.²⁹² Implicit (and sometimes explicit) in this theory is the assumption that elected officials have mainstream policy preferences by virtue of their election, so Justices appointed in their likeness will have mainstream policy preferences too.²⁹³

Most majoritarian-minded scholars leave it at that, although a few have taken a more nuanced view, recognizing that party polarization may lead to off-center judicial appointments as presidents and senators increasingly look to appease their party base.²⁹⁴ Where the same party controls the presidency and Senate, this is a distinct possibility. But where divided government splits control of the two or the minority in the Senate has enough votes to filibuster the appointment, a different dynamic is at work. Here presidents must weigh their partisan preferences against their need to nominate a confirmable candidate (and the amount of political capital it will cost to do it),²⁹⁵ resulting in substantial pressure to choose an ideological moderate over an ideological match. The closer the nominee is to espousing mainstream political values, the better chance the nominee has of being confirmed by a hostile Senate, rather than Borked.²⁹⁶

Even so, the judicial-appointments process is an incomplete explanation for the Supreme Court's majoritarian decision-making proclivities at best. Supreme Court Justices have a judicial life expectancy much longer than those who put them on the bench, so their views could easily differ from the prevailing ideology of any given moment.²⁹⁷ Moreover, history is replete with examples of presidents who *thought* they had nominated a Justice with views similar to their

centrally on this mechanism to explain how the Court purportedly comes to reflect national political majorities”).

292. See Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 586 (2001); Friedman, *supra* note 10, at 613–14; Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 716 (1994).

293. See, e.g., Norpoth & Segal, *supra* note 292, at 716 (“It is not that the justices pay keen attention to public opinion but that they have been chosen by a president (with the advice and consent of the Senate) who presumably shares the public’s views.”).

294. See, e.g., Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1522–25 (2010); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2609–10 (2003).

295. See generally Timothy R. Johnson & Jason M. Roberts, *Presidential Capital and the Supreme Court Nomination Process*, 66 J. POL. 663 (2004) (discussing the political costs of a Supreme Court nomination); David W. Rohde & Kenneth A. Shepsle, *Advising and Consenting in the 60-Vote Senate: Strategic Appointments to the Supreme Court*, 69 J. POL. 664 (2007) (same).

296. Yes, it is a word. See RANDOM HOUSE DICTIONARY (2011) (“Bork, v; to seek to obstruct a political appointment or selection; also, to attack a political opponent viciously.”).

297. See FRIEDMAN, *supra* note 11, at 374; see also Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006) (documenting the average tenure of retiring Justices from 1971 to 2000 at just over twenty-six years).

own, only to discover they were wrong.²⁹⁸ Perhaps the most famous illustration of the point is Dwight Eisenhower's answer to the question of whether he felt he had made any mistakes during his presidency—"Yes, two," he reportedly replied, "and they are both sitting on the Supreme Court."²⁹⁹ Finally, the judicial-appointments process cannot explain empirical studies establishing the Court's responsiveness to changes in public opinion even in the absence of changes in its composition,³⁰⁰ nor can it explain how the Burger Court could decide a case like *Roe v. Wade* 7–2.³⁰¹ In the end, the judicial-appointments process provides *some* explanation for the Court's predominantly majoritarian rulings, but there must be more to the story than that.

2. Majoritarian Constraints on Supreme Court Decision Making

A second explanation for the Supreme Court's majoritarian proclivities is that the force of majority will imposes constraints on the Justices' ability to deviate significantly, and for long, from the public's views. Even if the judicial-appointments process resulted in a majority of Justices on the extreme end of the political spectrum, a Supreme Court with off-center policy preferences cannot always pursue those preferences. As Alexander Hamilton famously declared, the Supreme Court has "neither force nor will, but merely judgment."³⁰² Its power depends on other political actors, rendering our independent judiciary not so independent after all. Lacking power of its own, the Supreme Court has at least three reasons not to stray far from mainstream public opinion: to ensure that its rulings are enforced, to protect itself from retaliatory court-curbing measures, and to preserve its institutional legitimacy. I discuss each in turn.

Enforcement of Supreme Court edicts is a constant concern. The Court needs the support of the executive and legislative branches to make its rulings matter, yet these institutional actors may choose to override, undermine, or simply

298. See Jason DeParle, *In Battle To Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1 (discussing Justices who have disappointed the presidents who appointed them, including Justices Brennan, Blackmun, Stevens, Souter, and Kennedy).

299. McMAHON, *supra* note 65, at 11. For the backstory of this oft-cited quote, see SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 139 (2010); see also MELVIN I. UROFSKY, *THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY* 90–91 (2001) (quoting Eisenhower as saying that his appointment of Earl Warren as Chief Justice was "the biggest damn fool mistake" he ever made).

300. See William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 91–94 (1993); see also *supra* note 208 (citing additional studies).

301. See *supra* note 196 and accompanying text (discussing commitment to judicial restraint as the defining trait of the Burger Court, and irony in fact that three of President Nixon's four appointees voted with the majority in *Roe*, including Justice Burger himself).

302. THE FEDERALIST NO. 78, *supra* note 286. For this reason, Hamilton considered the Supreme Court the "least dangerous" branch. *Id.*

ignore the Court's rulings instead.³⁰³ This is the lesson of Gerald Rosenberg's classic study, *The Hollow Hope*,³⁰⁴ and it is amply illustrated by the Court's decision in *Brown*. In the wake of the Court's 1954 ruling, the South resisted and neither Congress nor the President offered much support for nearly a decade—and it showed. Ten years after the Court's 1954 ruling, only 1.2% of black children in the South went to the same school as whites.³⁰⁵

Recognizing that Supreme Court rulings are only effective to the extent the representative branches are willing to implement them, political scientists contend that today's Justices act strategically as a result, anticipating the reaction of the other branches and adjusting their decisions accordingly.³⁰⁶ Although majoritarian rulings do not guarantee that the other branches will enforce them, the public's anticipated reaction does play an integral part in the mix. The more popular the ruling, the riskier it will be for public officials to oppose or subvert it (at least openly); conversely, the more *unpopular* the ruling, the more difficult it will be to enforce and the less likely that elected officials will commit to enforcement, regardless of political stripe.³⁰⁷ All other things being equal, one reason the Supreme Court issues majoritarian rulings is the difficulty of enforcing those rulings that are not.

Enforcement concerns aside, the Supreme Court has another reason to consider the reaction of the representative branches to its rulings: the availability of a host of court-curbing measures designed to snap an errant bench back into line. Congress can strip the Court's jurisdiction, pack its membership, curtail its budget, and propose constitutional amendments to reverse its rulings, among other options at its disposal.³⁰⁸ Granted, only jurisdiction stripping has proved a credible threat in recent years,³⁰⁹ and the constraint imposed by the possibility

303. See Peretti, *supra* note 211, at 133; see also BICKEL, *supra* note 1, at 252 (acknowledging the executive's obligation to enforce the Court's rulings while adding, "[b]ut there are degrees of enthusiasm in rendering executive support").

304. See ROSENBERG, *supra* note 125.

305. See *id.* at 52.

306. See Epstein et al., *supra* note 292, at 610 ("Tests at both the individual and the aggregate levels support the proposition that the Justices adjust their decisions in anticipation of the potential responses of the other branches of government."); McGuire & Stimson, *supra* note 208 (testing dynamic with similar results).

307. See Friedman, *supra* note 294, at 2612 (noting the function of public pressure when enforcement is up to public officials).

308. See CHOPER, *supra* note 203, at 47–55 (discussing variety of court-curbing measures); NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 22–28 (2004) (same); FRIEDMAN, *supra* note 11, at 375 (same).

309. See Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1337 (2006) ("Over the past two years, Congress has considered proposals to strip federal courts of jurisdiction over same-sex marriage, the Pledge of Allegiance, judicial invocations of international law, the public display of the Ten Commandments, and legal challenges filed by 'enemy combatants.'" (footnotes omitted)). Ultimately, Congress did pass jurisdiction-stripping statutes in the enemy-combatant context, but the Supreme Court used them to increase its power. See Neal Devins, *Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction*, 91 MINN. L. REV. 1562 (2007). For a discussion of the executive

of retaliation is weaker than many majoritarian-minded scholars are willing to concede. Divided government and political polarization make it unlikely that the Court's foes will unite behind a court-curbing agenda³¹⁰—assuming that actually curbing the Court (as opposed to galvanizing the party base) is the point of such proposals in the first place.³¹¹

Yet here again, dominant public opinion plays a part in the mix. The more unpopular the Court's decision, the more likely that the political branches will find common ground against it, and the converse is true as well; elected officials will retaliate against the Court only when doing so does not itself provoke public condemnation.³¹² In the end, the Court's best defense against the people's representatives is the people themselves.

