

# Is the Supreme Court a ‘Majoritarian’ Institution?

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## Abstract:

*This research paper presents the main theories regarding whether the Supreme Court is a representative institution and why a small, non-elected group of nine individuals, should have the power to decide some of the most profound moral issues for a country.*

*In some opinions, it is stated that the appointments process in the United States is itself controlled by the political branches and it should come as no surprise, then, that nominations and appointments are likely to reflect the median preferences of the relevant political actors.*

*The main constraints that requires the Court to reflect majoritarian views are: Public Opinion, The Appointments Process and Political Institutions.*

## Rezumat:

*Prezentul studiu prezintă principalele teorii cu privire la întrebarea dacă este Curtea Supremă de Justiție o instituție reprezentativă și de ce un mic grup de nouă persoane, care nu au fost alese prin vot, ar trebui să aibă puterea de a decide unele dintre cele mai profunde aspecte morale pentru o țară.*

*În unele opinii, se afirmă că procesul de numire în Statele Unite este în sine controlat de către ramurile politice și nu ar trebui să surprindă pe nimeni că numirile și rezervările sunt susceptibile de a reflecta preferințele principalilor actori politici.*

*Principalele constrângeri care impun Curții să adopte opiniile majoritare sunt: opinia publică, procesul de numire și instituțiile politice.*

**Keywords:** judges, Supreme Court, judicial independence, the “majoritarian thesis”

The birth of *The Supreme Court Review* 50 years ago was accompanied by the publication of two classic, enduring works of scholarship on the relationship of the Supreme Court to the political branches of government and American democracy more broadly. These two works, from within different disciplines, stood in some tension with each other, though neither confronted that

tension directly.

On one side, Alexander Bickel in 1962 memorably posed a fundamental moral question concerning the role of the Supreme Court in Ame-



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rican democracy: the “countermajoritarian difficulty.”<sup>300</sup>

Why should a small, non-elected group of nine individuals (a bare majority of five of whom is enough) have the power to decide some of the most profound moral issues for a country of now 308 million people, and to do so in a way that all other actors in the national and state governments have no direct power to override?<sup>301</sup> This moral challenge to judicial review, present in all constitutional democracies in which courts have the final power to decide the meaning of fundamental law, is particularly acute in the United States, because the moral force of the ideas of popular sovereignty and self-government have nowhere been as powerful as in the United States. That American constitutional scholarship since Bickel has been uniquely dominated, compared to that in other countries, by the struggle to rationalize judicial review with democracy is thus no surprise. Indeed, it is not wrong to characterize American legal thought as “obsessed” with the moral problem of judicial review.<sup>302</sup>

On the other side, the empirically-minded political scientist Robert Dahl, writing in 1957 a few years before Bickel, concluded that the Supreme Court had not functioned historically as a counter-majoritarian institution and, for structural reasons, was unlikely to do so.<sup>303</sup> Dahl argued that “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United

States.”<sup>304</sup> In Dahl’s analysis, the Court was “inevitably a part of the dominant national [lawmaking] alliance,”<sup>305</sup> because “it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”<sup>306</sup> Thus, Dahl’s social-scientific study of the Court’s decisions suggested that Bickel’s concern was misplaced, for as a matter of political realism, the Court had not functioned, and could not function, in the countermajoritarian way that troubled Bickel.

For several decades, Bickel’s and Dahl’s warring perspectives remained largely cabined within their own respective disciplines. Legal scholars continued to develop normative constitutional theories designed to justify judicial review or specific methods of constitutional interpretation that would accommodate judicial review with democracy in morally acceptable ways. Meanwhile, political scientists continued to test Dahl’s original claims, to explore more broadly the extent to which the Court’s decisions were effective in practice, and to examine the empirical relationship between the Court, public opinion, and the political branches.

But in recent years, these two bodies of literature have finally come into more direct conversation and collision. A number of legal scholars and commentators on the Court have re-discovered Dahl’s insight and run with it. Engaging directly with

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<sup>300</sup> Alexander M. Bickel, *The Least Dangerous Branch* at 16-23 (Yale 1962).

<sup>301</sup> The most powerful moral case against the institution of judicial review in a democracy has been made by my colleague, Jeremy Waldron, in works such as *Law and Disagreement* (Clarendon 1999).

<sup>302</sup> See, for example, Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 *Ann Rev L & Soc Sci* 361, 380 (2008); Barry Friedman, *The Birth*

*of an Academic Obsession: The History of the Countermajoritarian Difficulty*, Part Five, 112 *Yale L J* 153 (2002).

<sup>303</sup> Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 *J Pub L* 279 (1957).

<sup>304</sup> *Idem* at 285.

<sup>305</sup> *Idem* at 293.

<sup>306</sup> *Idem* at 291.

Bickel, as Dahl did not, they have sought to dissolve Bickel's question or suggest it is naive and passe. Building on Dahl's purportedly realist conclusions, they argue that there is, as a matter of history and fact, simply no countermajoritarian difficulty about which to worry. The Supreme Court cannot and does not stray too far from "majoritarian views" (we will soon explore more precisely this concept of "majoritarian views"). If the Court does, larger political forces bring the Court back into line; the Justices, knowing this, do not wander far. As Dahl did, this more recent literature seeks to turn Bickel's premise on its head: far from being a counter-majoritarian institution, the Supreme Court primarily functions to enforce and enshrine majoritarian views. For better or worse, the Court does not and cannot protect political minorities, be they the "discrete and insular minorities" of liberal jurisprudential fame, or any other kind of minority. Instead, Court decisions will reflect the preferences and views of what some scholars in this camp call "the national governing coalition." This conception of a Court strongly constrained by political and/or popular majorities I will call the "majoritarian thesis" of judicial review.

Last Term's decision in *Citizens United*, in which a 5-4 Court concluded that corporations (and unions) have a First Amendment right to spend unlimited amounts of money to seek to influence the outcome of national, state, and local

**Perhaps America's most distinctive and enduring contribution to the design of democratic self-government, exists somewhere between a realm in which judges are free to reach any outcome, regardless of the likely public or political response.**

elections – and overruled two precedents to do so – provides an apt occasion for assessing this debate between Bickel and his modern challengers.<sup>307</sup> Judged in any number of ways, *Citizens United* appears to be the most countermajoritarian act of the Court in many decades. Indeed, *Citizens United* is perhaps the most visible such act on an issue of high public salience since the Court's brief encounter with the symbolic issue of flag-burning in the late 1980s<sup>308</sup> or the Court's more substantive engagement with the death-penalty in its decisions of the 1970s.<sup>309</sup>

*Citizens United* thus prompts many questions about the majoritarian thesis and the limits on the Court's power. What exactly does the new, majoritarian thesis claim about the constraints on the power of the Court? How powerful a normative response to the "countermajoritarian difficulty" does this new thesis turn out to be? And even if the majoritarian thesis describes much of Supreme Court history

<sup>307</sup> This money must involve "independent expenditures," which cannot be coordinated with a candidate or the candidate's campaign. Coordinated expenditures remain subject to various caps. See *Citizens United v. Federal Election Commission*, 130 S Ct 876, 910 (2010).

<sup>308</sup> The Court in a controversial 5-4 decision, *Texas v. Johnson*, 491 US 397 (1989), initially overturned on First Amendment grounds a criminal prosecution under state law for flag desecration. Congress responded by passing the Flag Protection Act of 1989, which was designed to protect the flag against various acts of desecration. In *United States*

*v. Eichman*, 486 US 310 (1990), a 5-4 Court again invalidated on First Amendment grounds a criminal prosecution, this time under the federal statute, for flag desecration.

<sup>309</sup> See *Furman v. Georgia*, 408 US 238 (1972). Using popular opinion as the baseline, the Court's most "countermajoritarian" decision upholding legislation, if that is a coherent concept, is surely *Kelo v. City of New London*, 545 U.S. 469 (2005). See Nathaniel Persily, Jack Citrin, and Patrick J. Egan, eds, *Public Opinion and Constitutional Controversy* 286-309 (Oxford 2008).

in the past, are there reasons to think this past will not be prologue - that the Court of our era might be less constrained in these ways than prior Courts might have been? What, then, is the empirical and moral relationship between the Supreme Court and constitutional law, on the one hand, and political and popular constraints on the Court, on the other?

### I. The Citizens United Decision

Like many landmark cases, *Citizens United* arose as a result of bureaucratic tunnel vision. Citizens United (CU) was a small nonprofit corporation with an annual budget of around \$12 million; most of its funding came from individuals and a small amount from for-profit corporations.<sup>310</sup> In the period leading up to the 2008 Presidential primary process, CU wanted to make available through video-on-demand (VOD) broadcast a 90-minute documentary film, called *Hillary: The Movie*. The movie mentioned Hillary Clinton by name and contained relentlessly negative commentary on her from political commentators and others. For a payment from CU of \$1.2 million, a VOD cable channel, "Elections '08," offered to make *Hillary* freely available to viewers who chose to access the movie.

But the Bipartisan Campaign Reform Act of 2002 (BCRA), colloquially known as the McCain-Feingold Act, arguably covered the VOD broadcast of *Hillary*. BCRA made it illegal, with civil and criminal sanctions, for corporations and unions to use general treasury funds to finance "electioneering communications."<sup>311</sup> The Act's primary definition of electioneering communication was "any broadcast, cable, or satellite communication" that "refers to a clearly identified

candidate for Federal office" and that was made within 30 days or a primary or 60 days of a general election."<sup>312</sup> Regulations of the Federal Election Commission (FEC) elaborated that an electioneering communication was a communication that was "publicly distributed," which was further defined to mean, in the case of a candidate for nomination as President, that the communication "[c]an be received by 50,000 or more persons in a State where a primary election is being held."<sup>313</sup>

While direct treasury corporate or union funding for such broadcast ads was banned, corporations (and unions) could establish a "separate segregated fund," or political action committee (PAC), to fund such ads.<sup>314</sup> Money could be contributed to a PAC of this sort only from stockholders or employees of the corporation, or, for unions, from union members.

Because CU was partly corporate funded and wanted to make *Hillary* available through VOD within 30 days of a primary election, CU feared, correctly as it turned out, that the FEC would treat the movie's broadcast as a prohibited corporate electioneering communication. In December 2007, CU therefore brought a declaratory and injunctive action against the FEC, in which CU sought to have the relevant provisions of BCRA held unconstitutional as applied to *Hillary*.

At that point, the FEC could have invoked any of several reasons for concluding that, although the VOD movie might fall literally within the terms of BCRA, the FEC would not construe the Act to reach the movie. Most importantly, the FEC could have concluded that the entire focus of Congress in 2002 was on broadcast ads on conventional television, in which election ads bombard a captive

<sup>310</sup> *Idem* at 887.

<sup>311</sup> 2 USC § 441b (2002).

<sup>312</sup> 2 USC § 434(f)(3)(A) (2002).

<sup>313</sup> 11 CFR § 100.29(a)(2) and § 100.29(b) (2009).

<sup>314</sup> 2 USC § 441b(b)(2) (2002).

audience. That audience has chosen a channel or program for its content, not for the election ads with which it gets bombarded during the height of a competitive race. With VOD, by contrast, viewers have to choose to receive the exact communication at issue – in this case, a 90-minute movie. Viewers who choose to watch a movie like this presumably want to receive the message it conveys, and they can turn the movie off anytime otherwise.

This distinction, arguably, is critical to the only purpose that lay behind the ban on corporate electioneering and the only purpose that could, constitutionally, justify that ban: preventing corruption or the appearance of corruption of public officials. The theory behind §441b was that captive viewers flooded with corporate-funded broadcast ads on conventional television might be influenced by ads they were forced to see, and officeholders might thus feel beholden to these funders. But when viewers are a willing audience, as with VOD, they already want to receive the message because of its content or, at least, are more predisposed to accept the message. Information that viewers must choose to receive is therefore less likely to be influential; officeholders are therefore less likely to be holden to the funding entities. At a minimum, the FEC could have concluded that, in light of the serious constitutional and policy

questions new technologies like VOD presented, the term “electioneering communication” should be construed and enforced so as not to reach these technologies until Congress affirmatively addressed them.<sup>315</sup>

But the FEC would have none of that. A legally sophisticated FEC might have recognized that it was operating in a radically changed constitutional environment in which the Court was deeply skeptical, if not outright hostile, to BCRA’s regulation of electioneering spending. Nearly two years before CU filed its complaint against the FEC, the Court had dramatically signaled its discomfort with BCRA in *Federal Election Comm’n v. Wisconsin Right to Life (WRTL)*.<sup>316</sup> Although a 5-4 Court in the *McConnell*<sup>317</sup> case in 2003 had upheld BCRA’s ban on corporate-funded electioneering communications shortly after BCRA was enacted, by the time of *WRTL* in 2007, Justice Alito had replaced Justice O’Connor, one of the authors of *McConnell*. *WRTL* then dramatically cut back on *McConnell*’s holding by concluding that *McConnell* had only addressed a facial challenge to BCRA; that as-applied challenges remained open; and that BCRA’s ban on corporate-funded electioneering communications was only valid as applied to ads there involved “express advocacy [of the election or defeat of a specific candidate] or its functional equivalent.”<sup>318</sup> Seven

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<sup>315</sup> In addition, the FEC could have invoked earlier Supreme Court decisions to conclude that §501(c)(4) non-profits that accept only a *de minimis* amount of money from for-profit corporations, as was allegedly the case for CU, were exempt from BCRA’s ban on corporate electioneering. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 US 238 (1986), the Court had held unconstitutional § 441b’s restrictions on corporate expenditures as applied to nonprofit corporations that did not engage in business activities, were formed for the sole purpose of promoting political ideas, and did not accept contributions from for-profit corporations or labor unions. Finally, the FEC regulations that require that

a communication “[c]an be received by 50,000 or more persons” could have been read to require “a plausible likelihood that the communication will be viewed by 50,000 or more potential voters,” rather than being understood to require only that the communication be technologically capable of reaching that many viewers. In the Supreme Court, this suggestion was made in an *amicus curiae* brief that Former Officials of the American Civil Liberties Union filed. 130 S Ct at 889.

<sup>316</sup> 551 US 449 (2007).

<sup>317</sup> *McConnell v. Federal Election Commission*, 540 US 93 (2003).

<sup>318</sup> *WRTL*, 551 US at 481.