A final majoritarian constraint concerns the Court's need to preserve its institutional legitimacy. When Supreme Court rulings go unenforced, or the Court itself is attacked, the Justices lose some modicum of political power, which, over time, can render the Court vulnerable to further disregard and attacks by the democratic branches.³¹³ Legitimacy, then, is the long-term, dynamic aspect of the enforcement and court-curbing constraints just discussed. Today, the Court has a deep reservoir of public confidence and respect, allowing the Justices a good deal of slack to go their own way.³¹⁴ But that reservoir is not without limits. “[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either,” wrote Justice Powell.³¹⁵ “The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of other branches.”³¹⁶ Years later, Justice O'Connor made a similar point, explaining:

We don't have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That's why we have to be

branch's ability, and incentives, to oppose Congressional jurisdiction-stripping attempts, see Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250 (2012).

310. See WHITTINGTON, *supra* note 39, at 126; Pildes, *supra* note 19, at 137.

311. See LASSER, *supra* note 65, at 262 (“Scholars have marveled at the Court's ability to survive the fiercest of battles. What they have failed to realize is that the Court's enemies, for the most part, were shooting blanks.”); Devins, *Congress*, *supra* note 309, at 1580 (“[R]ecent proposals to strip the courts of jurisdiction over same-sex marriage, the pledge of allegiance, and other social issues were rhetorical moves in which Republican lawmakers sought to strengthen ties with their social-conservative base. Congress had no interest in passing those measures.” (footnote omitted)).

312. See FRIEDMAN, *supra* note 11, at 375; Friedman, *supra* note 294, at 2610–12.

313. See Baum & Devins, *supra* note 294, at 1530.

314. See CHOPER, *supra* note 203, at 138; Friedman, *supra* note 294, at 2614–20, 2630. This slack is helped by the fact that the public has little political knowledge and many issues are not particularly salient. See Friedman, *supra* note 294, at 2617–23; see also *supra* notes 263–69 and accompanying text (discussing political ignorance and apathy of today's voters).

315. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring).

316. *Id.*

aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.³¹⁷

What the Supreme Court has—indeed, all the Court has—is the power of “because I said so.”³¹⁸ Yet for that to mean anything, for it to actually effectuate change, the Court cannot stray far, or for long, from majority will.³¹⁹

In sum, one reason the Supreme Court is majoritarian is that, at least in salient cases, it often has little choice. Majority will imposes significant constraints on the Justices’ ability to deviate from mainstream policy preferences. The question then becomes how much this constraint matters. As discussed in the next section, the force of majority will may well limit what the Justices *want* to do before it limits what they *can*.

3. Majoritarian Influences on Supreme Court Decision Making

Just as majority will constrains the Justices’ ability to pursue their policy preferences, it influences what those policy preferences are in the first place. Part of that influence comes from the larger cultural backdrop against which cases are decided. The text of the Constitution is inherently indeterminate, rendering the interpretive process capacious enough to reflect the panoply of attitudes, assumptions—even prejudices—that define a given place and time.³²⁰ As Robert McCloskey put the point, “We might come closer to the truth if we said that the judges have often agreed with the main current of public sentiment because they were themselves part of that current, and not because they feared to disagree with it.”³²¹ Steven Winter takes the point one step further, explaining, “[J]udges cannot even think without implicating the dominant normative

317. Sandra Day O’Connor, Remarks, *Public Trust as a Dimension of Equal Justice: Some Suggestions To Increase Public Trust*, CT. REV., Fall 1999, at 10, 13. Others Justices have made similar statements. See, e.g., STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW xiv (2010) (“At the end of the day, the public’s confidence is what permits the Court to ensure a Constitution that is more than words on paper.”); William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 595–96 (2004) (“The degree to which [judicial] independence will be preserved will depend again in some measure on the public’s respect for the judiciary.”).

318. This is not to denigrate the power of “because I said so,” a long-standing, venerable doctrine (and the ultimate supremacy clause) in the Lain household.

319. This recognition was critical to Bickel ultimately coming to peace with the countermajoritarian difficulty. See BICKEL, *supra* note 1, at 258 (reasoning that the Supreme Court’s need for public support for its rulings “in the end, is how and why judicial review is consistent with the theory and practice of political democracy”).

320. As Oliver Wendell Holmes explained, “The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.” OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Harvard Univ. Press 1963) (1881); see also KLARMAN, *supra* note 34, at 5–6 (“[B]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times.”); see also Kramer, *supra* note 7, at 1440 (noting “the inevitable ways in which the views of courts and judges are shaped by the evolving understandings of the societies in which the judges also live”).

321. ROBERT G. McCLOSKEY, THE AMERICAN SUPREME COURT 209 (2d ed. 1994).

assumptions that shape their society,” resulting in “unarticulated normative assumptions that shape and produce legal outcomes with distinctly majoritarian overtones.”³²² Like the rest of us, Supreme Court Justices are a product of their time.

Against this cultural backdrop is another, more pointed majoritarian force influencing the Justices’ decision making: the gravitational pull of dominant public opinion. A number of empirical studies have established that public opinion is a statistically significant and powerful influence on the Justices, leading one team of political scientists to conclude that “a system of popular representation is alive and well in the Supreme Court.”³²³ For some jurists, the notion that judges would be influenced by public opinion is hardly news.³²⁴ As Chief Justice Rehnquist wrote over twenty years ago, “Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.”³²⁵ Whether the Justices’ views are shaped by what others think, or by the underlying events that shape what others think (or both), the result is decision making that tilts in a decidedly majoritarian direction.

Granted, the pull of dominant public opinion is complicated. Some Justices are more responsive to it than others, and the Justices as a whole tend to espouse elite views. Setting aside for the moment the impact of public opinion on particular Justices, I pause to state an obvious (but important enough to articulate) point: The Justices are not average members of the public. They are well-educated elites, predominately of the upper socioeconomic class, and their views tend to reflect that fact.³²⁶ Thus, it should come as no surprise that when the Supreme Court departs from mainstream public opinion, it tends to favor elite policy preferences instead.³²⁷ Most of the time, however, the Court does

322. Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1925, 1927 (1991); see also Lawrence M. Friedman, *Coming of Age: Law and Society Enters an Exclusive Club*, 1 ANN. REV. L. & SOC. SCI. 1, 10 (2005) (“In some ways, people are like animals born and raised in zoos; they are not aware that their world of cages and enclosures is highly artificial, that their range of behavior is limited by conditions they did not create for themselves. . . . This is true for legal behavior as much as for any other form of behavior.”).

323. McGuire & Stimson, *supra* note 208, at 1033; see also *supra* notes 208, 305 (citing additional empirical studies).

324. See DEVINS, *supra* note 135, at 155 (quoting Justice Robert Jackson as saying, “[L]ong-sustained public opinion does influence the process of constitutional interpretation. . . . [J]udicial power has often delayed but never permanently defeated the persistent will of a substantial majority” (some alterations in the original)); McGuire & Stimson, *supra* note 208, at 1022 (quoting Justice Felix Frankfurter as saying, “To a large extent, the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion”).

325. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986).

326. See Jack M. Balkin, *How Social Movements Change (or Fail To Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 32 (2005); Michael J. Klarman, *Civil Rights and Civil Liberties in United States Law*, in 2 THE OXFORD ENCYCLOPEDIA OF LEGAL HISTORY 15, 22 (2009).

327. See *infra* note 334.

not depart from mainstream public opinion in the first place.³²⁸ It could be that, as Mike Klarman has argued, the Justices are more influenced by the zeitgeist of a particular moment than they are by elite views.³²⁹ Or it could be that the Justices are constrained.³³⁰ Whatever the reason, the key recognition is that even with elite members, the Supreme Court's decision making tends to reflect majoritarian views.

The other complication—the fact that some Justices are more susceptible to the influence of public opinion than others—is equally important. As one might imagine, the Justices at both extremes of the ideological spectrum are largely unresponsive to changes in dominant public opinion.³³¹ Yet neither of these extremes has constituted a solid majority of the Supreme Court. As I have discussed elsewhere, the Court's membership has remained relatively ideologically balanced for decades, and there is reason to think it may well stay that way.³³² On this ideologically balanced Supreme Court, it is the moderate, swing Justices who matter most in the Court's decision making,³³³ and empirical evidence has shown these Justices to be highly responsive to changes in public opinion.³³⁴ Such findings are consistent with comments that the Justices themselves have made. Justice O'Connor has written that “[R]eal change, when it comes, stems principally from attitudinal shifts in the population at large. . . . Courts, in particular, are mainly reactive institutions.”³³⁵ Justice Kennedy has put the point even more bluntly, stating, “In the long term, the court is

328. See *supra* note 208 (citing empirical studies).

329. See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 *Nw. U. L. Rev.* 145, 191–92 (1998).

330. See *supra* section II.B.2.

331. See Mishler & Sheehan, *supra* note 291, at 172, 189–93 (empirically proving point). Given the fact that those Justices have stronger, more rigid policy preferences, this is just as one would think.