Justices – including all those on the Court in *McConnell* – asserted that *WRTL* had effectively overruled *McConnell*'s holding on electioneering communications.<sup>319</sup> Moreover, Justice Alito went out of his way to signal his openness to reconsidering *McConnell*.<sup>320</sup>

In the face of all this, the FEC nonetheless went ahead and took the litigation position that it would apply the full, literal force of BCRA to the facts of *Citizens United*. By the time the case reached a second round of argument in the Supreme Court, the new Solicitor General Elena Kagan, desperately offered the Court several ways to avoid reaching the merits of the constitutional challenge.<sup>321</sup> But by then, it was too late. The FEC had either taken the bait of a litigation strategy *CU* had cunningly designed or been obtuse about how the FEC's enforcement position on these facts would come across to an already-skeptical Court.

The Court concluded, by a 5-4 vote with Justice Alito in the majority, that independent expenditures on election advertising and communication are fully

protected by the First Amendment, including when undertaken through general-treasury corporate funds.<sup>322</sup> The Court also concluded that insufficient justification existed for overcoming this First Amendment protection because independent expenditures, by corporations and others, do not and cannot create the reality or appearance of *quid pro quo* corruption of officeholders.<sup>323</sup> Corruption, understood in these terms, is the exchange of campaign spending for political favors, such as the enactment of rent-seeking legislation officeholders would not support but for this spending. *McConnell* had invoked a broader conception of political corruption, which included preferred access to policymakers that large campaign spending might secure. In the critical conceptual shift, Justice Kennedy, reviving his own dissenting opinion in *McConnell* but now writing for the majority, expressly rejected the view that differential access, or other forms of differential influence, was a kind of corruption at all.<sup>324</sup> As a result, the Court held that the First Amendment prohibited Congress from banning independent spending on

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<sup>319</sup> See, for example, *Idem* at 499 n 7 (Scalia, J., dissenting) ("This faux judicial restraint [of distinguishing *McConnell*, rather than overruling it] is judicial obfuscation."); *Idem* at 525 (Souter, J., dissenting) (concluding that *WRTL* overruled *McConnell*).

<sup>320</sup> *Idem* at 482.

<sup>321</sup> See Supplemental Brief for the Appellee, *Citizens United v. FEC*, No. 08-205, \*2-5 (US Supreme Court filed July 4, 2009) (available on Westlaw at 2009 WL 2219300) (arguing that *Citizens United* is "a particularly unsuitable vehicle" for re-examination of *Austin* and *McConnell*); Transcript of Oral Argument, *Citizens United v. FEC*, No. 08-205, (US Supreme Court Sep. 9, 2009) (available on Westlaw at 2009 WL 6325467).

<sup>322</sup> For my view of the doctrinal questions the case raises, see Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 *Tex L Rev* 1803 (1999) and Richard H. Pildes, *Foreword – The Constitutionalization of Democratic Politics*, 118 *Harvard Law Review* 29, 130-153 (2004).

<sup>323</sup> 130 S. Ct. at 910 ("This confirms *Buckley*'s reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption.").

<sup>324</sup> Justice Kennedy first stated: "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." 130 S Ct at 910. He then went on to quote from his earlier dissent: "Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *Id.* (quoting *McConnell*, 540 US, at 297 (opinion of Kennedy, J.)).

election broadcast ads, including ads involving express advocacy of the election or defeat of candidates that ran close to election day, whether those ads were financed by domestic corporate (or, by implication, union) general-treasury funds or any other domestic source.<sup>325</sup> To reach that conclusion, the Court was required to overrule not just *McConnell*, but also *Austin v. Michigan Chamber of Commerce*, a 1990 decision that had upheld a state ban on general-treasury corporate independent expenditures in connection with state elections.<sup>326</sup> Having struck down the ban on corporate electioneering, *Citizens United* did go on to uphold BCRA's disclaimer and disclosure provisions, including as applied to *Hillary the Movie*.<sup>327</sup>

And with that, the five-year old Roberts Court issued by far its most controversial decision.

## II. Response to the Decision

*Citizens United* spawned an immediate torrent of academic and more popular reactions and commentary, surely as much as any Supreme Court

decision since *Bush v. Gore*. BCRA had been enacted with significant bipartisan support; it passed the House 240-189, the Senate 60-40, and was signed into law by President George W. Bush. Few Court decisions immediately become such pervasive and central features of popular culture and debate, as well as electoral politics, as did *Citizens United*. The public is typically less aware of Court decisions than constitutional scholars assume or would like to believe,<sup>328</sup> but not so with *Citizens United*. Not only did President Obama directly attack *Citizens United* in front of members of the Court during his State of the Union address,<sup>329</sup> but the Democratic Party suggested the decision was turning the 2010 midterm elections in the Republicans favor.<sup>330</sup> During this first election cycle after the decision, newspapers were filled with almost daily stories suggesting (often, in my view, without an adequate basis in fact) that *Citizens United* had dramatically reshaped the world of election financing and campaigns.<sup>331</sup> Though public opinion polls are notoriously suspect as a gauge of popular views, 80% of Americans reportedly oppose the Court's decision,

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<sup>325</sup> The Court left open the question of foreign spending on election ads. 130 S Ct at 911.

<sup>326</sup> 494 US 652 (1990). The state statute at issue permitted corporate independent expenditures on elections from segregated funds, akin to PACs, to which the corporation could solicit specific contributions from an enumerated list of persons associated with the corporation, such as stockholders, officers, directors, and certain employees. *Idem* at 656.

<sup>327</sup> 130 S Ct at 913-16. The disclaimer provisions require all electioneering communications, among other items, to include a statement that "is responsible for the content of this advertisement." The disclosure provisions require any person or entity that spends more than \$10,000 in a calendar year on such communications to file forms with the FEC identifying the actor making the expenditure, the election to which the communication is directed, and the names of certain contributors.

<sup>328</sup> See David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 Law & Policy Q 405, 407 (1983).

<sup>329</sup> President Barack H. Obama, *Remarks by the President in the State of the Union Address*, online at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address> (visited Oct 28, 2010).

<sup>330</sup> Perhaps the most concise expression of this view was the comment of House Speaker Nancy Pelosi, introducing President Barack Obama at a fundraiser, who commented about the 2010 election: "Everything was going great and all of a sudden secret money from God knows where - because they won't disclose it - is pouring in." David Brooks, *No Second Thoughts*, NY Times A29 (Oct 26, 2010).

<sup>331</sup> See, for example, David G. Savage, *Corporate campaign spending still murky*, LA Times A1 (Oct 27, 2010).

with a strikingly high percentage, 65%, reporting that they “strongly oppose” it.<sup>332</sup> To the extent these numbers are meaningful, *Citizens United* provoked more widespread popular resistance than *Bush v. Gore*, to which popular reactions divided more along partisan lines.<sup>333</sup>

In addition, within months of the decision, Congress reacted. The “Disclose Act” would have required organizations financing independent electioneering communications to disclose the source of their largest donors and to reveal their identities in ads.<sup>334</sup> The Act passed the House but has succumbed thus far to Republican filibusters in the Senate. Outside Congress, academics and others immediately began generating proposals that the rules of corporate governance be changed in response to *Citizens United*, so that shareholders, for example, be required to approve the amounts and targets of corporate spending on elections and that independent directors be required to oversee this spending.<sup>335</sup>

Fear of the practical consequences of the Court’s decision is generated by the amounts of money available, in theory, for corporate general-treasury spending.<sup>336</sup> The fear is that this money will overwhelm all other sources of election financing, making officeholders, in turn, beholden to corporate interests. The two largest energy companies, Exxon Mobile and Chevron, made more than \$120 billion in profits in the last election cycle.<sup>337</sup> If an Exxon CEO decided to commit one week of profits to spending on elections, he would have over \$800 million to spend (in the *pre-Citizens United* world in 2008, Exxon’s PAC raised only \$950,000 in voluntary contributions). The four biggest high tech companies, Google, Microsoft, Apple, and Intel, have more than \$100 billion in cash on hand. These are daunting figures. President Obama, for example, raised around \$745 million and spent \$730 million in 2008, which itself was more than both major-party

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<sup>332</sup> See Gary Langer, *In Supreme Court Ruling on Campaign Finance, The Public Dissents*, online at <http://blogs.abcnews.com/thenumbers/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents.html> (visited Oct 28, 2010). See also David Savage, *Most agree with high court; Since the justices’ tilt to the right, rulings appear largely in sync with public opinion*, LA Times A26 (Oct 17, 2010) (reporting on results of Constitutional Attitudes Survey showing that decision was “very out of step with public opinion” and that 85% of those surveyed support requirement of shareholder approval for corporate political electioneering spending).

<sup>333</sup> See Jeffrey Rosen, *A Majority of One*, NY Times Magazine 32 (June 3, 2001) (noting that, after *Bush v. Gore*, “[a]mong Republicans, approval of the court between August and January jumped from 60 percent to 80 percent, but among Democrats, it fell from 70 percent to 42 percent.”).

<sup>334</sup> See HR 5175, 111th Cong, 2d Sess (Apr 29, 2010) in 156 Cong Rec H4795-04 (June 24, 2010); S 3295, 111th Cong, 2d Sess (Apr 30 2010) in 156 Cong Rec S3029-3031 (May 3 2010).

<sup>335</sup> For one of the leading versions of this proposal, see Lucian A. Bebchuk and Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides*, Harvard Law Review (forthcoming 2010).

<sup>336</sup> The Court’s decision also had further immediate legal and regulatory consequences. In response to *Citizen United*, an *en banc* D.C. Circuit held unconstitutional other federal provisions that limited individual contributions to political action committees (PACs) to \$5,000, as applied to PACs that only engage in independent election spending. *SpeechNow.org v. FEC*, 599 F3d 686 (DC Cir 2010) (*en banc*). The D.C. Circuit rejected the FEC’s narrower interpretation of *Citizens United*. In later regulatory rulings, the FEC then concluded that these PACs could also accept unlimited corporate as well as individual contributions. Federal Election Commission, Advisory Opinion 2010-11 (July 22, 2010) (concluding that the “Commonsense Ten” PAC may accept unlimited contributions for independent expenditures). These rulings gave birth to what quickly came to be known as “Super PACs.”

<sup>337</sup> These figures and those concerning other corporate profits and cash are taken from the testimony of Karl J. Sandstrom, former FEC Commissioner and now election-law specialist at Perkins Coie LLP, in Hearing on Corporate Governance After *Citizens United* before the Subcommittee on Capital Markets Insurance and Government Sponsored Enterprises of the House Financial Services Committee, 111th Cong, 2d Sess (2010) (statement of Karl J. Sandstrom).



candidates combined in any previous presidential election.<sup>338</sup> In addition to the fear that the success of corporate rent seeking will skyrocket, there is also the fear that corporate spending will have a partisan skew.

The practical question of how much new corporate – and union – spending the Court’s decision will trigger is too uncertain to gauge at this stage. In the short term, media coverage of the issue during the 2010 elections was unreliable; while greatly increased spending by independent groups occurred, stories too casually linked this increase to the Court’s decision, without adequate information about the sources funding this spending.<sup>339</sup> In the long term, the amount of corporate spending will likely be affected by whether Congress enacts legislation to require adequate disclosure of all direct and indirect corporate spending. But in striking down a major, bipartisan Act of Congress (passed by a Republican-

controlled House, a 50-50 Senate controlled by the Democratic Party, and signed into law by a Republican President), and in triggering such broad public opposition, immediate presidential condemnation, and congressional legislative response (albeit failed), *Citizens United* provides an appropriate occasion to ask how constrained the modern Supreme Court is likely to be by the “majoritarian” forces of public opinion or formal politics.

### III. The Majoritarian Thesis and Its Problems

The “majoritarian thesis” was perhaps first put forward in general form during the New Deal by Dean Alfange, whose 1937 book, *The Supreme Court and the National Will*, asserted that “[n]o institution can survive the loss of public confidence, particularly when the people’s faith is its only support” (of course, all public institutions, not just the Court, ultimately

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<sup>338</sup> Samuel Issacharoff, *On Political Corruption*, Harvard Law Review (forthcoming 2010).

<sup>339</sup> Spending from all sources – independent groups, the party committees, and candidates – soared dramatically in 2010 compared to prior mid-term elections, though the Court’s decision had no effect on spending by the latter two entities. See Dan Eggen, *Records Broken for Fundraising*, Wash Post A1 (Oct 26, 2010). The generally high level of spending was driven by the perception that control of one or both chambers of Congress is potentially at stake, as well as reaction to the first two years of President Obama’s agenda. Levels of spending by entities independent of the parties and campaigns increased also, though, in both absolute dollar terms and as a percentage of overall spending; about a third of all independent expenditures reported to the FEC as of this writing came from the two major parties, as compared with 54 percent in 2008 and 80 percent in previous cycles. See T.W. Farnamand and Dan Eggen, *Democratic Donors Catch Up*, Wash Post A4 (Oct 28, 2010). To the extent news stories have revealed some of those contributors, they have overwhelmingly been wealthy individuals who had long been free, by virtue of *Buckley v. Valeo*, not *Citizens United*, to make such contributions. See Spencer MacColl, *Wealthy Political Bankrollers Favor Conservative* 527

*Groups*, Open Secrets (Oct 23, 2010), online at <http://www.opensecrets.org/news/2010/10/top-executives-favor-conservative-5.html> (visited Oct 28, 2010). The one well-documented source of new corporate money is the spending by the Chamber of Commerce, all of whose funds come from anonymous corporate contributions. But to determine what percentage of that new spending is due to *Citizens United*, one must know how much of the Chamber’s spending has been on traditional issue ads, to which corporations could contribute before *Citizens United*, how much has been on the kind of electioneering communications that the Court concluded were constitutionally protected before *Citizens United*, in the *WRTL* case, and how much is for election ads that is permitted only by virtue of *Citizens United*. The most intriguing speculation about the practical consequences of *Citizens United* is that the Court’s decision is having an unanticipated legitimation effect: individuals and groups who were always free to engage in various forms of contributing and spending before the decision are now doing much more of both because *Citizens United* constitutes a kind of cultural endorsement that this activity is a positive, important First Amendment form of participation. See Michael Luo, *Money Talks Louder Than Ever in Midterms*, NY Times A13 (Oct. 7, 2010).

exist by virtue of that support).<sup>340</sup> Thus, he argued, the Court “with but few exceptions, has adjusted itself in the long run to the dominant currents of public sentiment.”<sup>341</sup> Dahl’s work in the late 1950s placed this general historical conclusion on a firmer social-scientific foundation. Dahl examined all cases in which the Court had held a provision of federal law unconstitutional. He then correlated those decisions with how long after the statute’s enactment they had occurred; with admirable precision, Dahl defined as counter-majoritarian those decisions that came down within four years of a statute’s enactment, so that the Court could plausibly be said to be standing against the preferences of the current, national lawmaking institutions.<sup>342</sup> More than 50 years later, Dahl’s work still provides a foundation for today’s “majoritarian” theorists, many of whom continue to invoke his work as authority for the majoritarian thesis.<sup>343</sup> Cast carefully enough, an appropriate version of this thesis is surely right: in a sustained conflict between the Court and an overwhelming consensus within the political branches and the public, concerning the most salient and momentous

issues of the day, the Court will eventually reflect that broader consensus, if a President gets enough successful appointments to seize control of the Court. It is true that “whenever popular majorities elect an entire government opposed to the direction of recent judicial policymaking, the justices quickly abandon their effort to make those policies.”<sup>344</sup> If for no other reason, this is true because the appointments process in the United States is itself controlled by the political branches (unlike in some other countries<sup>345</sup>); it should come as no surprise, then, that nominations and appointments are likely to reflect the median preferences of the relevant political actors. If a coalition governs long enough to make enough appointments to control the Court, the Court is likely to reflect the median preferences of that coalition. Constitutional doctrine obviously changes significantly over periods of time. Those changes reflect shifts in cultural understandings and political values, and the most direct route by which those changes come to be expressed in doctrine is through appointments that reflect contemporary cultural and political understandings.