332. See Lain, *supra* note 28, at 68; see also *supra* notes 295–96 and accompanying text (noting pressure to appoint moderates onto Supreme Court).

333. See Neil Devins & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 85, 87 (David Klein & Gregory Mitchell eds., 2010) (“All models [of analyzing judicial decision making] . . . think that power resides at the median During the 2006 term, for example, Justice Anthony Kennedy was a ‘super-median’; among other measures, he was a member of the winning coalition in each case decided by a 5-to-4 vote.”); FRIEDMAN, *supra* note 11, at 375 (“The Court will always have its extremists. But the justices make decisions by majority vote, giving the ‘median’ justice, the justice in the middle of the Court, enormous power. . . . [I]t is a rare (and likely far from significant) case in which the extreme justices are going to be calling the shots.”); Baum & Devins, *supra* note 294, at 1536 (“[A] swing Justice will have numerous opportunities to exercise substantial power. Swing Justices can exercise that power by writing consequential concurring opinions that limit the reach of the majority’s ruling or by insisting that their legal policy preferences are reflected in the majority opinion.”).

334. See Mishler & Sheehan, *supra* note 291, at 172, 189–93 (empirically proving point); see also Devins, *supra* note 11, at 1349 (“Swing justices do not have fixed preferences and are more likely to pay attention to the views of elected officials, elites, and the American people. . . . [T]he dominion of swing justices on the Rehnquist Court made the Court more reflective of popular opinion than Congress was.”).

335. SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 166 (Craig Joyce ed., 2003); see also *id.* (“Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus.”).

not antimajoritarian—it's majoritarian."³³⁶ His own voting pattern is, ironically, one of the chief reasons he is right.

When it comes to the Supreme Court's moderates, yet another gravitational force also may be tilting the Court in a majoritarian direction: the lure of public prestige. Moderates are not the only members of the Court who care about their prestige; Justices on both sides of the ideological spectrum have peer groups that matter, and there is reason to believe that judges as a class care more about public esteem than do people in other professions.³³⁷ Yet here again, the effect on the Court's pivotal moderates is what matters most in Supreme Court decision making, and that effect appears to be substantial.³³⁸ This is the so-called "Greenhouse effect"—a nod to former *New York Times* reporter Linda Greenhouse when she was covering the Supreme Court—and it embodies the idea that the Court's moderate, swing Justices care deeply about public approval and their image in the popular press.³³⁹ To the extent this is true, Justices holding pivotal positions on the Court can be expected to be particularly receptive to rulings that will earn them public acclaim, now or in the foreseeable future—and that makes the Supreme Court as a whole particularly receptive to such rulings too.³⁴⁰

In sum, there are a host of reasons why Supreme Court decision making leans in a majoritarian direction. None of this is to say that the Supreme Court *always* issues majoritarian rulings, nor is it to say that any given ruling is inevitable as a result. But it does explain why the Court is a particularly receptive channel of majoritarian change. *Brown*, *Furman*, and *Roe* provided a bird's-eye view of the phenomenon, but the larger, cross-cutting institutional

336. DeParle, *supra* note 298 (quoting Justice Kennedy).

337. See Devins & Federspiel, *supra* note 333, at 92 ("Accepting a judgeship entails accepting relatively significant constraints on personal activities and behaviors as well as a significant reduction in monetary compensation. The inducement for accepting these losses is an increase in prestige (and an increase in potential power). As a result, the types of people who end up with judicial positions tend to be those who care a great deal about the esteem of others."). For a thoughtful discussion of the desire of judges to win approval from their peer-reference groups, see generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

338. See Devins & Federspiel, *supra* note 333, at 86; Lain, *supra* note 28, at 76.

339. See Mark Tushnet, *Understanding the Rehnquist Court*, 31 OHIO N.U. L. REV. 197, 200–01 (2005) (discussing Greenhouse effect). Although some have suggested that the Court's moderates care about the views of left-leaning elites rather than public opinion, see Baum & Devins, *supra* note 294, at 1516, the more plausible scenario (and the one consistent with the vast majority of empirical and anecdotal evidence) is that these Justices care about both. See *supra* notes 334–36 and accompanying text (discussing empirical research and quoting Justices O'Connor and Kennedy); see also MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 176 (2005) (quoting a former Kennedy law clerk as saying Justice Kennedy "would constantly refer to how it's going to be perceived, how the papers are going to do it, how it's going to look").

340. The lure of public esteem may render these Justices particularly receptive to decisions that are not yet majoritarian but reflect a clear majoritarian trend. Justices concerned with their individual legacies would presumably gauge how history might treat the ruling—would the Court be viewed as the moral vanguard, as in *Brown*, or as the Court that guessed wrong, as in *Furman*? How any particular Justice would resolve the question is of course impossible to say, although the more majoritarian the ruling, the more this consideration would come into play.

dynamics driving those decisions are the essence of upside-down judicial review. The institutions that we think are majoritarian sometimes are not. And the institution we do not think of as majoritarian often is. The combination is what creates the critical (and upside-down) insight: Rather than a countermajoritarian Supreme Court checking the majoritarian branches, sometimes what we see is a majoritarian Court checking the not-so-majoritarian branches, enforcing prevailing norms when the representative branches do not. What remains is a discussion of the concept itself—the what, how, when, and normative implications of upside-down judicial review.

III. EXPLORING THE CONTOURS OF UPSIDE-DOWN JUDICIAL REVIEW

In this final Part, I use the insights developed in Parts I and II to articulate, and explore the contours of, upside-down judicial review. First, I discuss what upside-down judicial review is and why it matters, situating my work within the current scholarly discourse and discussing its theoretical implications. Next, I turn to how upside-down judicial review might happen and when, addressing the practical implications raised by my theoretical analysis. Finally, I consider the normative implications of the positive account I offer.

A. WHAT UPSIDE-DOWN JUDICIAL REVIEW IS, AND WHY IT MATTERS

Context matters, and this is no less true for the notion of upside-down judicial review—it is best understood when considered in light of the backdrop against which it arises. Here, that backdrop is the larger landscape of constitutional theory, which starts with a presumption of majority rule. Majority rule is “the keystone of a democratic political system in both theory and practice,”³⁴¹ and “the core of the American governmental system.”³⁴² Commitment to majority rule (and the presumption that legislative enactments reflect it) is what makes judicial review so problematic—and the countermajoritarian difficulty so difficult.

To alleviate this tension, Bickel claimed that judicial review must be capable of performing a function “which will not likely be performed elsewhere if the courts do not assume it,” something an unelected judiciary could do that the legislative and executive branches could not.³⁴³ For years now, that special function has meant turning vice to virtue—what the Supreme Court offers that other branches do not is countermajoritarian judicial review. Whether articulated in terms of protecting unpopular minorities or otherwise, today most normative theories of judicial review are based on the Court’s ability to act in a

341. CHOPER, *supra* note 203, at 4.

342. ELY, *supra* note 12, at 7.

343. BICKEL, *supra* note 1, at 24.

countermajoritarian manner.³⁴⁴

By conventional wisdom, *Brown*, *Furman*, and *Roe* are classic examples of the Supreme Court serving this countermajoritarian function, although as Part I showed, something vastly different was going on in those cases instead. In all three, the Court either made a majoritarian move or meant to and arguably missed. And in all three, the Court acted under circumstances in which the democratic channels of change were blocked. As the discussion in Part II showed, the juxtaposition of institutional roles in these cases is no historical fortuity. A host of forces can lead to the upside-down dynamic that *Brown*, *Furman*, and *Roe* illustrate.

The question then becomes how these forces translate to upside-down judicial review, and here the whole is greater than the sum of its parts. Upside-down judicial review is not just the result of one set of institutional forces cutting one way, one set cutting another. It is also the result of one set of institutional forces *influencing* the other—of the dynamic, integral relationship between the two.

Here is the gist. When widespread attitudes change but the law does not, pressure builds to effectuate that change—to give force of law to the transformation of attitudes, values, and policy preferences occurring in larger society. Sometimes the Supreme Court is the most conducive outlet through which this change can occur. Free of the legislative logjams that stymie the representative branches, and moved by majoritarian proclivities of its own, the Court responds to, and reflects, prevailing norms otherwise frustrated in the democratic process. Indeed, the fact that those norms are otherwise frustrated in the democratic process is what creates the pressure that moves the Court in the first place. In short, democratic dysfunction sets in motion the very forces that bring about its solution. We're back to old-fashioned checks and balances, but in a completely newfangled way.