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<sup>340</sup> Dean Alfange, *The Supreme Court and the National Will* 235 (Doubleday 1937). On the ultimate dependence of public institutions on the support of public opinion, see Jack Goldsmith and Daryl Levinson, *Law for States*, 122 *Harvard Law Review* 1791 (2009).

<sup>341</sup> Alfange, *The Supreme Court* at 40 (cited in note 339).

<sup>342</sup> According to Dahl’s data, the Court had invalidated 86 provisions in federal law, in 78 cases, over the 167 years of the Court’s history at the time he wrote. Dahl, 6 *J Pub L* at 282 (cited in note 302).

<sup>343</sup> See, for example, Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* at 16 (Chicago 1991); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *Stud Am Polit Dev* 35, 38 (1993). Shortly after Dahl, Robert McCloskey’s well-known historical study, *The American Supreme Court*, concluded “it is hard to find a single

historical instance when the Court has stood firm for very long against a really clear wave of public demand.” Robert McCloskey, *The American Supreme Court* 230 (Chicago, 3d ed. 2000).

<sup>344</sup> Graber, 7 *Stud Am Polit Dev* at 72 (cited in note 342).

<sup>345</sup> In Israel, which has one of the most activist “Supreme Courts” in the world, the judges on the highest court are appointed by a committee consisting of the current President of the Supreme Court, two other Supreme Court Justices, two government ministers, two members of the Knesset, and two members of the Israel Bar Association. Once a candidate has been nominated by the this committee, the candidate must then be approved by the Prime Minister. See Malvina Halberstam, *Judicial Review, A Comparative Perspective: Israel, Canada, and the United States*, 31 *Cardozo L Rev* 2393, 2396.

Dahl's effort to situate the Court in the larger political context in which it inevitably operates provided a necessary corrective to overly romanticized images of the Court as a wholly autonomous institution capable of protecting any minority interest or group against the forces of majoritarian democracy. But current majoritarians have gone too far in the other direction. In dismissing out of hand Bickel-like concerns as naive or passe, they present the Court as so tightly cabined in by "majoritarian forces" as to be little more than a reflection of pre-existing majoritarian preferences. Judicial review can be defended, of course, on many different moral grounds. But today's majoritarians do not mount those kind of defenses; instead, they argue no need for such defenses exist because judicial review, like democracy itself, is essentially a majoritarian institution. In pushing this view as far as they have, today's majoritarians risk complacency about the extent to which judicial review and democratic self-government remain in deep tension, both as a descriptive and a moral matter.

At the descriptive level, today's majoritarians are able to cast the Court as so powerfully constrained by "majoritarian pressures" because they rely on constantly varying and slippery conceptions of "the majority" that purportedly constrains the Court. The lack of a precise conception of the relevant majority enables majoritarians to claim that almost any decision of the Court reflects majoritarian views, since there is almost always some "majority" to which one can appeal in asserting that the Court's decisions reflect "majority" views. Indeed, some modern majoritarians come dangerously close to claiming that Court decisions are not just majoritarian over long enough periods of time, but majoritarian from the moment of birth, taken one by one. Moreover, today's

majoritarians are not clear enough about the mechanisms or institutional pressures by which the Court is purportedly constrained; vague appeals to means by which the Court is said to be constrained further enable overly complacent portraits of a tightly hemmed-in Court. But once one actually explores those possible mechanisms, it becomes easier to identify not only the specific conditions under which these mechanisms might actually function (or not), but why these mechanisms might be much weaker today and in the future than in the past. Modern majoritarians often leave behind too quickly all the conditions and qualifications, noted above, that make more nuanced versions of the majoritarian thesis more plausible. As a result, they paint a dangerously misleading picture of how constrained the Court actually is.

Moreover, even assuming the majoritarian thesis correctly describes much of the Court's prior history, past returns are no guarantee of future performance. Structural changes in the appointments process and the Court's perceived authority and support vis a vis other institutions suggest the Court might have considerably more freedom of action today than in the past. Finally, Bickel's challenge is fundamentally a moral one. The majoritarian literature offers a descriptive account of purported constraints on the Court, but those constraints cannot answer the moral challenge.

Thus, both descriptively and morally, the modern majoritarian view of the Court has been pushed to unrealistic and troubling extremes. At the least, *Citizens United* is a reminder of how dramatically the Court can stand against "majoritarian views." Whether the decision is a harbinger of a Court that continually does so remains to be seen, but despite the claims of modern majoritarians, that possibility cannot be ignored or dismissed out of hand.

### A. What Is the Relevant Baseline?

In reviewing the modern majoritarian literature, one can become frustrated by the elusiveness of the central claim. Different theorists appeal to different baselines for defining what constitutes the “majoritarian views” that purportedly constrain the Court. Or the same theorists invoke different concepts of “the majority” in different works. Moreover, some of the baselines are so nebulous that it becomes almost impossible to confirm or falsify the theory.

As a social scientist, Dahl recognized these problems and provided an admirably precise definition and test of “majoritarian views.” Dahl emphasized that unless “majoritarian” was defined with reference to legislative outcomes, the concept would be difficult, if not impossible, to pin down. Moreover, he understood that legislative majorities can come and go quickly. Thus, Dahl’s baseline was actual legislation enacted four years or fewer before the Court’s decision (this time-frame avoided the problem of defunct legislative majorities). In essence, Dahl treated the Court as acting in countermajoritarian ways only if it invalidated acts of Congress within four years of their enactment. That definition provided a meaningful way to assess how far out of line from current, national law-making majorities the Court’s decisions might be.

Modern majoritarians are not as precise as Dahl. They appeal to a range of different baselines. To Barry Friedman, the relevant baseline is “mainstream public opinion,” or “the popular will,” or “the considered judgment of the American people.”<sup>346</sup> For Jack Balkin, the theory sometimes is taken to mean that courts work in cooperation with “the dominant national political coalition.” They invalidate “statutes passed by older regimes that are inconsistent with the current coalition’s values.”<sup>347</sup> Here “majoritarian” means the current national lawmaking majority, similar to Dahl’s baseline. Yet at other times, Balkin is concerned about the problem of “partisan entrenchment,” which he calls the most important factor in understanding how judicial review works.<sup>348</sup> In this view, justices are responsive not to current lawmaking majorities, but to those that were in power at the time the justices were appointed. The governing coalition at one point in time appoints justices who entrench that coalition’s preferences long into the future – for individual justices, 18 years on average, given the average tenure on the Court.<sup>349</sup> Balkin notes that this might suggest the Court is indeed a countermajoritarian institution. But he rejects this view and argues that the Court represents “a temporally extended majority rather than a contemporaneous one.”<sup>350</sup> Here, the definition of “majoritarian” is not as precise as Dahl’s.

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<sup>346</sup> Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* at 368, 369, 370, 371 (Farrar, Straus 2009). For criticism of whether some of the sources Friedman relies on are adequate measures of “public opinion,” see Justin Driver, *Why Law Should Lead*, *The New Republic* (April 2, 2010).

<sup>347</sup> Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 *Nw U L Rev* 549, 563 (2009).

<sup>348</sup> See, for example, Jack M. Balkin and Sanford Levinson, *Understanding the Constitutional*

*Revolution*, 87 *Va L Rev* 1045, 1066 (2001).

<sup>349</sup> Balkin suggests we consider Justices as analogous to Senators who are elected once and then serve, on average, for 18 years. *Idem* at 1076. For the argument that efforts at partisan entrenchment explain the creation of judicial review in several modern contexts, see Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard 2004).

<sup>350</sup> Balkin and Levinson, 87 *Va L Rev* at 1076 (cited in note 347).

ritarian” is the governing coalition at the time a justice was appointed; the Court is not countermajoritarian because it enforces the preferences of the earlier lawmaking majority.

Keith Whittington, whose interdisciplinary work in history and political science has contributed a great deal to understanding the Court within the larger political-institutional environment, argues that the Court reflects the policy preferences, not of national lawmaking institutions, but of the president or “the presidential wing” of the dominant party.<sup>351</sup> Though Mark Graber presents himself as a majoritarian theorist, his argument is that the Court “typically makes policies only in response to legislative stalemates or invitations.”<sup>352</sup> But the former acknowledges far more scope for independent Court action than one might think a “majoritarian” view of the Court entails, or that seems implied in other versions of majoritarian theory, while the latter suggests a different set of moral questions about judicial review than other majoritarian theories (or Bickel’s book) raise. In other work, Graber offers a particularly thin conception of majoritarian constraint by asserting that the Court is majoritarian in the sense that some “subset of the lawmaking elite supports particular judicial decisions or the trend of judicial decision making”; the key point, for him, is that courts do not protect those who

have “no” champions among the powerholding majority.<sup>353</sup> Gerry Rosenberg, often taken to be another majoritarian theorist, actually asks a somewhat different question: whether courts can effectively impose significant social change. His conclusion is that the answer varies, depending on factors such as whether the incentives of private actors align with the courts’ objectives (thus he emphasizes market-based constraints on effective implementation of *Roe*).<sup>354</sup> But exploration of the practical effectiveness of Court decisions, though not unrelated to the countermajoritarian debate, pursues somewhat different questions.

It is easy to assume that all these theorists are “majoritarians” who share a common view and whose work collectively establishes a common point. But different work of this sort appeals to quite different conceptions of the relevant majority. Some of these conceptions envision the Court as much less constrained than others. Some of these conceptions are so nebulous as to make the theory difficult to confirm or falsify. These differences matter in assessing “majoritarian” theories. For example, the *Lochner* era’s activism might have reflected majority popular opinion even as the Court overturned lawmaking majorities.<sup>355</sup> The same might have been true of the Rehnquist Court’s cases holding unconstitutional all or parts of 31 statutes between 1995 and 2002.<sup>356</sup>

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<sup>351</sup> Keith Whittington, *The Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton 2007).

<sup>352</sup> Graber, 7 *Stud Am Polit Dev* 35, 37 (cited in note 342).

<sup>353</sup> Graber, 4 *Ann. Rev. Law Soc. Sci.* at 364 (cited in note 301). Though Friedman generally casts the Court as constrained by “mainstream public opinion,” he sometimes suggests that the Court instead reflects “elite voices, rather than the average person” (which he suggests explains the Court’s decisions in the school prayer and flag burning cases) or that Justices respond to their peer

groups, so that if a Justice’s “peers have elite views not shared by most of the country, the justice will seem to be going his own way.” Friedman, *Will of the People* at 378 (cited in note 345).

<sup>354</sup> Rosenberg, *Hollow Hope* at 195 (cited in note 342).

<sup>355</sup> For the claim that popular opinion supported the *Lochner* Court’s substantive decisions, see Barry Cushman, *Mr. Dooley and Ms. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *Buffalo L Rev* 7 (2002).

<sup>356</sup> See Neal Devins, *The Majoritarian Rehnquist Court?*, 76 *L & Contemp Probs* 63, 64 (2004).

These different baselines also have different implications both for the descriptive issue of how constrained the Court is in fact, and by what means, as well as for the moral issue of how to reconcile judicial review with democracy.

### ***B. Was Brown Majoritarian or Counter-majoritarian?***

These different definitions of “the majority” come into play when majoritarians contend with one of the most important decisions of the 20<sup>th</sup> century, *Brown*.<sup>357</sup> The views of “majoritarian” theorists about the extent to which *Brown* and related cases reflected majoritarian preferences at the national level reflect a wide range of different conclusions. These divergences cast doubt on the cogency of the underlying theoretical claim.

Dahl, the founding father of the theory, did not directly address Court decisions striking down state laws; yet he said enough to suggest he viewed *Brown* as at odds with his claim about the highly constrained Court. For Dahl, *Brown* illustrated that the Court *can* successfully act, “and may even succeed in establishing national policy,” when the governing national coalition in Congress and the White House is “unstable with respect to certain policies,” as Dahl thought the national government with respect to civil rights in this period.<sup>358</sup> Dahl thus saw *Brown* and the Court’s civil-rights decisions of the prior 30 years as an exception to his thesis (one might think this is a rather large, significant exception).<sup>359</sup> Such exceptions were

possible, in his view, whenever a powerful enough legislative-executive coalition did not exist to *overturn* the Court, as did not with respect to *Brown*. In those contexts, Dahl argued, the Court would have a wide berth for freedom of action.

But of course, by this standard, the Court will have vast scope to act in ways that do not reflect majority views, if “majority” is understood in certain, plausible ways. There is a world of difference in viewing the Court as likely to act consistently with the general preferences of the national lawmaking institutions, and viewing the Court as free to act up to the point at which those institutions are able to muster an effective response. Congress in the 1950s could not act either to legislate to require segregation or to require the end of segregation. The “gridlock interval,” as political scientists call it, can be vast on certain issues – indeed, the more salient and controversial the issue, perhaps the larger. In our modern world of hyperpolarized parties and routine filibusters, marshaling effective legislative responses to Court decisions will be all the more daunting.

In contrast to Dahl, other “majoritarian theorists” view *Brown* as consistent with their theory. Despite the more conventional view of *Brown* as the paradigmatic instance of counter-majoritarian Court decisionmaking that nonetheless justifies judicial review, these theorists rescue *Brown* for the majoritarian cause by asserting that “a national majority favored the result in *Brown*, as did foreign policy elites.”<sup>360</sup> This view rests *Brown*’s

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<sup>357</sup> The substantive conception of equality reflected in *Brown* can, of course, be considered a required aspect of a morally thick conception of “democracy.” But these kinds of justifications for *Brown* as consistent with a certain substantive, moral conception of democracy are not what the modern majoritarians I discuss have in mind when they argue that *Brown* reflected the “majority’s preferences.”

<sup>358</sup> Dahl, 6 J Pub L at 294 (cited in note 302).

<sup>359</sup> *Idem* (noting that legislative gridlock “is probably the explanation for the relatively successful work of the Court in enlarging the freedom of Negroes to vote during the past three decades and in its famous school integration decisions.”).

<sup>360</sup> Balkin, 103 Nw U L Rev at 576 (cited in note 346). See also Friedman, *Will of the People* at 245 (cited in note 345) (national majority in public-opinion polls favored *Brown*).

majoritarianism on appeals to national public opinion at the time. But among all the familiar problems with relying on polls as evidence of public opinion, on this issue, that data is even more suspect: the only polls available were taken *after Brown* was decided and there is no way of knowing whether their results were influenced by *Brown* itself.<sup>361</sup>

Yet still other majoritarians argue that *Brown* was ineffective precisely because it was countermajoritarian in a different sense than what public opinion polls expressed: it did not have the support of Congress or the executive branch. In one of the canonical works in this literature, Gerald Rosenberg's *The Hollow Hope: Can Courts Bring about Social Change?*, Rosenberg famously argues that *Brown* was too countermajoritarian to be effective.<sup>362</sup> Only when Congress and the President were prepared to support *Brown's* principles wholeheartedly did *Brown* have any practical effect.<sup>363</sup> Still other majoritarians hedge their bets regarding whether *Brown* stood against national political opinion or not.<sup>364</sup> Thus, the majoritarian theory has no settled view about the monumentally significant *Brown* decision. Slipping back and forth between

appeals to a vaguely-defined and deeply divided "national opinion," and appeals to majorities in lawmaking bodies which did not support the Court but were not coherent or large enough to overturn the Court, the theory fails to make any clear sense of whether one of the most significant decisions in the Court's history is consistent with the theory's claims or not.

### C. The Wholesale-Retail Confusion

The reality that the Court acts within a larger political and institutional context that shapes and constrains the Court to some extent need not lead to the view that the Court's decisions, taken one by one, are likely or structurally pre-determined to reflect current "majoritarian" preferences. That over broad-enough swaths of time, the Court's decisions eventually reflect that larger political and cultural context does not entail the quite different claim that individual Court decisions are destined to reflect current "majoritarian" views.

Some majoritarian theorists are careful to note and honor this distinction.<sup>365</sup> Yet others push the majoritarian view all the way to the point of insisting, or

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<sup>361</sup> See Thomas A. Schemling, *Supreme Court Counter-Majoritarianism Revisited: Warren Court Cases Invalidating State Laws, 1954-1969* (Paper prepared for delivery at the Annual Meeting of the Midwest Political Science Association April 7-10, 2005).

<sup>362</sup> Rosenberg, *Hollow Hope* at 46-54 (cited in note 342).

<sup>363</sup> More recent work argues that the courts were effective in implementing major social changes, such as the integration of labor unions, that national lawmaking majorities were not prepared to adopt. See Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton 2007).

<sup>364</sup> Thus, Michael Klarman is appropriately cautious in his conclusion: "during the time period covered by this book, not a single Court decision involving race clearly contravened national public opinion. *Brown* was the closest to doing so, but half the country supported it from the day it was

decided." Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 450 (Oxford 2004). For a similarly nuanced view, see also Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolution*, 82 Va L Rev 1(1996) (arguing that the scope of the Court's autonomy lies somewhere between the countermajoritarian and the majoritarian views).

<sup>365</sup> See, for example, Whittington, *Political Foundations* at 288 (cited in note 350) ("It is certainly not the case that every decision rendered by the Supreme Court and every aspect of its jurisprudence can be reduced to the political interests of the party in power, but in understanding how the Court has successfully claimed and exercised the power of constitutional interpretation and judicial review, it is fruitful to understand the ways in which that power can coexist with the demands of political leadership.").

strongly suggesting, that the Court's individual decisions necessarily reflect majoritarian views.<sup>366</sup> Thus, in calling the Supreme Court *The Most Democratic Branch*, for example, Jeffrey Rosen argues that on "a range of issues during the 1980s and 1990s, the moderate majority on the Supreme Court represented the views of a majority of Americans more accurately than the polarized party leadership in Congress."<sup>367</sup> That might or might not be true as a contingent, factual matter, but the thrust of Rosen's book is that it is in the nature of the Court's place within the larger political environment that the Court will reflect this kind of "majority view."

To illustrate his general point, Rosen offers specific recent examples. In the area of race and equal protection, he notes that the Court seemed to flirt with the idea of holding that the Fourteenth Amendment banned race-conscious affirmative action in settings like academic institutions, only to back away in the 2003 case testing the constitutionality of affirmative action in law school admissions, *Grutter v. Bollinger*.<sup>368</sup> In Rosen's portrayal, the Court backed down in the face of the endorsement of affirmative action by the president, Congress, and the military. But to insist that individual 5-4 decisions, such as *Grutter*, "had" to come out the way they did, because the Court inevitably reflects majoritarian pressures, is to cede too little to randomness and

fortuity, at the very least.<sup>369</sup> Had *Grutter* reached the Court three years later, or had Justice O'Connor retired three years earlier, it seems clear that Justice Alito would have been a fifth vote for the opposite result in *Grutter*.<sup>370</sup> *Grutter* also reached the Court at the same time as a constitutional challenge to affirmative action in undergraduate admissions; and the Court held the latter unconstitutional even as it upheld the law school program in *Grutter*.<sup>371</sup> Had the Court not been able to "split the baby" by deciding the two cases at the same time, who knows whether the result in *Grutter* would have been affected? Of course, if the Court had banned all affirmative action in public institutions, it is possible political and other institutions would have responded in some way that would have tested the Court's commitment to this principle. But to maintain that individual 5-4 decisions necessarily reflect "majoritarian views" – whether majority here refers to national lawmaking majorities or national "popular" majorities or a majority of "the elite" or the views of the president as the relevant baseline – is to push a deterministic view of the Court too hard. Even if the general thrust of the Court's decisions over extended periods of time tends to come into line with dominant views, each and every decision need not do so.

Similarly, Barry Friedman comes close to suggesting that the Court's decisions,

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<sup>366</sup> Although these theorists typically nod to the point that the majoritarian constraints on the Court apply over long periods of time, they quickly leave this acknowledgment behind in arguing that virtually every decision of the Court does so.

<sup>367</sup> Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* at 3 (Oxford 2006).

<sup>368</sup> 539 US 306, 326 (2003).

<sup>369</sup> The claim that the Court backed down is also at odds with the fact that Justice O'Connor had taken this intermediate position on affirmative action cases for years, as had Justice Powell, a figure she greatly admired, in the *Bakke* case itself. Nothing in Justice O'Connor's jurisprudence

indicated agreement with the strict colorblindness position. See Reva Siegal, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 Yale L J (forthcoming, 2010); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich L Rev 483 (1993).

<sup>370</sup> See *Parents Involved In Community Schools v. Seattle School District No. 1*, 551 US 701 (2007) (rejecting 5-4, with Justice Alito in the majority, local school district's affirmative action plan and distinguishing *Grutter*).

<sup>371</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).



one-by-one, necessarily will reflect “majoritarian views” by insisting that now “the system [of judicial review and politics] tends to rest in a relatively quiet equilibrium.”<sup>372</sup> Invoking the concept of anticipated reaction, Friedman argues that the Court has so internalized the disciplining power of Congress or popular opinion that the Court senses trouble in advance and avoids it by rendering only opinions that will have majoritarian support. Congress has not retaliated in any significant way against the Court in many decades.<sup>373</sup> Nonetheless, Friedman believes the Court has absorbed the much longer history of its relationship to the political branches and popular opinion, so that the shadow of this retribution, however dim, is enough to keep the Court in line. This view, too, leads majoritarians too close to the view that all Court decisions reflect the Court’s calculation as to where the (relevant) “majority” view lies.

This deterministic vision leads majoritarians sometimes to sound like Ptolemaic cosmologists, adding epicycle upon epicycle in an effort to sustain their theory (or whichever versions of it the particular theorist happens to hold). Indeed, Friedman recognizes that the Court’s decision in *Citizens United* to free

up corporate electoral speech at a moment of enormous public anger and hostility to Wall Street and financial institutions was particularly poor timing if the Court cared deeply about public opinion. His conclusion is that the Court simply made a mistake: it misjudged what the reaction to the decision would be.<sup>374</sup> Friedman similarly suggests that the explanation for the Court’s highly unpopular school-prayer decisions of the 1960s, which unleashed a “gale of disagreement,”<sup>375</sup> was that the Court failed to anticipate public reaction correctly. If it had, the implication runs, it would have decided differently.

Most of the time, majoritarians view the Court as a savvy judge of the political environment and public opinion. Thus, these *deus ex machina* appeals to mistake seem particularly odd. Moreover, as a factual matter, the appeal to mistake is particularly hard to credit regarding *Citizens United* (or the school-prayer decisions<sup>376</sup>). Campaign finance, particularly the issue of corporate speech, is one of the issues on the Court’s docket that regularly generates front-page news coverage. Public support for campaign finance reform (other than public financing) has been extremely high for many years.<sup>377</sup> When the Court announced after

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<sup>372</sup> Friedman, *Will of the People* at 376 (cited in note 345).

<sup>373</sup> See *infra*.

<sup>374</sup> Barry Friedman and Dahlia Lithwick, *Speeding Locomotive: Did the Roberts Court Misjudge the Public Mood on Campaign Finance Reform?*, *Slate* (Jan 25, 2010), online at <http://www.slate.com/id/2242557/pagenum/all/#p2> (visited Oct 28, 2010).

<sup>375</sup> Friedman, *Will of the People* at 264 (cited in note 345).

<sup>376</sup> That the Court wrongly guessed at what public reaction to these decisions would be is belied by the historical record. *Engel* involved a prayer actually written by public officials, which was not a common practice, and the Court’s 6-1 decision was written in such a way that it could have been confined to that context. Public disagreement over *Engel* was widespread and intense. *Idem* at 263.

But the Court then went ahead and decided *School District v. Schempp*, 374 US 203 (1963), which invalidated in an 8-1 decision the more common practice of Bible readings that included the Lord’s Prayer. Nor did the Court back away from its stance on prayer in the public schools in later cases. I am indebted to Adam Samaha for these observations. Of course, there is a great deal of non-compliance with these decisions, according to many studies. Friedman, *Will of the People* at 266-67 (cited in note 345).

<sup>377</sup> A compendium of public-survey data on popular views on campaign-finance regulation at the time BCRA was enacted is contained in *Public Opinion & Campaign Finance, Expert Report Prepared for Congress* by Robert Y. Shapiro, Professor and Chair, Department of Political Science, Columbia University (Sept. 18, 2002) (on file with author).

the first *Citizens United* argument that it would hear argument on the question whether to overrule its precedents on corporate speech, the very announcement triggered a flood of media coverage. The Court received over 40 amicus briefs in the case, an exceptionally large number. That the Court did not realize *Citizens United* was one of the most high-profile cases it would hear, or that a 5-4 decision holding unconstitutional one of the two central features of the McCain-Feingold Act, overturning two precedents along the way, including one only four years old, would be noticed and greatly controversial is hard to credit. What seems more likely is that the decision was a matter of deep conviction for the majority who believed it correct; indeed, three of those Justices had endorsed that position for many years.

Of course, there is no need to claim that every Court decision is predetermined by larger structural forces to be a “majoritarian one,” whatever the baseline that a particular theorist uses to define “majoritarian.” Nearly all majoritarians acknowledge that at least some of the time.<sup>378</sup> Yet having made this formal acknowledgment, many modern majoritarians nonetheless quickly return to theoretical accounts that suggest the Court’s decisions nearly always do reflect majoritarian views and to demonstrating, case by case, that the Court’s decisions do so.

#### ***D. What Is the Mechanism By Which the Court is Constrained?***

To evaluate the extent to which the Court is constrained by “majoritarian

pressures,” one wants to understand the mechanism by which this constraint is supposed to work. Similarly, to predict whether this constraint is likely to operate in the future with the same force it has in the past, one would like to know what this mechanism is supposed to be. Because different “majoritarians” appeal to different conceptions of the “majority” that constrains the Court, they rely on different mechanisms, explicitly or implicitly, to explain how the Court comes to be constrained. In working through the various mechanisms that might be involved, most appear to be rather weak, at least at this stage of American institutional development. Moreover, the one mechanism that does seem most plausibly effective – the appointments process – is likely to be less effective in the future than in the past.

1. “*Public Opinion.*” Majoritarians like Friedman and Rosen, among others, rely primarily on “public opinion” as the principal constraint that requires the Court to reflect majoritarian views. As Friedman puts it, this mechanism purportedly works because justices “are no less vain than the rest of us, and it is human nature to [want to – check this in book] be liked or even applauded and admired.”<sup>379</sup> Perhaps. Testing this claim is difficult, not just because public opinion polls are notoriously sensitive to subtle wording and framing differences, but because data are available only for a relatively small number of issues that historically have come before the Court.<sup>380</sup>

In addition, we live in a more fragmented “public opinion culture” than in the

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<sup>378</sup> See, for example, Friedman, *Will of the People* at 14 (cited in note 345) (acknowledging that “[i]t is hardly the case that every Supreme Court decision mirrors the popular will – even less so that it should.”).