Of course, the story is more complicated than that. First, we may not see mounting pressure for majoritarian change when there is a disconnect between the law and the societal judgments it purports to reflect. Perhaps nobody knows about it. The issue is not salient enough to register, communicate, or build pressure for majoritarian change. Or perhaps nobody cares. The issue is not all that important or the law regulating it is so infrequently enforced that it is effectively a nonissue.³⁴⁵ Criminal prohibitions against oral sex between consent-

344. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 279 (2005) (“Yet most extant normative theories of judicial review rest on the capacity of judges to act in a manner contrary to political or popular preferences.”).

345. The Supreme Court is not the only available avenue for pent up pressure for majoritarian change. Prosecutors can refuse to bring charges, juries can refuse to convict, the law can otherwise languish. There are multiple fail safes within our system, and to the extent other actors respond to majoritarian change when legislatures do not, we may not need the Court's intervention (although this is the time we are most likely to get it). See Balkin, *supra* note 35, at 1546–51 (discussing “Lesson Two: Courts Are Bad at Tackling, Good at Piling On”).

ing adults may be an example of both.³⁴⁶ In any event, the nuance is an important one: Upside-down judicial review is about the Supreme Court serving as an outlet for pent up pressure for majoritarian change, and sometimes there isn't any.

Second, even when there is mounting majoritarian pressure for change, the Supreme Court may not respond to it. A number of factors can influence Supreme Court decision making—the Justices' policy preferences and views about institutional considerations like federalism and separation of powers are but a few.³⁴⁷ Thus, majoritarian forces pushing the Court may *or may not* create a tipping point for judicial review, depending on the cauldron of other decision-making factors also in play and the direction those factors cut.³⁴⁸

Finally, as I have just articulated it, upside-down judicial review is about what happens when legislatures fail to respond to majoritarian change—and it is. Stymied legislatures, rather than off-center ones, present the most likely opportunities for upside-down judicial review. But given the discussion in section II.A, one can also imagine upside-down judicial review enforcing majoritarian norms where the legislature has acted but in a nonmajoritarian way. Indeed, media speculations as to how the Supreme Court would rule on the Affordable Care Act (“Obamacare”) made this point explicitly, suggesting that the law’s low public-approval ratings could (perhaps even should) lead the Justices to strike it down.³⁴⁹

In the end, the point is this: Upside-down judicial review does not happen

346. A number of states still criminalize so-called “crimes against nature,” which has traditionally included oral sodomy even when between heterosexual, consenting adults in private. *See, e.g.*, ALA. CODE § 13A-6-65 (LexisNexis 2005); FLA. STAT. ANN. § 800.02 (West 2003); IDAHO CODE ANN. § 18-6605 (West 2004); LA. REV. STAT. ANN. § 14:89 (2011); MASS. GEN. LAWS ANN. ch. 272, § 35 (West 2002); MINN. STAT. ANN. § 609.293 (West 2006); MISS. CODE ANN. § 97-29-59 (West 2009); N.C. GEN. STAT. § 14-177 (2009); S.C. CODE ANN. § 16-15-120 (2003); UTAH CODE ANN. § 76-5-403 (West 2008); VA. CODE ANN. § 18.2-361 (West 2009). To the extent they do so, such statutes would appear to be wildly out of touch with contemporary values, but my sense is that few people know about these laws and to the extent they know, lack of prosecutions means they likely don't care.

347. For an excellent in-depth discussion of the numerous non-doctrinal factors that can influence Supreme Court decision making, see generally RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

348. This is why upside-down judicial review is a better tool for understanding cases than predicting them. *See infra* note 377 and accompanying text (discussing point). This is also why the Supreme Court can, and does occasionally, render truly counter-majoritarian opinions. *See supra* note 248 (viewing *Citizens United* as a genuinely counter-majoritarian decision but one that is hardly surprising given the Justices' ideological leanings).

349. *See* Barry Friedman & Dahlia Lithwick, *Justice by the Numbers: When It Comes To Deciding the Future of Obamacare, the Supreme Court Should Ignore Public Opinion*, SLATE, Apr. 24, 2012, http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/the_supreme_court_and_obamacare_the_justices_should_be_careful_not_to_let_public_opinion_guide_their_decisions_.html (“The Supreme Court’s argument over Obamacare may well be the first in history in which news about public opinion was driving the news about constitutional decision-making, rather than vice versa. . . . What pundits and the press seem to be suggesting by linking opinion polls to the constitutional debate over healthcare is this: *If* the health care law is unpopular, the justices *will*—or worse, *should*—strike it down.” (emphasis in original)). Such predictions did not come to pass. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (upholding individual mandate of Affordable Care Act).

all the time, and it can happen in various ways (themes I return to in the next section).³⁵⁰ What it provides is yet another understanding of judicial review—an understanding that at its core is about the Supreme Court's ability, at times, to be *more* majoritarian than the majoritarian branches, rather than less.

By way of comparison, and for the purpose of further clarifying what upside-down judicial review is, I pause for a moment to clarify what it is not, distinguishing my work from that of three scholars it closely resembles. First is perhaps history's most famous theory of judicial review—John Hart Ely's political-process theory, which argues that judicial review is justified whenever the political process is “systematically malfunctioning” in a way that renders it undeserving of trust.³⁵¹ Upside-down judicial review can also be viewed as a response to malfunctioning political processes, but there are several key differences between the two.

First and foremost, upside-down judicial review is a descriptive account of judicial review—an extralegal observation about how judicial review works, rather than a normative justification about how it should. Ely's political-process theory, by contrast, is a normative justification of judicial review. For comparison purposes, the two are apples and oranges.

Second, even assuming for the moment that Ely's theory were descriptive, the two understandings would still differ. Upside-down judicial review is conceptually more broad and thus accounts for cases that Ely's political-process theory does not. *Roe v. Wade* provides a prime example. Ely considered *Roe* deeply misguided; in his view, the political process was not broken, so there was no reason to fix it.³⁵² Although the case-study discussion above casts doubt upon that position, the point is irrelevant to upside-down judicial review. Whether the representative branches are unable to accommodate majoritarian change because they are malfunctioning, *or because they are just cumbersome and slow by design*, the result is the same—a disconnect between the law and the societal norms it purports to reflect, and the majoritarian pressure for judicial review that the disconnect sets in motion. Ely embraced a comparatively much more limited conception of judicial review.

Third, because it is descriptive, upside-down judicial review picks up where Ely's political-process theory leaves off. Ely told us what the Supreme Court *should* do; upside-down judicial review explains why it *might*. More specifically, Ely wrote about democratic failure; what he did not write about were the majoritarian implications of that failure, and the role those implications play in

350. See *infra* section III.B (exploring how upside-down judicial review might happen, and when).

351. ELY, *supra* note 12, at 103. See also *id.* (“Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority . . .”).

352. See *id.* at 248 n.52; Ely, *supra* note 28, at 934–36.

triggering the exercise of judicial review.³⁵³ When the representative branches are stymied, majoritarian change is stymied too. That can cause pressure to mount and move to other available outlets, including the Supreme Court, which, for all the reasons discussed in Part II, is a surprisingly conducive channel of majoritarian change. Again, democratic dysfunction has majoritarian implications, and those implications are the very thing that can bring about its solution—a contribution to, and extension of, Ely’s political-process account of judicial review.

Finally, and perhaps most importantly, upside-down judicial review rejects the notion of judicial review as inherently antidemocratic outside the realm of correcting malfunctions in the democratic process. For Ely, political-process outcomes were irrelevant; a political process functioned or it did not, and outcomes with which people disagreed simply meant it was time to vote elected officials out of office.³⁵⁴ Upside-down judicial review views that conception as overly narrow and simplistic, resulting in fundamentally different notions of how judicial review intersects with democratic values. As a purely descriptive matter, Ely recognized the process side of democracy-enhancing judicial review. Upside-down judicial review recognizes a substantive side too. Its point is that *sometimes* the Supreme Court supports democratic values not by protecting majoritarian process, but simply by producing majoritarian results—a descriptive account fundamentally at odds with Ely’s most basic assumptions.

The remaining two comparisons move more quickly, starting with Jeff Rosen’s account of judicial review. An astute observer of law and politics, Rosen has recognized as well as anyone the juxtaposition of institutional roles in today’s polity, writing in the *New York Times Magazine*:

[I]t would seem that, on balance, the views of a majority of Americans are more accurately represented by the moderate majority of the Supreme Court . . . than by the polarized party leadership in the Senate The[] standard charge is that unelected judges are thwarting the will of the people by overturning laws passed by elected representatives. But in our new topsy-turvy world, it’s the elected representatives who are thwarting the will of the people, which is being channeled instead by unelected judges.³⁵⁵

353. Put another way, Ely showed us that judicial review can remedy malfunctions in the political process, but the Supreme Court does not always step in when the political process malfunctions. What explains when it does and when it does not? There may be several answers to this question, but one is undoubtedly mounting majoritarian pressure for change, as *Furman* illustrates nicely. See *supra* notes 121–22 and accompanying text (noting that the death penalty’s application had been problematic for decades, but changed sociopolitical context moved the Supreme Court from hands-off to hands-on).

354. ELY, *supra* note 12, at 103 (“Our government cannot fairly be said to be ‘malfunctioning’ simply because it sometimes generates outcomes with which we disagree, however strongly. . . . In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office.”).

355. Jeffrey Rosen, *Center Court*, N.Y. TIMES MAG., June 12, 2005, <http://www.nytimes.com/2005/06/12/magazine/12WWLN.html>; see also ROSEN, *supra* note 11, at 3 (“[T]he Supreme Court in recent years has become increasingly adept at representing the views of the center of American politics that

Although Rosen's account is more observation than theory, the "topsy-turvy" institutional dynamic he recognizes is on all fours with upside-down judicial review. In other work, Rosen builds upon this account, and to the extent he offers a theory of judicial review there, his too is a normative view of what the Supreme Court *should* do—validate popular preferences.³⁵⁶ Upside-down judicial review makes no such claim. It is not something the Court should, or should not do. It just *is*, resulting in vastly different conversations from the start.

Third, and finally, by way of comparison is David Strauss's work on modernization as an understanding of judicial review.³⁵⁷ As Strauss (and others) have recognized, sometimes the Supreme Court uses judicial review to invalidate laws that are the product of a bygone era and have since lost popular support.³⁵⁸ Upside-down judicial review is also a way of understanding this phenomenon, and there is substantial overlap between the two.³⁵⁹ But here again, Strauss's work is a *normative* account, an account that sees accommodating popular preferences as its own "principled regime."³⁶⁰ As a result, his focus is more on how the Court might make such determinations and how it should respond if it gets popular sentiment wrong, questions that are different from the start (with

Congress is ignoring."). Interestingly, Rosen does not see *Roe* as an example of this phenomenon, although others have disagreed with his assessment. See ROSEN, *supra* note 11, at 90 (arguing that *Roe* "unilaterally leaped ahead of a national consensus" and imposed a reform "not yet accepted by a majority of the public"); Devins, *supra* note 11, at 1337 (rejecting Rosen's view of *Roe* and arguing that "*Roe* and *Brown* are not so easily distinguishable").

356. See ROSEN, *supra* note 11, at 13 ("My point is that judges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable and then enforce those views as consistently as possible."); *id.* at 15 ("[The Supreme Court] should hesitate to strike down state laws unless it is confident that a clear national consensus, represented by a strong majority of states, has, in fact, materialized."); *id.* at 210 ("The courts can best serve the country in the future as they have served it in the past: by reflecting and enforcing the constitutional views of the American people.").

357. See David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009); David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STAN. L. REV. 761 (2004).

358. See Strauss, *Modernizing Mission*, *supra* note 357, at 862–63; Strauss, *Modernization and Representation Reinforcement*, *supra* note 357, at 762. For a sampling of other recognitions of this phenomenon, see, for example, Balkin, *supra* note 35; Klarman, *supra* note 38; Sunstein, *supra* note 274. For a discussion of the same modernizing phenomenon in the context of statutory interpretation, see generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

359. See Strauss, *Modernization and Representation Reinforcement*, *supra* note 357, at 768 ("Sometimes, existing laws and institutions do not reflect popular sentiment because of some form of inertia."); *id.* at 777 ("When such situations exist, judges would promote democracy if they invalidated the laws."). That said, upside-down judicial review might also be used to enforce majoritarian norms where the legislature has acted but in an off-center way. See *supra* note 349 and accompanying text (discussing possibility).

360. See Strauss, *Modernizing Mission*, *supra* note 357, at 898 ("[A]ccommodation is the principled regime. The governing idea of the modernization view is that statutes are unconstitutional just because, and to the extent that, they do not reflect true popular sentiment. If it turns out that the Court has miscalculated, and the statutes do reflect popular sentiment, then the principled thing to do is change course." (emphasis in original)). In this sense, it is more like Jeff Rosen's work than upside-down judicial review.

different conclusions at times too)³⁶¹ from the institutional dynamics and causal relationships that are the focus of upside-down judicial review.³⁶²

Having distinguished my work from that of others, what remains is a distillation of why it matters—the implications of upside-down judicial review for the larger landscape of constitutional law and theory. I set aside for a moment the normative implications of judicial review, whether it is on balance a good thing or bad, and focus here on impact. As a practical matter, why should we care about upside-down judicial review?

One answer is constitutional doctrine. As I have detailed elsewhere, the Supreme Court relies on state legislation to identify and apply constitutional norms in a surprisingly broad array of doctrinal contexts.³⁶³ According to the Court, legislation is “the ‘clearest and most reliable objective evidence of contemporary values.’”³⁶⁴ Upside-down judicial review poses a challenge to that assertion. Legislation is not always the most reliable evidence of contemporary values. Sometimes it is not reliable at all.

Yet equally, if not more important, is what upside-down judicial review does for constitutional theory. Scholars have long lamented the disconnect between constitutional theory and practice, with political scientists particularly discouraged by the legal academy’s failure to produce normative theories based on how judicial review actually works in our constitutional system.³⁶⁵ Mark Graber typifies the sentiment in writing:

361. For example, Strauss focuses heavily on a state’s outlier status on the national scene as evidence of modernizing judicial review. See Strauss, *Modernizing Mission*, *supra* note 357, at 865–68, 875–87; Strauss, *Modernization and Representation Reinforcement*, *supra* note 357, at 768. This tends to result in decisions that look majoritarian (because they are) rather than decisions that look counter-majoritarian, but aren’t. I also strongly disagree with Strauss that Ely would approve. Compare Strauss, *Modernization and Representation Reinforcement*, *supra* note 357, at 776 (arguing that modernization is consistent with Ely’s theory because it “focuses on procedure, not on the substantive decision”), with ELY, *supra* note 12, at 63–69 (considering and rejecting “popular consensus” as a way to give content to the Constitution’s open-ended provisions).

362. See Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. Rev. 1129, 1158 (2012) (“Even so, Strauss offers no causal account That is, he offers us a normative role that judges might play, but no reasons to think that they will play it.”).

363. See Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards.”* 57 UCLA L. Rev. 365 (2009) (discussing Supreme Court’s reliance on the majority position of state legislatures to identify and apply constitutional norms in the substantive- and procedural-due-process contexts, the equal-protection context, and in the context of the First, Fourth, Sixth, and Eighth Amendments).

364. *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O’Connor, J., dissenting) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

365. See, e.g., Gewirtzman, *supra* note 262, at 903 (“[A]n accurate descriptive account of how our interpretive system functions has been all too absent from constitutional theory.”); Hutchinson, *supra* note 231, at 93 (“[L]egal theorists have neglected to utilize the rich analysis of public institutions that social scientists have produced. This omission limits the relevance of legal theory.”); Terri Peretti, *The Virtues of “Value Clarity” in Constitutional Decisionmaking*, 55 OHIO ST. L.J. 1079, 1081 (1994) (arguing that current constitutional theory “rest[s] on a fundamental misunderstanding of how American politics actually operates”); Keith E. Whittington, *Constitutional Theory and the Faces of Power*, in *THE JUDICIARY AND AMERICAN DEMOCRACY*, *supra* note 211, at 163, 164 (“Constitutional theory has tended to focus on the legal to the exclusion of the political, and as a consequence has ignored important aspects of how constitutionalism works in practice. The countermajoritarian framework is

Theories of judicial review in a democracy will be of only limited interest until they correctly describe the circumstances in which judicial policymaking takes place. . . . When the actual political histories of the most important instances of judicial policymaking are examined closely, however, the relationship between judicial review and the democratic requirements of deliberate decision-making, majoritarianism, and political accountability are far more complex than the simplistic models presupposed by much constitutional commentary.³⁶⁶

At the time, Graber was writing about legislative deferrals and constitutional theory's failure to recognize that sometimes when the Supreme Court resolves conflicts, "the practical alternative is not having those conflicts resolved at all."³⁶⁷ But what he wrote was equally applicable to a broader phenomenon of which legislative deferrals are just a part: upside-down judicial review. Upside-down judicial review answers the call for much needed work on how judicial review actually operates. One dimension of that is understanding why it happens, others are *how* and *when*.

B. HOW UPSIDE-DOWN JUDICIAL REVIEW MIGHT HAPPEN, AND WHEN

Thus far, I have discussed upside-down judicial review in theory, emphasizing its importance as a conceptual phenomenon. I now turn from theory to practice, considering how upside-down judicial review might happen and when. First I use the case studies from Part I to explore how upside-down judicial review might play out in the Supreme Court's decision making, cataloging the doctrinal and non-doctrinal avenues in which it might find expression. Then I use the dynamics discussed in Part II to address the more speculative question of when upside-down judicial review might be most likely to occur.