<sup>379</sup> *Idem* at 374. Interestingly, Friedman alone among majoritarians disclaims strong reliance on

the appointments process as the mechanism by which the Court is constrained to reflect public opinion. *Id.*

<sup>380</sup> Gregory Caldeira, *Courts and Public Opinion*, in J.B. Gates and C.A. Johnson ed., *The American Courts* (CQ Press 1991).

past, which heightens the possibility for justices, like the rest of us, to exist in a cultural and news environment pre-selected to confirm prior beliefs. At one time, it was thought (some) justices might be particularly responsive to elite academic legal opinion; but here, too, there has been fragmentation of authority and perceived authority. Justices can more readily find confirming academic views for a wide range of opinions than 50 years ago. Friedman himself acknowledges that justices might be more influenced (if influenced at all) by a narrow segment of the opinion, the opinion of their “peers,” rather than some more general “public.”<sup>381</sup> He offers the example of Justice Scalia, who Friedman suggests remains popular with the Federalist Society even when his votes depart from “mainstream public opinion.”<sup>382</sup> But this acknowledgment undermines the notion that the latter will necessarily function as a substantial constraint; those in power have always found it easy to exist in an echo chamber of supporters.

In addition, a considerable difference exists between views that “the public” loosely holds, as revealed in public opinion polls, for example, and views of sufficient moment and intensity as to mobilize the kind of concerted, organized, and effective public response necessary to generate action, particularly legislative action. Not only must the issues the Court

decides be of sufficient salience to motivate public action, but the intensity of feeling and belief about the substantive issue must be strong enough to overcome the “diffuse support”<sup>383</sup> that the American public has for the Court as an institution. Though some predicted that the Court’s legitimacy or public support would be drastically eroded by its intervention in the 2000 presidential election, for example, the empirical evidence refutes the view that the Court suffered any long-term drop in support.<sup>384</sup> Indeed, as one major study concludes, the aggregate level of public confidence in the Court has remained largely unchanged for several decades despite the range of contentious issues the Court has addressed.<sup>385</sup> Similarly, the Court’s approval ratings since the early 1970s have been consistently stronger than those for Congress or the president.<sup>386</sup>

The mechanism by which public opinion is supposed to constrain the Court is not always clearly identified in majoritarian theories. But if the issue is whether public disapproval of specific decisions in survey-type settings is likely to translate into meaningful public action, such as defiance of the decision or pressure being brought to bear on political actors to resist the decision,<sup>387</sup> then the extent to which “the public” is prepared to challenge the Court, or support challenges to the Court, must be taken into account

<sup>381</sup> *Idem* at 378.

<sup>382</sup> *Id.*

<sup>383</sup> See Gregory A. Caldeira and James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 *Am J Pol Sci* 640 (1992) (finding strong diffuse support for the Court).

<sup>384</sup> Six months after the decision, one major poll concluded public support for the Court was at the 80% level. See Devins, 76 *L & Contemp Probs* at 76 n 88 (cited in note 355) (citing Gallup poll conducted June 8 2001). See also Stephen P. Nicholson and Robert M. Howard, *Framing Support for the Supreme Court in the*

*Aftermath of Bush v. Gore*, 65 *J Pol* 676 (2003).

<sup>385</sup> See Persily, *Public Opinion and Constitutional Controversy*, at 14 (cited in note 308).

<sup>386</sup> See Frank Newport, *Trust in Legislative Branch Falls to Record Low*, Gallup (Sept 24, 2010), online at <http://www.gallup.com/poll/143225/Trust-Legislative-Branch-Falls-Record-Low.aspx> (visited Oct 28, 2010). At the time of this recent survey, the Court’s approval rating was 66%; the President’s was 49%; and Congress’s was 36%.

<sup>387</sup> Kevin T. McGuire and James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 *J Pol* 1018, 1019 (2004).

– not just “public opinion” in the abstract. Nowhere are these hurdles better illustrated than in the Court’s battle with FDR over the New Deal.

In the American context, majoritarians have always offered up the Court’s dramatic confrontation with the New Deal, in which the Court eventually bowed in the face of the New Deal’s transformative constitutional vision, as the most compelling illustration of how public opinion constrains the Court.<sup>388</sup> Thus, “the lesson of 1937” is central to modern American constitutional history, as well as to the understanding of constitutional law and theory today. But what exactly is that lesson?

The conventional takeaway is that public opinion controls the Court.<sup>389</sup> As I have noted throughout, I would build in many more qualifications in characterizing the conditions under which the Court’s decisions are likely to reflect “majoritarian views.” But it is these qualifications that majoritarians too quickly leave behind. Indeed, properly viewed, “the lesson of 1937” might well be precisely the opposite of the conventional understanding of majoritarians: judicial review can remain remarkably independent and countermajoritarian, for only a concatenation of the most extraordinary

circumstances will provoke politics and public opinion into imposing major constraints on the modern Court.

First, the Court’s challenge to the political branches was far more breathtaking than many recall. We are all aware of the major highlights – the Court’s invalidation of the National Industrial Recovery Act (NIRA) and the Agricultural Adjustment Act (AAA).<sup>390</sup> But consider the range of national and state legislation and presidential action the Court held unconstitutional in one 17-month period starting in January, 1935: the NIRA, both its Codes of Fair Competition and the president’s power to control the flow of contraband oil across state lines;<sup>391</sup> the Railroad Retirement Act;<sup>392</sup> the Frazier-Lemke Farm Mortgage Moratorium Act;<sup>393</sup> the effort of the president to get the administrative agencies to reflect his political vision (*Humphrey’s Executor*);<sup>394</sup> the Home Owners’ Loan Act;<sup>395</sup> a federal tax on liquor dealers;<sup>396</sup> the AAA; efforts of the new SEC’s attempt to subpoena records to enforce the securities laws;<sup>397</sup> the Bituminous Coal Conservation Act;<sup>398</sup> the Municipal Bankruptcy Act, which Congress passed to enable local governments to use the bankruptcy process;<sup>399</sup> and, perhaps most dramatically, in *Morehead v. Tipaldo*,<sup>400</sup> minimum-wage

<sup>388</sup> This and the next six paragraphs are slightly modified versions of an online essay I published for Jotwell, the Journal of Things We Like (Lots). See Richard H. Pildes, *The Court and Politics: What Is the Lesson of FDR’s Confrontation with the Court*, Jotwell (Sept 23, 2010), online at <http://conlaw.jotwell.com/the-court-and-politics-what-is-the-lesson-of-fdrs-confrontation-with-the-court/> (visited Oct 28, 2010).

<sup>389</sup> See, for example, Friedman, *Will of the People* at 4 (cited in note 345); McCloskey, *American Supreme Court* at 177-78 (cited in note 342).

<sup>390</sup> *Schechter Poultry Corp. v. United States*, 295 US 495 (1935) (NIRA) and *United States v. Butler*, 297 US 1 (1936) (AAA).

<sup>391</sup> *Panama Refining Co. v. Ryan*, 293 US 388 (1935).

<sup>392</sup> *Railroad Retirement Bd. v. Alton R. Co.*, 295 US 330 (1935).

<sup>393</sup> *Louisville Joint Stock Land Bank v. Radford*, 295 US 555 (1935).

<sup>394</sup> *Humphrey’s Executor v. United States*, 295 US 602 (1935).

<sup>395</sup> *Hopkins Federal Savings & Loan Ass’n v. Cleary*, 296 US 315 (1935).

<sup>396</sup> *United States v. Constantine*, 296 US 287 (1936).

<sup>397</sup> *Jones v. SEC*, 298 US 1 (1936).

<sup>398</sup> *Carter v. Carter Coal Co.*, 298 US 238 (1936).

<sup>399</sup> *Ashton v. Cameron County Water Improvement District No. One*, 298 US 513 (1936).

<sup>400</sup> 298 US 587 (1936).

laws on the books in a third of the states, in some cases, for decades. Some of these decisions have withstood the test of time, but most, of course, have not.

In the summer of 1935, more than 100 district judges held Acts of Congress unconstitutional, issuing more than 1,600 injunctions against New Deal legislation.<sup>401</sup> Moreover, at least some of these issues cut to the bone of the average person; a window into the salience of the Court's actions is provided in the comments of the founder of the ACLU, at a town meeting, who said: "Something is seething in America today. . . We are either going to get out of this mess by a change in the Court or with machine guns on street corners."<sup>402</sup> What would the modern Court have to do, and in what context, that would come close to all this?

Yet even so, from the moment it was announced, the resistance to FDR's legislative assault on the Court, the Court-packing plan, was vehement, geographically widespread, and bipartisan. This resistance is all the more remarkable for FDR did not propose the use of a new, controversial type of power. Congress has always had the power to decide the size of the Court and, of course, had used that power in the past to increase and decrease the size of the Court. The controversy was over whether FDR was asking Congress to use a power it clearly possessed for purposes that were perceived to undermine the Court's independence.<sup>403</sup>

Yet FDR's Court-packing plan was in dire shape politically long *before* the Court's "switch in time" took the last wind

out of that effort – despite the fact, as well, that the plan was the first piece of legislation FDR put forward after having just won the biggest landslide in American history. Two-thirds of the newspapers that had *endorsed* FDR came out immediately and vociferously against the plan.<sup>404</sup> The most common charge was that FDR was seeking "dictatorial powers," a particularly resonant charge.<sup>405</sup> Telegrams to Congress, a leading gauge of public opinion at the time, flowed overwhelmingly, and with passionate intensity, against the plan.<sup>406</sup> Some leading Progressive Democrats in the Senate, like Hiram Johnson and George Norris, quickly bolted from FDR and defended the Court's independence; conservative Democrats wanted no part of the plan; a leading Western Democrat, Senator Burton Wheeler, announced he would lead the fight against the plan; FDR's Vice President did little to conceal his disdain for Court packing; Republicans sat silently and let the Democratic Party tear itself apart.<sup>407</sup> And the Court, too, has tools to fight back: Chief Justice Hughes sent a letter, with devastating effect, to the Senate Judiciary committee that took apart FDR's justifications for Court packing.<sup>408</sup>

We cannot know, of course, whether FDR would ultimately have prevailed, had the Court's decisions not started to change course. But more remarkably, here was the most popular president in history, with a Congress his party controlled overwhelmingly, confronted by the most aggressive Court in American history – and yet, it is entirely plausible that FDR's legislative challenge to the authority of the

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<sup>401</sup> Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (Norton 2010).

<sup>402</sup> *Idem* at 387-88.

<sup>403</sup> The Judiciary Act of 1789 called for the appointment of six justices. The court was expanded to seven members in 1807, nine in 1837, ten in 1863, and then stabilized at nine in 1869.

<sup>404</sup> *Idem* at 301.

<sup>405</sup> *Idem* at 303.

<sup>406</sup> *Idem* at 305.

<sup>407</sup> *Idem* at 307-49. See also William Leuchtenburg, *The Supreme Court Reborn* 134 (Oxford 1995) (noting that the plan immediately generated more intensity and controversy than any other legislative proposal "in the century," other than the League of Nations issue).

Court would have failed, given how deep the cultural and political support was for the Court's institutional authority, even as the Court issued one unpopular decision after another. And finally, consider the aftermath of the confrontation: who won the Court-packing fight? The conventional wisdom among constitutional academics, focused narrowly on the Court itself, is that FDR lost the battle, but won the war, since the Court (assisted by 7 FDR appointments between 1937 and 1943), acceded to the New Deal's constitutionality. But FDR's legislative assault on the Court destroyed his political coalition, in Congress and nationally, and ended his ability to enact major domestic policy legislation, despite his huge electoral triumph in 1936.<sup>409</sup> As a *Fortune* magazine poll in July 1937 put it: "The Supreme Court struggle had cut into the President's popularity as no other issue ever had."<sup>410</sup> National health-care, the next major item on FDR's agenda, faded away. The progressive domestic policy agenda did not recover until 1964. Reflecting back, FDR's second vice president, Henry Wallace, observed: "The whole New Deal really went up in smoke as a result of the Supreme Court fight."<sup>411</sup> No rational politician, looking back at FDR's attempt to bring the Court into line, other than through the ordinary appointments process, is likely to repeat FDR's efforts.

Thus, one can read the 1937 experience as suggesting that, for better or worse, judicial independence and the authority of the Court have become so entrenched in America that even the most popular politicians play with fire if they seek too directly to take on the power of

the Court. If a president is lucky to have enough appointments to control the Court, the Court will likely come to reflect the President's agenda; but that is a matter of luck, not inevitability, and short of that, it is far from clear how likely or effective any other political attempts to hold the Court to account will be. Indeed, by the 1940s, the Court was already striking down or limiting more federal statutes than it had before the burst of extreme activism of 1919 to 1937; by the late 1990s, it was doing so even more often than during the New Deal, though with far less political or public pushback.<sup>412</sup> Put back in the actual historical context, "the lesson of 1937" might be taken to pose a sobering challenge to the view that the Court is inevitably constrained to be a "majoritarian" institution.

2. *Political Institutions.* The New Deal history suggests how difficult it now is to marshal effective political responses to the Court. It has been many generations since Congress retaliated against the Court through measures such as eliminating the Court's Term, expanding or shrinking the size of the Court, impeaching a justice, or stripping the Court of jurisdiction over major areas. Indeed, when Congress has attempted to remove the Court's jurisdiction over specific issues in the modern era, the Court has found ways to reassert its power.<sup>413</sup> The most recent example involves judicial oversight of detentions at Guantanamo. Each time the Court asserted a role for federal court oversight, Congress responded with legislation aimed at reducing or eliminating the courts' role. Yet each time, the Court responded by finding ways to

<sup>408</sup> *Idem* at 393-94.

<sup>409</sup> Leuchtenburg, *Reborn* at 156-61 (cited in note 406).

<sup>410</sup> Shesol, *Supreme Power* at 458 (cited in note 400).

<sup>411</sup> *Idem* at 158.

<sup>412</sup> Tom S. Clark and Keith E. Whittington, *Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789-2006* (unpublished manuscript, Nov. 1, 2010) (on file with author).

<sup>413</sup> See Vicki C. Jackson, *Introduction; Congressional Control of Jurisdiction and the Future of the Federal Courts*, 86 *Geo LJ* 2445 (1998).

construe the statutes, and ultimately, to invoke the Constitution, to fend off Congress's attempts and to reassert the Court's role.<sup>414</sup> Far from being cowed, the modern Court has stood its ground.

But perhaps Congress does not need to act decisively to bend the Court to its will. Perhaps a credible congressional threat is sufficient. Thus, we should look to the general history of congressional threats to curb the Court's powers. Only a few studies of congressional Court-curbing efforts exist. In an important one, Gerald Rosenberg concludes that only nine periods have been characterized by high levels of such efforts, defined as eras with a large number of proposed bills that can be catalogued as major institutional challenges to the Court, rather than as case-specific efforts to reverse a particular decision.<sup>415</sup> Four of these nine periods lasted two years; two more lasted four years; only three extended longer. During the rest of American history, Congress undertook no sustained effort to rein in the Court.

Rosenberg concludes that in three of these periods, the Court backed down and was effectively constrained by the threat of congressional response (1802 to 1804, 1858 to 1869, and 1935 to 1937). But is it the shadow of congressional retaliation or the appointments process that accounts for the shift in decisions? In at least one of these periods, the change is probably best attributed to changes in

personnel; between 1858 and 1869, six justices retired and Lincoln appointed five. In my view, the appointments process might well have been a crucial element in the Court's New Deal transformation as well; it is difficult to know whether the "switch in time" would have been enduring had FDR not been able to appoint seven Justices from 1937 to 1943. Drawing any conclusions for modern contexts from the weakness of the fledgling Court in 1802 and 1804 seems hazardous. Whether it is Court-curbing legislation or the appointments process that accounts for the Court's change in direction in even these periods of a clear judicial shift, then, remains indeterminate. That uncertainty is important, if there are reasons to argue, as I do below, that the appointments process is unlikely to be as significant a means in the future of constraining the Court as in the past.

In three of the other nine periods of congressional Court-curbing efforts, Rosenberg concludes that the Court was unaffected and stayed on the same decisional path (1893 to 1897, 1922 to 1924, and 1963 to 1965). The political assault on the Court in these periods dissipated of its own accord. In the other three periods, he finds the Court neither acquiesced strongly in the face of congressional pushback nor maintained its same decisional path wholly unaffected by the congressional action. In these three indeterminate periods, he notes, the

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<sup>414</sup> The culminating act in this drama, for now, which summarizes the history of the Court-Congress struggle, is *Boumediene v. Bush*, 553 US 723 (2008).

<sup>415</sup> Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 Rev Pol 369 (1992). Rosenberg builds on an earlier study. See Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 Vand L Rev 925 (1965). The periods Rosenberg identifies are 1802-04; 1823-31; 1858-69; 1893-97; 1922-24; 1935-37; 1955-59; 1963-65; 1977-82. *Idem* at 379. These periods do not correspond exactly to those identified

in the one other major study of Court-curbing bills. See Tom Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 Am J Poli Sci 971,979 (2009). Borrowing from others, Rosenberg defined a relevant congressional bill as legislation introduced in the Congress having as its purpose or effect, either explicit or implicit, Court reversal of a decision or line of decisions, or Court abstention from future decisions of a given kind, or alteration in the structure of functioning of the Court to produce a particular substantive outcome. Rosenberg, 54 Rev Pol at 377 (cited in note 342). His data appears to terminate in 1984.

congressional opposition to the Court could not effectively coalesce into an effective, unified opposition.

This analysis of Court-curbing efforts in Congress does not seem to support a particularly strong version of the majoritarian thesis.<sup>416</sup> Even if one accepts that the Court might be constrained when Congress manages credibly to threaten to curb the Court, there have been only three periods in which we can conclude unequivocally that the Court actually backed down in any significant manner. One of those is of little modern relevance; in the other two periods, the key factor might well have been, not congressional resistance, but the president's ability to reshape the Court through the appointments process. But if that process no longer provides as effective a means for presidents to bring the Court into line, as I argue below, it is unclear what relevance even these periods hold going forward.<sup>417</sup>

If congressional efforts have been of only moderate effect, how can majoritarian theorists appeal to political mechanisms as an important mode of Court constraint? The classic source of this claim, Dahl, seems to have implicitly envisioned *two* distinct configurations of national politics within which the Court might operate. His theory applied to the first, but not the second. In that first configuration, “[n]ational politics in the United States, as in other stable democracies, is dominated by relatively cohesive alliances that endure for long

periods of time.”<sup>418</sup> In noting this structure of politics, Dahl referred to the Jeffersonian alliance, the Jacksonian era, the “extraordinary long-lived Republican dominance of the post-Civil War years,” and the New Deal alliance FDR shaped. It was with respect to *these* alliances that Dahl concluded – in a famous line often taken out of context – that “the Supreme Court is inevitably part of the dominant national alliance.”<sup>419</sup> Indeed, dominant political coalitions of the duration of these past alliances will naturally see their preferences reflected in the Court, in no small part because they are in control long enough to appoint controlling justices who share that coalition's general views.

When Dahl wrote, he was able to look back on long stretches of American politics in which such enduring, dominant governing coalitions had existed. During his lifetime and for the first half of the twentieth century, divided government hardly existed. From 1900 to 1952, twenty-two out of twenty-six national elections (85%) produced unified party control, with the Republicans dominating in the first quarter of the century (with an interlude during the Wilson Administration) and the Democrats in the second quarter. In only four midterm elections in these years (two of them at the end of wars), did the president's party temporarily lose control of one house of Congress (1910, 1918, 1930, 1946). In each case, unified party control was restored in the next election.<sup>420</sup>

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<sup>416</sup> Rosenberg himself concludes otherwise, but it is not clear his data justify that conclusion, unless the hypothesis being tested is that the Court is always fully independent of the political branches and their responses to Court decisions, including through the appointments process.

<sup>417</sup> A comprehensive, recent statistical analysis examines not just discrete periods of intense Court-curbing efforts in Congress, but the entire history of Court-curbing efforts since 1877. See

Clark, 53 Am J Poli Sci 971 (cited in note 414). That study concludes that an increase in year one of congressional court-curbing efforts results in a statistically-significant decrease in the number of federal laws held unconstitutional the following year. *Id.*, at 981.

<sup>418</sup> Dahl, 6 J Pub L at 293 (cited in note 302).

<sup>419</sup> *Id.*

<sup>420</sup> For the data in this paragraph, see Daryl J. Levinson and Richard H. Pildes, (continued...)



But American politics has not existed in such a period for some time now. We have not had the kind of dominant governing coalition that was critical to Dahl's theory of the Court since, perhaps, the 1960s. Indeed, we live in an era in which the country has remained almost evenly divided over more election cycles in a row than at any time since the 1880s, if then,<sup>421</sup> we thus experience exceptional volatility in partisan control of the national institutions of government. The parties have alternated in control of the House and Senate more in recent years than at any time since the late 19<sup>th</sup> century. We have now had three shifts in partisan control of the House in 16 years, beginning with the 1994 Republican takeover after 40 years of continuous Democratic control; not since the late 19<sup>th</sup> century have partisan turnover rates been as high.<sup>422</sup> Similarly, the Senate has changed party control five times since 1985, again a more rapid rate of partisan turnover than at any time in the 20<sup>th</sup> century.<sup>423</sup>

If these patterns continue, they suggest two implications for the Court's freedom of action. First, it becomes unlikely that any electoral coalition would control the presidency and Senate over long enough periods of time to be certain to put its imprint on the Court through the appointments process. FDR succeeded in taming the Court because his coalition

governed long enough to dominate that process. Second, this partisan volatility, which also makes divided government more likely, will make it much more difficult to enact specific laws to curb the Court.

Dahl himself recognized a second kind of configuration of politics, one more akin to recent American experience, in which no dominant and sustained national coalition exists. In these periods, Dahl argued, the coalition in power, would be "unstable with respect to certain key policies" and the Court could "succeed in establishing policy" of its own.<sup>424</sup> This suppressed strain in Dahl's work is the relevant one for contemporary American politics. As Mark Tushnet has noted, in periods of divided government (or perhaps periods of rapid partisan turnover in control) judges have substantial freedom to enforce their own constitutional visions because any particular vision will be shared by enough elected officials to block legislative response to the Court.<sup>425</sup> In an era of unified political parties and routine Senate filibusters, the system will function like divided government most of the time, absent dramatic change (the last time one party had more than 60 seats, enough to block filibusters regularly, was the 96<sup>th</sup> Congress in 1979 to 1981).<sup>426</sup> The Court's freedom of action, accordingly, will be considerable, as *Citizens United* perhaps signals.

<sup>421</sup> The data evidencing these patterns is in Samuel Merrill III, et al, *Cycles in American National Electoral Politics, 1854-2006: Statistical Evidence and an Explanatory Model*, 102 Am Pol Sci Rev 1 (2008). In particular, see Figure 1D, at 4, which averages for each election year the Democratic seat share for the House, Senate, and Presidency; since around 1992, that percentage has consistently hovered in a narrow range close to 50%, longer than in any period reflected in the figure, which dates back to the formation of the modern two-party system in 1854. This pattern appears to have begun, arguably, in 1976, with a brief spike of Democratic preferences around 1992, but not for a sustained

period.

<sup>422</sup> These calculations are based on data taken from [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html](http://clerk.house.gov/art_history/house_history/partyDiv.html)

<sup>423</sup> These calculations are based on data taken from [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm)

<sup>424</sup> Dahl, 6 J Pub L at 294 (cited in note 302).

<sup>425</sup> Mark Tushnet, *Political Power and Judicial Power: Some Observations On Their Relation*, 75 Fordham L Rev 755, 768 (2006).

<sup>426</sup> Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics, 2005-2006*, at 38-39 (CQ Press 2006).

Mark Graber illuminates still another reason why the Court can often act with relative autonomy.<sup>427</sup> In an effort to avoid responsibility for issues that risk fracturing their supporting coalition, political leaders will defer at times to the Court's power to resolve the issue. Graber sees these situations as ones in which the political branches "invite" the Court in.<sup>428</sup> Because there is no effective congressional majority on the issue, perhaps these are situations in which the Court's decision to invalidate national action cannot be considered either majoritarian or counter-majoritarian with respect to the political branches. Even so, here too the Court has considerable latitude and power, and hence, the moral questions about why the Court ought to have this power cannot be dismissed by casting the Court as doing no more than implementing "majoritarian views."<sup>429</sup>

Finally, some majoritarians view the president rather than Congress as the most likely source of political constraint. But if presidential leadership is supposed to a major or contributing force driving political responses to the Court, it is significant that the most thorough study of the relationship between presidents and the Court concludes that only five presidents have directly challenged the authority of the Court: Jefferson, Jackson, Lincoln, Franklin Roosevelt, and Reagan.<sup>430</sup> Only during these "reconstructive" presidencies, as Keith Whitting-

ton characterizes them, do presidents want to fight constitutional battles with the Court and enjoy enough public support to be capable of waging a credible battle. Only these few reconstructive presidents have sought to challenge the fundamental interpretive authority of the Court – to split the constitutional atom, as he nicely puts it — and separate judicial supremacy from constitutionalism.<sup>431</sup>

But these periods of reconstructive presidencies do not endure for long. During the rest of American history, presidents have had neither the ambition nor the support to challenge the Court in any fundamental way. And as "presidential authority to interpret the Constitution wanes, judicial authority waxes."<sup>432</sup> In addition, Whittington concludes that the reduced ability of presidents since the New Deal to control Congress, even a same-party Congress, and the greater frequency of divided government, mean that the power of presidents to pursue constitutionally reconstructive visions that challenge the Court has diminished; while visions of this sort might continue to exist, presidents are less able to muster effective support for them.<sup>433</sup> This, too, enables Courts to act with greater autonomy.<sup>434</sup> Indeed, though Whittington's work is sometimes invoked as support for the majoritarian view of the Court, his analysis is actually more complex and subtle. His view is that the Court should be understood within the

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<sup>427</sup> Graber, 7 *Stud Am Polit Dev* 35 (cited in note 342).

<sup>428</sup> Graber has good evidence to support the claim that Congress did affirmatively invite the Court into the slavery issue in the 1850s, which led to *Dred Scott*, and the antitrust issues of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. *Idem* at 46-53. In other contexts, it might be more appropriate to see Congress as acquiescing in the Court's power, rather than affirmatively inviting the Court in.

<sup>429</sup> Graber thinks that because there is a dominant majority whose preferences the Court is

frustrating, the Court cannot be said to be counter-majoritarian in these contexts. But that is not enough to dismiss the moral concerns about judicial review: the Court is exercising an important form of political power, and the question is what justifies that.

<sup>430</sup> Whittington, *Political Foundations* at 30-31 (cited in note 350).

<sup>431</sup> *Idem* at 286.

<sup>432</sup> *Idem* at 287.

<sup>433</sup> *Idem* at 273-74.

<sup>434</sup> *Idem* at 274.

larger framework of national political institutions, especially the presidency, but that within that framework the Court often has a great deal of semi-autonomous space within which it can act.

In sum, the constraints political institutions impose on the Court today might be much less than some majoritarian theorists suggest. None of this is to say that the Court will necessarily challenge the central political commitments of a dominant governing coalition, particularly an enduring one. But Congress has not effectively retaliated or even credibly threatened to retaliate against the Court in generations; even when Congress has done so, it has had only sporadic success. Only two presidents in the twentieth century have directly challenged the authority of the Court. And whatever power dominant, enduring governing coalitions have to constrain the Court, we have not had such coalitions for many years. The political branches today are less likely effectively to resist the Court. History suggests the most effective means of doing so is through the appointments process. But for reasons to which I now turn, that process is likely to be a much weaker mechanism than it has been in the past.

3. *The Appointments Process.* The one powerful mechanism for ensuring that the Court is in line with majoritarian views is the appointments process, which in the United States is more politically-structured than in some countries. Indeed, most majoritarians rely centrally on this mechanism to explain how the Court purportedly comes to reflect national political majorities.<sup>435</sup> If the cycle of appointing justices tracked the cycles of

electoral politics, there would be strong reason to expect the Court continually to reflect the dominant views of the president and Senate. But the life tenure system has always made the appointments process more random than that; moreover, that randomness has increased dramatically over recent decades. The majoritarian thesis depends heavily on the appointments mechanism, but that mechanism is much weaker now than in the past.

The role of luck in the extent to which presidents and their governing coalition can shape the Court is illustrated by the contrast between the Nixon and Clinton presidencies. Nixon had the opportunity to make four appointments (Burger, Blackmun, Powell, and Rehnquist) between 1969 and 1972. Those appointments defined the character of the Burger Court until at least the mid-1980s. Yet while serving two full terms, Clinton was able to appoint only two justices (Ginsburg and Breyer), with only modest effect on the Court's substantive positions. Power to shape the Court through the appointments process does not always correlate with electoral success.

Moreover, justices these days serve far longer, on average, than in the past; they leave the Court at much older ages; and they therefore create vacancies at much lower rates. As Steven Calabresi and James Lindgren have documented, the average tenure of a justice from 1941-1970 was 12.2 years.<sup>436</sup> But from 1971-2000, retiring justices spent an average of 26.1 years on the Court. In that first period, justices retired at an average age of 67.6 years; in the latter, period, they did so on average at 78.7 years. These

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<sup>435</sup> See, for example, Dahl, 6 J Pub L at 284-85 (cited in note 302); Graber, 4 Ann Rev L & Soc Sci at 366-67 (cited in note 301); Balkin, 103 Nw U L Rev at 22 (cited in note 346).