Returning to *Brown*, *Furman*, and *Roe* as examples, one can imagine a number of ways in which upside-down judicial review might find expression in the Supreme Court's decision making. Easiest to spot is when doctrine explicitly incorporates the upside-down dynamic, and *Furman* is a prime example. Justices Brennan and Marshall both voted to abolish the death penalty in *Furman* based on their view that society had rejected it, rendering the punishment "cruel and unusual" under the Eighth Amendment's "evolving standards of decency" doctrine.³⁶⁸ The petitioners' political-process argument in *Furman* took an equally express approach, arguing that the death-penalty statutes at issue had lost their barometric status as a reflection of societal values and that

adequate neither for understanding how constitutional government works, nor for evaluating the exercise of judicial review.").

366. Graber, *supra* note 187, at 71; *see also id.* at 36 ("Empirical works typically suggest that most normative analyses of the Supreme Court are of little relevance to the actual practice of judicial review in the United States.").

367. *Id.* at 73. For a discussion of legislative deferrals, *see supra* notes 271–73 and accompanying text.

368. *See supra* note 75 and accompanying text.

the democratic process was incapable of restoring it.³⁶⁹ Whether couched in terms of substance or process, one way that upside-down judicial review might play out is explicitly in the Court's doctrinal decision making.

The Supreme Court might also exercise upside-down judicial review *implicitly* in its doctrinal decision making. Both *Furman* and *Roe* exemplify this phenomenon. In *Furman*, Justice White maintained that society's refusal to actually use the death penalty negated the asserted state interest supporting it—deterrence.³⁷⁰ In *Roe*, the Supreme Court rejected the asserted state interest supporting abortion restrictions—the mother's health and safety—on the ground that modern developments had rendered that interest obsolete.³⁷¹ In both cases, it was the “ludicrously poor fit” between the statutes at issue and the society in which the Justices lived (at least as they perceived it) that rendered the state interests invalid.³⁷² When legislation grows out of sync with widespread social convictions, the state interests supporting it become increasingly unpersuasive, presenting an attractive target for upside-down judicial review.

Sometimes upside-down judicial review has no expression at all in the Supreme Court's doctrinal decision making but is nevertheless clearly at work. Here *Brown* and *Furman* provide the best illustrations. In *Brown*, the Justices' comments in conference left no doubt that extralegal change played a role in their decision making, and their questions at oral argument made equally clear their lack of confidence in Congress to provide relief.³⁷³ In *Furman*, the Justices' comments in conference made clear their view that the country was moving towards abolition, while legislatures were lagging behind.³⁷⁴ In both cases, the Justices' comments on and off the bench left little doubt about what was driving their decision making—the cross-cutting institutional dynamics of upside-down judicial review.

In a final category of cases, the Justices may well be exercising upside-down judicial review, but there is no indication that they understand their decision making as such. They are simply doing what they think is right at the time, completely oblivious to the fact that what they think is right is itself profoundly influenced by larger societal norms. Without conference notes and oral-argument transcripts for enlightenment, one might have viewed the Court's ruling in *Brown* this way—the opinion itself says nothing of the upside-down dynamics driving the Justices' decision making. In the end, the Justices need not deliberately, or even consciously, channel majoritarian norms when exercising

369. See *supra* notes 109–11 and accompanying text.

370. See *supra* note 79 and accompanying text.

371. See *Roe v. Wade*, 410 U.S. 113, 148–49 (1973).

372. Sunstein, *supra* note 274, at 31 (making point in the context of *Lawrence v. Texas*); see also *id.* (“When the [Supreme] Court asserts the absence of a ‘legitimate state interest which can justify its intrusion into the personal and private life of an individual,’ it is best understood to be saying that the moral claim that underlies the intrusion has become hopelessly anachronistic.” (footnote omitted) (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))).

373. See *supra* notes 36, 56–60 and accompanying text.

374. See *supra* notes 75–79, 112–15 and accompanying text.

judicial review in an upside-down manner. As discussed in Part II, the cultural backdrop against which cases are decided and the pull of dominant public opinion may influence the Justices' decision making in subliminal, unarticulated ways.³⁷⁵

In short, upside-down judicial review might operate through a number of different mechanisms, including no formal mechanism at all. The hard question is not so much *how* upside-down judicial review might happen, but *when*.

Predicting Supreme Court behavior is a risky business. Nothing is a sure thing, and one can imagine a number of situations in which the opportunity for upside-down judicial review does not even present itself because public opinion has not yet coalesced into a majority view. Indeed, even when public opinion has coalesced, there is no guarantee that the Court will go along; although Supreme Court rulings are generally majoritarian, sometimes they are not. As previously discussed, where the Court ultimately comes out on an issue depends on a number of decision-making influences, and the way those influences cut.³⁷⁶

For this reason, upside-down judicial review is more about understanding Supreme Court decisions than predicting them. But the two are not unrelated. Understanding the conditions that create upside-down judicial review also provides some understanding as to when it is most likely to occur. As Barry Friedman put the point, “[W]e can’t be sure today will be yesterday. But we can learn something from the patterns”³⁷⁷ If Archibald Cox was right in claiming that when one institutional channel of change is blocked, pressure moves to another,³⁷⁸ then the theoretical constructs discussed in Part II provide a starting point for thinking about the conditions that are most likely to result in upside-down judicial review.

Half of the equation is majoritarian pressure for change. All other things being equal, the stronger the consensus, the more likely it is that the Supreme Court will agree with it—and the more quickly it develops, the harder it will be for the more obstacle-laden representative branches to keep up. Both considerations suggest that one predictor of upside-down judicial review is the presence of strong gusts of extralegal change—winds that are powerful enough to cause deep shifts in public opinion over a relatively short period of time. Social movements, to take perhaps the most obvious example, fit the bill perfectly. Thus, it should come as no surprise that *Brown* was supported by a burgeoning civil rights movement, that *Furman* was supported by a decade-long abolition movement, and that *Roe* was supported by the women’s rights movement and sexual revolution. The Supreme Court’s 2003 decision in *Lawrence v. Texas*,³⁷⁹ which invalidated same-sex-sodomy statutes against the backdrop of an ascen-

375. See *supra* notes 320–25 and accompanying text.

376. See *supra* note 348 and accompanying text (discussing point).

377. Barry Friedman, *Discipline and Method: The Making of The Will of the People*, 2010 MICH. ST. L. REV. 877, 898.

378. See *supra* note 202 and accompanying text.

379. 539 U.S. 558 (2003).

dant gay-rights movement, provides a more modern example.³⁸⁰

That said, full-blown social movements are not the only forces of majoritarian change. Economic developments, technological and scientific advances, high-profile events like the rubella outbreak prior to *Roe*—*anything* that leads to fundamental shifts in cultural norms can lead to upside-down judicial review.

The other half of the equation is whatever might keep the representative branches from representing majority will. What sort of circumstances do that? Let me count the ways. The list starts in Part II and is as long as the number of opportunities for the democratic process to break (or simply bog) down. Of particular relevance here may well be issue-specific impediments to effectuating majoritarian change—tough social-agenda items that are simply too costly for the political branches to deal with on their own. Abortion. The death penalty. Race. Again, the case studies are instructive.

What about gay marriage, inquiring minds want to know. Polling data show that public support for gay marriage has grown in fits and starts; it now stands at an even fifty percent, with strong support for gay marriage among people aged eighteen to thirty-four suggesting that it will continue to grow over time.³⁸¹ For their part, legislatures have been remarkably responsive on the gay-marriage issue—but in the opposite direction. Today thirty-eight states refuse to recognize gay marriage by statutory or state constitutional provision.³⁸² At first glance, the pieces would appear to be falling into place for upside-down judicial review.

I wouldn't put money on it though. Most politicians believe that gay marriage is headed towards national recognition; it would take a massive disruption to reverse the current trend.³⁸³ Having nine unelected judges decide the issue, with

380. See Sunstein, *supra* note 274 (characterizing *Lawrence* as an instance in which the Justices gave force of law to a societal transformation that had already occurred).

381. See Frank Newport, *Half of Americans Support Legal Gay Marriage*, GALLUP (May 8, 2012), <http://www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx>. (reporting support for gay marriage at 50% and opposition at 48%); *id.* (“The trend on Americans’ attitudes on same-sex marriage has not followed an entirely consistent trajectory. While the percentage in favor increased to 46% in 2007, it slipped to 40% in the following two years. In somewhat similar fashion, last year’s increase to 53% support has edged back down slightly this year to 50%—not a statistically significant change, but not a continued increase, either.”); Lydia Sand, *U.S. Acceptance of Gay/Lesbian Relations Is the New Normal*, GALLUP (May 14, 2012), <http://www.gallup.com/poll/154634/acceptance-gay-lesbian-relations-new-normal.aspx> (noting 66% support for gay marriage among those aged eighteen to thirty-four).