<sup>436</sup> The data in this and the following paragraph are taken from Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv J L & Pub Pol 769 (2006).

patterns then show up in vacancy rates; from 1881 to 1970, the average number of years between appointments was 1.7, with that rate fairly consistent throughout these years. Since 1970, it has increased to 3.1 years.<sup>437</sup> Put differently, in that earlier era, a two-term president appointed on average 4.7 justices (more than half the Court), while today such a president would appoint only 2.7 justices.

This change has a dramatic effect on the opportunity of presidents to shape the Court. For example, Jimmy Carter was the only president in American history to complete one term yet never make an appointment to the Court. The same would have happened to George W. Bush had he not been re-elected. Another telling fact: from 1994 to 2005, the Court went nearly eleven years without a vacancy, the longest such period since the Court's size was fixed at nine Justices in 1869. Indeed, three of the five longest periods between vacancies since the Court went to nine members have occurred in the last 30 years.

In addition, over the last generation American political parties have become more ideologically unified and more sharply polarized and differentiated from each other than at any time since the late 19<sup>th</sup> century.<sup>438</sup> Thus, "in 1970, moderates constituted 41% of the Senate; today, they are 5%."<sup>439</sup> The center "has all but disappeared."<sup>440</sup> The effects of this transformed party structure on the appointments process remain to be seen in full. As Geoffrey Stone reports, even before this transformation, no nominee of

a president whose party controls the Senate has been denied confirmation in a full Senate vote in more than 80 years; only one has been so denied in the last 140 years. Stone reports that from 1964 to 1986, around 91% of Senators voted to confirm a nominee chosen by a same-party president and since then, that figure has gone up to around 99%.<sup>441</sup> With such unified, lock-step parties, we do not know how far a president with a same-party Senate can go toward appointing justices with more extreme views, should a president choose to head in that direction. Of course, this partisan configuration might spawn more contested nominations (as it already has, though with little effect on outcomes)<sup>442</sup> or more filibusters of Supreme Court nominations. The equilibrium these competing pushes and pulls from highly unified and polarized parties will generate for the kinds of justices who will be nominated and confirmed in the future is unknown. But the emergence of "hyperpolarized democracy in America" over the last generation further suggests that predicting how the increasingly random timing of appointments will play out in constraining or liberating the Court cannot necessarily be predicted from the past.

*E. The Data.* Surprisingly little data have been collected to test empirically any of the (many) versions of the majoritarian thesis. Many of the works seeking to demonstrate this thesis take the form of historical Court narratives,<sup>443</sup> but works of this sort, while valuable, always run the risk of selection bias and do not

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<sup>437</sup> By my own calculations, it has been slightly lower, 2.5 years between appointments, on average, since 1980, taking into account the most recent appointment of Justice Elena Kagan.

<sup>438</sup> Richard H. Pildes, *Why the Center Does Not Hold: Hyperpolarized Democracy in America* (forthcoming, Cal L Rev 2010).

<sup>439</sup> *Idem*.

<sup>440</sup> *Idem*.

<sup>441</sup> Geoffrey R. Stone, *Understanding Supreme Court Confirmations* 2010 Sup Ct. Rev.

<sup>442</sup> *Idem* at 38.

<sup>443</sup> See, for example, Alfange, *The Supreme Court* (cited in note 339); McCloskey, *American Supreme Court* (cited in note 342); Friedman, *Will of the People* (cited in note 345); Graber, 7 *Stud Am Polit Dev* 35 (cited in note 342).

provide the systematic and comprehensive quantitative data on which we can base robust judgments about patterns of Court-Congress-President relationships over time. For empirical support, these works often refer back to Dahl's original, pioneering study.

But Dahl's work, pathbreaking in 1957, has not stood up over time. Parts of it come across as quaint. Dahl, for example, noted that there was not a single case in the Court's history in which the Court had held federal legislation unconstitutional on First Amendment grounds.<sup>444</sup> In the years since, of course, it has become commonplace for the Court to do so. Whether with respect to Congress's efforts to regulate flag burning, child pornography, sexually explicit material, funding to legal services organizations, commercial advertisements, government-employee receipt of honoraria, or speech in public spaces, the Court has struck down numerous federal statutes on the basis of the First Amendment.<sup>445</sup> And in the context of campaign-finance regulation, Dahl's observation is particularly ironic. Ever since the beginning of modern congressional efforts in the 1970s to regulate financing of national elections, the Court – starting with *Buckley v. Valeo* – has invalidated time and time again national

legislation, culminating in *Citizens United*. But beyond the specific example of the First Amendment, a series of empirical studies starting in the mid-1970s have undermined Dahl's general findings.<sup>446</sup> As Whittington notes, "[s]ubsequent empirical analyses of Dahl's thesis have generally failed to confirm his findings."<sup>447</sup>

The most comprehensive study of these questions appears in recent unpublished work by Clark and Whittington.<sup>448</sup> As they point out, most empirical work in "attitudinal studies" of judicial decisionmaking focuses on correlating votes of individual judges or justices with outcomes, rather than on the behavior of multi-member judicial institutions, like the Supreme Court, as a whole.<sup>449</sup> They constructed a data set that includes every Supreme Court decision from 1789 to 2006 in which the Court addressed a substantial question concerning the constitutionality of federal legislation. By examining not just cases in which the Court holds legislation unconstitutional, but also cases in which the Court upholds legislation against constitutional challenge, their study is the first to offer a comprehensive view of the Court's treatment of federal legislation. Surprisingly, they conclude that the Court over its history has struck down or

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<sup>444</sup> Dahl, 6 J Pub L at 292 (cited in note 302).

<sup>445</sup> See, for example, *United States v. Stevens*, (2010); *Ashcroft v. American Civil Liberties Union*, 542 US 656 (2004); *Legal Services Corp. v. Velazquez*, 531 US 533 (2001); *Sable Communications of California v. FCC*, 492 US 115 (1989); *Regan v. Time, Inc.*, 468 US 641 (1984); *Bolger v. Youngs Drug Products Corp.*, 463 US 60 (1983).

<sup>446</sup> See generally Richard Funston, *The Supreme Court and Critical Elections*, 69 Am Poli Sci Rev 795 (1975); Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 Am Poli Sci Rev 50(1976); Bradley C. Canon and S. Sidney Ulmer, *The Supreme Court and Critical Elections: A Dissent*, 70 Am Polit Sci Rev 1215(1976); Roger Handberg and Harold F. Hill Jr.,

*Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress*, 14 L & Society Rev 309 (1980); Gregory A. Caldeira and Donald J. McCrone, *Of Time and Judicial Activism: A Study of the US Supreme Court, 1800–1973*, in Stephen Halpern and Charles Lamb, eds, *Supreme Court Activism and Restraint* (Lexington 1982); William Lasser, *The Supreme Court in Periods of Critical Realignment*, 47 J Polit 1174 (1985); John B. Taylor, *The Supreme Court and Political Eras: A Perspective on Judicial Power in a Democratic Polity*, 54 Rev Polit 345(1992).

<sup>447</sup> Whittington, *Political Foundations* at 42 (cited in note 350).

<sup>448</sup> Clark and Whittington, *Ideology* (cited in note 411).

<sup>449</sup> *Idem* at 35.

constitutionally limited federal legislation in 25% of the cases involving a constitutional challenge.<sup>450</sup> To my mind, that is an unexpectedly high rate, particularly because the rate in the modern era must be much higher than that, given that judicial review has become more assertive over time. If accurate, their analysis suggests that the Court stands up against national lawmaking majorities at much higher rates than many majoritarian theorists (and others) have assumed. Their findings also portray a Court characterized by sustained periods of “activism” (defined as invalidating federal legislation), rather than a Court defined by brief outbursts of activism, followed by long periods of deference.<sup>451</sup>

Moreover, Clark and Whittington find that the Court’s decisions are not, in the aggregate, correlated with partisan alignments between the Justices and Congress. The Court has been no more likely to invalidate congressional statutes of the Court’s partisan opponents than the Court’s partisan allies. That is, using the party of the appointing president as the party affiliation of a justice, a Republican-dominated Court has historically been no more likely to strike down statutes enacted by a Democratic Congress than a Republican one, and so too for a Democratic-dominated Court. As they note, this finding runs counter to much of the received wisdom on the perceived relationship of the Court, the political process, and partisanship. The Court is

somewhat more likely to invalidate laws passed at moments of divided government.<sup>452</sup>

Turning to more refined measures of judicial ideology than the party of the appointing President,<sup>453</sup> Clark and Whittington then find that the more ideologically distant the enacting Congress is from the ideology of the Court (using their measure), the more likely the Court is to invalidate a statute on its face. But these ideological differences have no effect when it comes to decisions invalidating statutes as applied; the Court is no more or less likely to invalidate federal statutes as applied based on whether the enacting Congress is ideologically close or distant to the Court.<sup>454</sup> The Court invalidates statutes as applied more often than on their face (58% of federal statutes invalidated were invalidated as applied). Finally, contrary to one of Dahl’s claims, Clark and Whittington do not find that important legislation is invalidated any more quickly than less important legislation (they also find important legislation to be upheld at higher rates than other legislation).<sup>455</sup> These findings suggest, at the least, that considerably more refined conclusions than Dahl’s original ones are required to understand the relationship between partisan and ideological preferences, on the one hand, and Court decisions, on the other.

F. *The Changing Power of the Court Over Time.* The perceived legitimacy and

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<sup>450</sup> *Idem* at 12.

<sup>451</sup> *Idem* at 13.

<sup>452</sup> *Idem* at 34.

<sup>453</sup> Having rejected the view that the partisan identity of the Court’s majority affects whether the Court is more or less likely to invalidate congressional legislation enacted by the same party, Clark and Whittington then construct a different measure of judicial “ideology.” To construct this measure of ideology, Clark and Whittington attempt to replicate the now familiar DW-NOMINATE scores

used for votes in Congress. Thus, for Justice who served in Congress, they use the actual DW-NOMINATE scores from their votes. For Justices who did not, they average the DW-NOMINATE scores of the appointing President and the same-party home-state senators of the appointed Justice. *Idem* at 16. Whether these are useful measures of judicial “ideology” I leave to others to assess.

<sup>454</sup> *Idem* at 20.

<sup>455</sup> *Idem* at 21.

authority of the Court are not constant or static, but dynamic. That the power and stature of the Court have increased dramatically over time is widely recognized. In the 1820s and 30s, for example, state officials regularly denied the authority of the Court. They refused to appear before the Court, ignored Court decisions, contested the authority of the Court to review state court decisions, and even executed a defendant in the face of Court orders to the contrary.<sup>456</sup> In 1831, the House Judiciary Committee went so far as to report out a bill to repeal Section 25 of the Judiciary Act of 1789, which would have eliminated the Court's power over the state courts.<sup>457</sup> But much as the Civil War settled the question of whether states can secede from the Union – the ultimate question to which all these forms of state defiance of the Court in the antebellum period were leading – American constitutional and political development have effectively settled these related questions concerning the Court's authority over state officials and institutions. The forms of state defiance of the Court from this earlier era are virtually inconceivable today.

Similarly, when faced in 1903 with constitutional challenges to the massive disfranchisement of black voters in the South after Reconstruction had died, the Court confessed impotence, declaring that any order on its part to counter disfranchisement "would be an empty form."<sup>458</sup> In language shocking to a modern ear, the Court, per Justice Holmes, wrote that the Court had:

little practical power to deal with the people of the State in a body. The bill

imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper [issued by the Court] will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form.<sup>459</sup>

*Giles's* language and result is consistent with the majoritarian thesis, in that the Court had no reason to believe the national political branches in that era would support and effectively enforce a Court decision to hold disfranchisement unconstitutional.<sup>460</sup> But the Court's language is shocking today precisely because these words are so alien to widely-shared and deeply-entrenched modern cultural and political understandings. Today, the Court can force a president to commit political suicide, by requiring him to turn over evidence that will inexorably drive him out of office,<sup>461</sup> and can help put a president in office by resolving a disputed presidential election.<sup>462</sup> It is difficult to conceive of the Court contemplating such actions in the 19<sup>th</sup> century, let alone being confident that its decisions on such issues would be honored and enforced. That is not to say that *any* decision of the Court today will be obeyed and enforced; surely limits exist. But the capacity of the Court to bend political actors and institutions, state and national, to the Court's judgments has increased dramatically.

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<sup>456</sup> See generally Friedman, *Will of the People* at 72-105 (cited in note 345).

<sup>457</sup> *Idem* at 88.

<sup>458</sup> *Giles v. Harris*, 189 US 475 (1903).

<sup>459</sup> 189 US at 488.

<sup>460</sup> For fuller discussion of the context and aftermath of the case, see Richard H. Pildes,

*Keeping Legal History Meaningful*, 19 Const. Comm. 645 (2002) and Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comm. 295 (2000).

<sup>461</sup> *United States v. Nixon*, 418 US 683 (1974).

<sup>462</sup> *Bush v. Gore*, 531 US 908 (2000).

A dynamic appreciation of the Court's authority over time requires caution about concluding that the deep history of political control over the Court is predictive of the Court's freedom of action today. The authority of the Court over time is also relational: as the authority of competing institutions, such as Congress or the presidency, wax and wane, the Court's autonomy will also ebb and flow. But as noted above, since the 1970s, the Court has consistently been the most trusted institution in the national government; in recent years, public trust in the Court has vastly exceeded that in Congress or the President.<sup>463</sup> These long-term patterns give the Court additional space for autonomous action.

Majoritarians sometimes diminish the force of these contextual considerations and take too static or isolated a view of the Court's freedom of action. They suggest, for example, that the Court has internalized this deep history of state defiance of, or legislative assaults on, the Court, even if no effective major national or state efforts to cabin in the Court have occurred for generations.<sup>464</sup> Yet the more recent history of failed political attempts to rein in the Court should give the Court more, not less, confidence in its independent authority.