382. See *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (June 2012), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>. Only six states and the District of Columbia currently recognize same-sex marriage, although two other states—Washington and Maryland—passed legislation doing so that has yet to take effect. *Id.*

383. See David Lightman, *VP: Gay Marriage Acceptance “Inevitable,”* SEATTLE TIMES, Dec. 25, 2010, at A5 (quoting Vice President Biden saying “I think the country’s evolving . . . and I think there’s an inevitability for a national consensus on gay marriage”); Michael Klarman, *Why Gay Marriage Is Inevitable*, L.A. TIMES, Feb. 12, 2012, <http://articles.latimes.com/2012/feb/12/opinion/la-oe-klarman-gay-marriage-and-the-courts-20120212> (noting that conservatives have begun to acknowledge that same-sex marriage is inevitable and concluding that the gay-marriage war is over even as the fighting

voting patterns that fall largely on ideological lines, probably qualifies. The Justices have been down this road before; they know the damage their rulings can do. In the end, it is hard to say which set of influences wins the day—public opinion might support the right to gay marriage, but strategic concerns (as well as policy preferences for some Justices) cut the other way. That said, if support for gay marriage continues to grow and legislation does not give way, my prediction is yes, the Justices will *eventually* respond to the disconnect with upside-down judicial review.

In the end, this is about as predictive as a theory not intended for prediction can be. How often might we expect to see upside-down judicial review? Hard to say, but the discussion in Part II suggests that those who write off the phenomenon as an “exceptional situation” are mistaken.³⁸⁴ Upside-down judicial review *happens*, and it happens enough to merit consideration in our normative theorizing about judicial review. As a step in that direction, I spend the last portion of the Article exploring the normative implications of my otherwise positive account.

C. THE NORMATIVE IMPLICATIONS OF UPSIDE-DOWN JUDICIAL REVIEW

Whether upside-down judicial review is, on balance, a good or bad thing seems to me a complicated question. Yet it is worth noting at the outset just how *uncomplicated* for others that question appears to be. However objectionable judicial review may be in the abstract, most scholars approve of its use to counter democratic deficiencies.³⁸⁵ Even the relatively recent high-profile Jeremy Waldron–Richard Fallon debate over judicial review set aside at the outset those instances when “legislative institutions are dysfunctional,” assuming instead “reasonably well-functioning democratic institutions” (and exemplifying the very sort of unrealistic assumptions that drive political scientists nuts).³⁸⁶ Elsewhere as well, so-called “Anti-Court scholars” like Mark Tushnet, Larry Kramer, Cass Sunstein, and Jeff Rosen assume reasonably-well-working political institutions, the absence of which would presumably change their views about judicial review.³⁸⁷ Not all upside-down judicial review is a response to

continues); *Poll: Gay Marriage Inevitable?*, DAILY HERALD, May 17, 2012, http://www.heraldextra.com/news/opinion/poll-gay-marriage-inevitable/article_f67f956c-a0a9-11e1-9a5f-0019bb2963f4.html (discussing sense of fatalism in gay-marriage debate and adding, “For increasing numbers of people, it’s no longer a matter of whether but only when”).

384. CHOPER, *supra* note 203, at 28.

385. See, e.g., CHOPER, *supra* note 203, at 28; ROSENBERG, *supra* note 125, at 22; Friedman, *supra* note 3, at 227–28; Graber, *supra* note 8, at 381; Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 796 (1991). Richard Davies Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223, 247 (1981).

386. Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1719 (2008); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006); see also *supra* notes 365–66 (noting widespread criticism that legal theories of judicial review use unrealistic assumptions that limit their usefulness).

387. See Josh Benson, *The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement*, 33 LAW & SOC. INQUIRY 1071, 1078, 1083 (2008) (introducing “the

democratic dysfunction, but much (if not most) of it is,³⁸⁸ and scholars tend to agree that judicial review in this instance is an easy call. Our republican form of government only comes first if it works.

I do not see the call on upside-down judicial review as being nearly that clear, although I agree that it eviscerates most democratic concerns. Chief among these is the countermajoritarian difficulty. In the context of upside-down judicial review, the unique function that judicial review serves—that special something that an unelected judiciary can do that the democratically elected branches cannot—is, ironically, vindicating majority will. As such, it is an answer to Bickel that turns the countermajoritarian difficulty on its head, justifying judicial review by the very benchmark used to condemn it. Rather than thwarting majority will, the Supreme Court facilitates it—in an unexpected and upside-down way, democracy never worked so well.

That said, one might make a number of other objections to judicial review in general, and upside-down review is subject to all of those objections. Some problems it makes better, others it makes worse. That is what makes upside-down judicial review hard.

One objection I do not so much worry about is the claim that judicial review is inherently incapable of rendering change without the support of the political branches (the possibility that it can actually reverse the direction of change is one I address separately in a moment).³⁸⁹ As previously noted, the Supreme Court's inability to effectuate change on its own is the point of Gerald Rosenberg's classic study, *The Hollow Hope*, and is amply illustrated by *Brown*.³⁹⁰ Yet as a normative matter, the fact that upside-down judicial review takes place against the backdrop of stymied political branches unable to bring change on their own lessens this concern. In that scenario, the question is not whether the Court is effective in generating change; the question is whether the Court can generate *more* change than the political process, which is generating no change at all.

Other objections prove more challenging. One is what Mark Tushnet calls “judicial overhang”—the notion that judicial resolution of conflicts crowds out democratic decision making by taking contested issues off of elected officials’

Anti-Court works of four prominent scholars”—“the popular constitutionalism of Larry Kramer, the minimalism of Cass Sunstein, the bipartisan restraint of Jeffrey Rosen, and the call to abolish judicial review by Mark Tushnet”—then comparing the four and concluding that “[p]erhaps most importantly, the Anti-Court scholars share a strong belief that the political branches function reasonably well”).

388. See *supra* section II.A (examining various impediments to majoritarian change). Admittedly, there are line-drawing problems with discerning when stymied legislatures are broken or just intractably slow—but there were line-drawing problems with Ely too. See Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981) (noting inherent difficulty in distinguishing between insular and discrete minorities that need protection and groups that lose in the political process because they should).

389. See *infra* notes 401–08 and accompanying text (discussing backlash).

390. See ROSENBERG, *supra* note 125; *supra* notes 302–12 and accompanying text.

backs.³⁹¹ On the one hand, upside-down judicial review is less worrisome in this regard because by definition, it occurs only when democratic decision making has already stalled. Yet it also cuts the other way. If the Supreme Court repeatedly serves as a release valve for majoritarian preferences, other institutional actors will eventually factor that release valve into their decision making. This is legislative deferral, and as *Roe* showed, it only exacerbates the democratic dysfunction that leads to upside-down judicial review.³⁹² Of course, legislative deferral can occur whether or not the Court accommodates; if legislators find an issue too costly to decide, they will not decide it regardless of what the Supreme Court does. But it is worth noting that among upside-down judicial review's virtues, promoting long-term responsiveness from the political branches is not on the list.

Another possible objection is the question of why enforcing majoritarian values is an unequivocal plus—isn't the very existence of the Supreme Court, and the fragmented structure of our Constitution, a recognition by the Framers that majority rule is not necessarily a good thing? This is the so-called "majoritarian difficulty," and it is in full flower with upside-down judicial review.³⁹³ Here we see the Court making majoritarian decisions, rather than principled ones, and in the process eviscerating structurally imposed brakes on majority rule. The only answer (and it is a limited one) is to note that just as enforcing majoritarian values is not always an unequivocal plus, the Court does not always exercise upside-down judicial review. Facilitating majoritarian change is one function of judicial review; the Court's ability to act in a countermajoritarian fashion, performing other functions in other circumstances, remains.

Federalism concerns present a similar challenge, raising legitimate questions about why the Supreme Court should be imposing national values upon outlier jurisdictions, rather than allowing them to experiment and go their own way. For political scientists like Keith Whittington, the answer is easy—the Supreme Court is a part of a national political coalition and serves a vital function in suppressing pockets of power adverse to the coalition's values and immune from regulation elsewhere.³⁹⁴ Here again, I am not convinced that the answer is that simple. In my mind, the problem with federalism as a concern is that it is *always* a concern when the Supreme Court reviews state actions. Hence the real question is not whether to intrude on states' prerogatives, but *when*, and as a purely descriptive matter, prevailing norms play an important role in that determination. As I have discussed elsewhere, the further states deviate from the

391. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57–65 (1999).

392. See *supra* notes 188–93 and accompanying text.

393. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); see also Friedman and Lithwick, *supra* note 349 (considering the majoritarian difficulty in the context of the Supreme Court's consideration of the Affordable Care Act and concluding, "That's the very antithesis of constitutionalism: reading the latest poll to understand our most long-standing and binding commitments.").

394. See WHITTINGTON, *supra* note 39, at 105–07.

national norm, the more likely the Justices will find their behavior patently offensive and below some constitutional base line, notwithstanding a general preference for deference.³⁹⁵ In short, majoritarian norms already influence the weight the Court affords to institutional values like federalism; upside-down judicial review merely theorizes the larger landscape in which that occurs.

Of course, all of this assumes that the Supreme Court actually knows majority will when it sees it, an assumption that may not be true. As Ely and others have noted, the Justices have no “special pipeline to the genuine values of the people”³⁹⁶—even where majoritarian sentiment exists, the Court would seem particularly unqualified to find it.³⁹⁷ The question then becomes whether the Justices get it wrong as much as they get it right; when the democratic process fails, why should we assume we are better off with upside-down judicial review? Perhaps the best answer is that the Court is in fact majoritarian and is influenced by majoritarian norms whether it tries to be or not.³⁹⁸ This is not to deny that the Justices can get majority will wrong; sometimes they assume a ruling is more majoritarian than it is because they have mistaken elite values for those of the public at large.³⁹⁹ But even when the Court misses the majoritarian mark, the result is not necessarily a bad thing. To understand why, it is first necessary to consider another potential downside to upside-down judicial review: backlash.

Supreme Court rulings can cause any number of reactions. Some are positive, as when a ruling inspires others or further legitimizes a contested position, and *Brown* is an example that to some extent did both.⁴⁰⁰ Yet far more often,

395. See Lain, *supra* note 28, at 77. Mike Klarman’s work on the Supreme Court’s early criminal-procedure decisions provides a rich example. What made the Justices in the 1930s inclined to depart from 150 years of deference to the states on matters of criminal justice? The answer, as Klarman lays out so persuasively, is a changed sociopolitical context, one that rendered southern conceptions of justice simply too far from the national norm for the Justices to allow those conceptions to stand. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–50 (2000).

396. ELY, *supra* note 12, at 103.

397. See BICKEL, *supra* note 1, at 239; ELY, *supra* note 12, at 71; Klarman, *supra* note 11, at 786; Nathaniel Persily, *Introduction*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 5 (Nathaniel Persily et al. eds., 2008).

398. This is the point of *Deciding Death*, where I argued that even when the Justices manipulate majoritarian doctrine to get where they want to go, where they want to go is, ironically, influenced by larger, nondocrinally recognized societal norms. See Lain, *supra* note 28; see also *supra* notes 320–25 and accompanying text (discussing majoritarian influence of larger societal context and public opinion).

399. See ROSEN, *supra* note 11, at 14. See also *supra* notes 326–27 and accompanying text (discussing the Justices’ tendency to espouse elite views).

400. See THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 50 (Clayborne Carson et al. eds., 1991) (quoting Martin Luther King speech in wake of *Brown* as stating, “If we are wrong, then the Supreme Court of this Nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong”). But see Michael Murakami, *Desegregation*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 397, at 33 (“There is limited evidence that the Supreme Court had a legitimizing effect on public opinion concerning school desegregation,” noting “a slow national tide of racial tolerance that began long before and continued long after *Brown*”).

reaction to the Court's rulings (to the extent there is reaction at all) is negative and manifests in the form of backlash.⁴⁰¹ Backlash can occur even if a ruling has the balance of public opinion on its side because those who agree do nothing, whereas those who disagree mobilize—as *Roe* well illustrates.⁴⁰² Defeat, as Jesse Choper has astutely recognized, is the “great energizer.”⁴⁰³ It solidifies opposition, inspires action, and provides a clear target for directing resistance to change.⁴⁰⁴ Meanwhile, those who are undecided or uninformed (or both) take social cues from the most salient reaction they see, that of mobilized dissenters.⁴⁰⁵ This, in turn, causes momentum to shift—the same majoritarian forces that once pushed toward the Court's ruling now have turned against it.

As one might imagine, the likelihood of backlash is highest when the Court is deciding hot-button issues that people care deeply about, the same sorts of issues that stymie legislatures. Thus, it is not surprising that in each of the case studies, the Court's decision resulted in backlash strong enough to hinder the very cause that the ruling appeared to promote. *Brown* first stalled, then reversed progressive racial reform then underway in the South.⁴⁰⁶ *Furman* turned the abolition movement around, resulting in a resurgence of death-penalty support and a slew of new capital statutes.⁴⁰⁷ And *Roe* fed a burgeoning right-to-life movement, which in turn triggered a conservative counterrevolution.⁴⁰⁸ Sometimes the Court's “help” can do more harm than good, even if it was a majoritarian move.

The answer to this objection—to the extent there is one—is also the reason it is not necessarily a bad thing if the Justices get majority will wrong. When backlash occurs, it launches a national conversation about the content of constitutional rights, engaging the people and their representatives in a dialogue with the Supreme Court.⁴⁰⁹ Granted, this is little consolation for those who care

401. See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); see also Friedman, *supra* note 294, at 2625 (discussing “Michael Klarman's well-developed ‘backlash’ thesis about Supreme Court decisions, that is, that their most significant impact is to embolden the forces that oppose the Court on the merits”).

402. See *supra* notes 200–01 and accompanying text (discussing backlash against *Roe*).

403. CHOPER, *supra* note 203, at 134.

404. Interestingly, however, recent research suggests that the public responds to Supreme Court-imposed policies in largely the same way that it responds to decisions by other national policymakers. See David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 789 (2012) (“On many fronts, our results suggest that the public responds to the Court playing a central role no differently than it responds to other institutions. . . . The Court is not more distinctively threatening to a cause, nor is it distinctively helpful.”).

405. See Persily, *supra* note 397, at 12–13.

406. See Klarman, *supra* note 401, at 97 (“Throughout the South the pattern of response to *Brown* was consistent: Race became the decisive focus of southern politics, and massive resistance its dominant theme.”).

407. See Lain, *supra* note 28, at 46–55 (discussing backlash to *Furman*).

408. See Post & Seigel, *supra* note 126 (discussing backlash to *Roe*).

409. A number of scholars have viewed judicial review as a fundamentally majoritarian dialogue with the people, but Barry Friedman's work has probably influenced my thinking the most. See

deeply about the merits. *Be careful what you ask for—winning at the Supreme Court could mean losing the majority view.* But by way of democratic decision making, the result is arguably popular constitutionalism at its best—a richly generative process that democratizes the Constitution by forcing public debate over contested constitutional questions. As Terry Peretti put the point, “Th[e] Court lost the battle, but ‘we the people’ won the war. The Court’s failures can, thus, often be regarded as democratic successes.”⁴¹⁰ By advancing deliberative democracy, the Justices can get it right even when they get it wrong.

What remains is a final, philosophical objection to upside-down judicial review: Majority will is a perverse engine for driving constitutional rights. As John Hart Ely recognized, using majoritarian values to define constitutional provisions intended as a check on majoritarian values “flips the point of the provisions exactly upside down.”⁴¹¹ Fair enough. But the fact is, Supreme Court Justices cannot help but be influenced by majoritarian values. This is the natural state of affairs, with or without the recognition of upside-down judicial review. In the 1960s, Archibald Cox wrote about what happens when one branch of government cannot solve an insistent problem; pressure to resolve it just builds and moves to another branch.⁴¹² This is the essence of upside-down judicial review. And now, as then, the insight remains true.

CONCLUSION

I began thinking about the notion of upside-down judicial review several years ago. Before the Tea Party Movement. Before Occupy Wall Street. But the outcry of the ninety-nine percenters adds a new reality to the mix, putting an exclamation point on the claim that our democratic process is broken. Upside-down judicial review is about the Supreme Court’s ability to be *more* majoritarian than the majoritarian branches, rather than less—its premise is that our democratic branches are so wildly ineffectual that the Supreme Court, ironically enough, may be better positioned to effectuate majoritarian change. Popular constitutionalists from the left and the right are trying to put the people back into democracy. What they have yet to realize is that the channel of change most open to democratic influence may not be democratic at all.

Friedman, *supra* note 10, at 654–55; FRIEDMAN, *supra* note 11, at 381–83; Friedman, *supra* note 294. For other prominent statements of the dialogic theory, see, for example, LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATIONS AS POLITICAL PROCESS 233–47 (1992); Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997).

410. Peretti, *supra* note 365, at 1095.

411. ELY, *supra* note 12, at 62.

412. See *supra* note 202 and accompanying text.