Indeed, the modern Congress typically treats the Court as the exclusive authority over constitutional issues. As Neal Devins has pointed out, one expression of this legislative deferral is the growing prevalence of statutes creating expedited Supreme Court review for statutes whose constitutionality is subject to debate.<sup>465</sup> Not only does Congress willingly invite the Court in, or prefer that the Court take

responsibility for constitutional issues, but today's Congress "rarely casts doubt on either the correctness of the Court's ruling or, more fundamentally, the Court's power to authoritatively interpret the Constitution."<sup>466</sup>

Nonetheless, we are told, the institutional memory of the Court has absorbed this deeper history, which disciplines the Court to avoid counter-majoritarian decisions. But why should the Court feel any more threatened by the history of antebellum attacks on it, for example, than Congress is today by the threat of secession? Why should the Court fear retaliatory Court-packing or Court-reducing plans, given the history of FDR's failed and self-destructive efforts? Norms about the legitimate role of the Court could change again – even secession could, in theory, become a viable option again – but the Court can safely discount to almost zero the risk that the most extreme political responses against it from the past will emerge again if the Court pursues its convictions about constitutional law too aggressively. The modern Court has considerably more latitude to depart from "majoritarian preferences," however defined, and the Court knows it. For prudential reasons, the Court might conclude that it is healthier for the country if particularly explosive cultural issues are handled legislatively or in the state courts – same-sex marriage might be a test case of this proposition – but that would not be because the Court feared it would be institutionally self-destructive for the Court to engage the issue.

One final response from majoritarians to the obviously greater autonomy of the

<sup>463</sup> See note.

<sup>464</sup> See, for example, Friedman, *Will of the People* at 376 (arguing that, although "it has been a long time since the justices were disciplined in any significant way," nonetheless "anticipated

reaction" keeps the justices in line with public opinion).

<sup>465</sup> Devins, 76 L & Contemp Probs at 70 (cited in note 355).

<sup>466</sup> *Id.*



modern Court is that this autonomy exists only because the American people continue to grant it. But this move radically shifts the grounds for the majoritarian thesis and transforms it into something else altogether; it now offers a second-order, rather than first-order, definition or conception of “majoritarian.” This shift salvages the majoritarian thesis by asserting that even if the Court defies majorities (whatever the conception of “majorities” might be) on particular substantive issues, those same majorities still support the Court’s legitimacy and authority to defy them. That argument turns the majoritarian thesis into a theory of Burkean consent or acquiescence in the status quo; the public’s inaction in the face of a Court decision means, on this view, that whatever the Court decides is accepted by “the majority.” In other words, by definition the Court can never get away with actions that are countermajoritarian, in this sense (nor can any other public institution, I suppose).

At this point, it is not clear what the majoritarian thesis is supposed to be illuminating. It is true of all public institutions, of course, that in some sense they continue to exist and maintain their authority only because “the people” are willing to accept that authority (or, the perceived costs of destroying that authority are greater than the harms imposed from particular decisions). At the descriptive level, this argument raises several questions, many of them familiar. How would the withdrawal of this second-order consent to the Court’s authority have to manifest itself to be effective in bringing the Court to heel? Would it be enough for public support for the Court to drop dramatically? Or would that withdrawal of diffuse support and consent have to be expressed through actual legislative

withdrawal of powers from the Court – in which case, all the familiar collective action problems of organizing and mobilizing a discontented public into concerted political action would arise, as well as the familiar realities of many veto gates within legislative bodies and the need to construct an effective supermajority to overcome the inertial forces internal to Congress.

In addition, we would now want to know what the parameters of this second-order or diffuse support for the Court might be. On this view, the Court can in fact go some distance toward creating law that runs counter to the substantive preferences of (political or public) majorities. Of course, this autonomy is not limitless. But how far can the Court deviate from majoritarian preferences (public or political) before its second-order support dissolves? That is a rather different question from the claim that the Court’s decisions are substantively strongly constrained by first-order “majoritarian” pressures. And from a moral perspective, if one thought judicial review were a kind of oligarchic rule or a form of despotism, as Bickel suggested and as some modern critics of judicial review, such as Jeremy Waldron argue, this second-order consent argument would raise familiar moral questions about the status of consent to despotism.

*G. Moral Issues: State Laws and Time.* Most of the laws the Court invalidates are state laws. By one count, for example, the Burger Court struck down ten times as many state as federal laws; the Warren Court, seven times as many.<sup>467</sup> The Court’s review of state law was the context in which Bickel wrote 1962; his aim was to confront moral questions the Court’s recent civil-rights decisions, starting with

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<sup>467</sup> See Bernard Schwartz, *The Ascent of Pragmatism: The Burger Court in Action* 408

(Addison 1990).

*Brown*, had spawned. Moreover, even a brief list provides a reminder of how much of the most significant and most controversial work of the Court involves constitutional invalidation of state, not national, laws: the reapportionment revolution, *Brown* and civil-rights,<sup>468</sup> the development of a constitutional code of criminal procedure, the right to privacy and *Roe v. Wade*, issues concerning religion, obscenity, sexual orientation, and so on.

The classic majoritarians, such as Dahl, did not address this aspect of the Court's work at all. Dahl examined only the relationship between the Court and federal statutes.<sup>469</sup> Thus, Dahl had nothing to say about whether the Court did or could act as a countermajoritarian institution in the most important arena in which the Court acts, its review of state laws, or even what this question might mean.<sup>470</sup>

Modern majoritarians are more imperialistic than Dahl. They seek to extend the majoritarian thesis to state

laws as well. Their response is that when the Court strikes down state laws, it often invalidates laws that are "outliers" – because few states have similar laws – or reflects the preferences of a national popular majority.<sup>471</sup> The Court's decisions are thus "majoritarian" in one or the other or both of these senses. Thus, we are told that *Brown* reflected the views of a national majority,<sup>472</sup> or that many seemingly controversial decisions of the Warren and Burger Courts were supported by half the public or more in polls, or that *Roe v. Wade*<sup>473</sup> "followed social trends," because "polls suggested strong support for leaving the decision to women and their doctors"<sup>474</sup> – although *Roe* had the effect of invalidating abortion laws in forty-six states, and ten months after *Roe*, thirty-two states had adopted new abortion restrictions, most of which were clear attempts to cabin in *Roe*.<sup>475</sup>

This "outlier" claim, however, should not be overstated. Many of the Court's most well-known decisions holding state

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<sup>468</sup> Richard Primus has pointed out that the Court has never invalidated a federal law as a race-based violation of equal protection, even as the Court has invalidated many state laws on this basis. Richard A. Primus, *Bolling Alone*, 104 Colum L Rev 975 (2004).

<sup>469</sup> Dahl, 6 J Pub L at 282 (cited in note 302).

<sup>470</sup> Nonetheless, legal scholars sometimes cite Dahl as if his analysis applied not only to national laws, but to the Court's more significant role: its relationship to state lawmaking institutions. See, for example, Rosen, *Most Democratic Branch* at 6 (cited in note 366); Balkin, 103 Nw U L Rev at 561 n 32 (cited in note 346).

<sup>471</sup> See, for example, Adam Samaha, *Low Stakes and Constitutional Interpretation*, (unpublished manuscript, 2010) (arguing that debates over judicial review involve low stakes, in part because "much of the Warren Court's constitutional work policed local or regional outlier policies without contradicting anything approaching a national consensus") (citing Lucas A. Powe, Jr., *The Warren Court and American Politics* 34–37, 376, 379–80, 396, 489–94 (2000)); Balkin, 103 Nw U L Rev at 565 (cited in note 346).

<sup>472</sup> Friedman, *Will of the People* at 297 (cited in

note 345). On state statutes concerning abortion at the time of *Roe*, see Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 Va L Rev 1537, 1545 (2004).

<sup>473</sup> 410 US 113 (1973).

<sup>474</sup> More refined breakdowns in the questions polled suggest that support for abortion in extreme circumstances, such as serious danger to the woman's health or pregnancy due to rape, received 75% support in polls, while support for abortion dropped to less than 50% if the reasons for it were that the woman could not afford more children, was not married and did not want to marry the man, or the woman was married and did not want any more children. Thomas A. Schmeling, *Supreme Court Counter-Majoritarianism Revisited: Warren Court Cases Invalidating State Laws, 1954-1969*, at 20 (Paper for delivery at the Annual Meeting of the Midwest Political Science Association April 7-10, 2005). These divergences illuminate the notoriously elusive nature of polling data on these kinds of questions.

<sup>475</sup> See Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich L Rev 2596 (2003); Barry Friedman, *Dialogue and Judicial Review*, 91 Mich L Rev 577, (1993).

laws unconstitutional did not involve state “outliers.” In addition to *Roe’s* invalidation of forty-six state laws, *Reynolds v. Sims*<sup>476</sup> invalidated the structure of every state senate, *New York Times v. Sullivan*<sup>477</sup> invalidated the libel laws of every state, *Miranda*<sup>478</sup> held unconstitutional state laws in nearly every state, *Engel v. Vitale*<sup>479</sup> invalidated at least thirty state’s statutes, *Mapp v. Ohio*<sup>480</sup> struck down laws in twenty-four states (through the trend was moving toward state adoption of the exclusionary rule).<sup>481</sup> One major empirical study on this question concludes that 36% of the Warren Court’s “most significant decisions” struck down state laws in a majority of states.<sup>482</sup> Even at the descriptive level, then, it is important not to overstate the extent to which the Court’s constitutional veto extends only to aberrational state laws.

More profoundly, the facts about how common a particular state law is, or how much national “opinion” supports or opposes that law, cannot answer the moral question Bickel raised. Yet modern majoritarians sometimes assert that facts like these do provide an answer, so that the concerns about judicial review can be dismissed.<sup>483</sup> But even assuming that “majoritarian” views can adequately be measured by polling data, rather than actual state laws, or even assuming most state laws the Court invalidates are outliers, these facts do not answer the moral question. If the appropriate level of democratic self-government for a certain issue is the state level (based on American political

practices and culture, or a view of the Constitution, or more general theoretical considerations), the Court is overturning a judgment of the relevant lawmaking majority. The question of what level of self-government, national or state, is appropriate for various issues is itself a moral question.

Yet the Court’s decision imposes a national rule for the issue. Simply to say that the rule reflects national majority preferences, or the preferences of other states, is to beg this moral question.

That the Court has concluded the

Constitution mandates a particular result cannot answer this question, of course, since we need a theory that stands outside the Court’s action to evaluate whether the Court’s action is correct. Put another way, those who are inflamed by the Court’s decisions, on the ground that the Court is running roughshod over the preferences of state lawmaking majorities, have every reason to express outrage at the Court’s actions, even if those actions reflect the views of a national majority. The moral force behind Bickel’s challenge to judicial review still requires a morally adequate answer.

In addition, the Court’s decisions in these areas are often outcome determinative: these decisions change public policy in ways it would not have otherwise changed. National popular-opinion majorities in opinion polls might agree with the Court’s decisions, but those free-floating majority opinions would never have been translated into national lawmaking outcomes. Would Congress

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<sup>476</sup> 377 US 533 (1964).

<sup>477</sup> 376 US 254 (1964).

<sup>478</sup> *Miranda v. Arizona*, 384 US 436 (1966).

<sup>479</sup> 370 US 421 (1962).

<sup>480</sup> 367 US 643 (1961).

<sup>481</sup> Schmeling, cited in note 473, at 25.

<sup>482</sup> *Idem* at 39.

<sup>483</sup> See, for example, Graber, 7 *Stud Am Cont Dev* at 35-36 (cited in note 342) (“Indeed, the claim

that independent judicial policymaking is rarely legitimate in a democracy is not wholly compatible with the claim that independent judicial policymaking seldom takes place in a democracy.”); Friedman, *Will of the People* at 372 (cited in note 345) (concluding that “the close relationship between popular opinion and judicial review goes a long way toward addressing Bickel’s ‘counter-majoritarian difficulty’”).

have legislated a national code of proper police conduct even if national majorities agreed with the substantive content of the rules in cases like *Miranda*? At the time of *Roe*, is it conceivable that Congress would have enacted national legislation on abortion, regardless of what national popular opinion polls might have shown? Apart from whatever issues might exist about Congress's formal power to legislate in such areas, American political practices and understandings would have made it seem inappropriate, if even conceivable, for Congress to legislate in these ways. Thus, the Court's decisions overturning state laws, particularly on some of the most controversial issues the Court has addressed, effectively change policy on these issues. Why the Court should have the power to do so is a moral question that cannot be dismissed by appeals to how popular the Court's decisions might be.

Finally, the majoritarian thesis should not underestimate the moral concerns that time imposes. Over long enough periods of time, if enough vacancies on the Court occur, the Court will come into line with a dominant national lawmaking coalition. But temporal lags still implicate moral concerns about judicial power.

Thus, Court decisions left the income tax unconstitutional for eighteen years, the time between *Pollock*<sup>484</sup> and ratification of the Sixteenth Amendment. More broadly, the Court was able to exercise considerable independence from 1912 to 1937 because opposition to its aggressive judicial role was too frag-

mented to cohere into an effective national lawmaking majority to resist the Court. As Keith Whittington puts it, progressives were successful enough in some states and in Congress to generate a flow of laws that the Court regarded as unconstitutional, but not strong enough to be able to marshal sufficient internal agreement or control of the presidency to be able to push back effectively at the Court.<sup>485</sup> To take one powerful example, the Court forestalled the implementation of child-labor laws for a quarter century; Congress first enacted legislation on the issue in 1916, then again in 1919, then pursued a failed effort in the 1920s at a constitutional amendment, before enacting legislation in 1938 that the Court finally upheld in 1941.<sup>486</sup> To the extent majoritarians implicitly or explicitly rely on lawmaking action as the key mechanism by which the Court is constrained, the inability of nominal political majorities to translate their power into the effective majorities needed to constrain the Court should be sobering.

In the modern era, Congress is more likely to accept Court decisions as final and less likely to continue to challenge the Court than in the child-labor saga. Thus, once the Court struck down restrictions on independent election spending in *Buckley v. Valeo*,<sup>487</sup> Congress did not seek to re-enact those restrictions in other forms or directly challenge the Court, even though public opinion has always strongly supported spending restrictions and most other Western democracies impose such limits.<sup>488</sup> Although those restrictions had

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<sup>484</sup> *Pollock v. Farmers' Loan & Trust Co.*, 157 US 429 (1895).

<sup>485</sup> Whittington, *Political Foundations* at 264-65 (cited in note 350).

<sup>486</sup> For the Court decisions, see *Hammer v. Dagenhart*, 247 US 251 (1918) (holding unconstitutional Act of Congress that prohibited interstate transportation of goods made with child labor), *Bailey v. Drexel Furniture Co.*, 259 US 20 (1922) (holding unconstitutional Child Labor Tax

Law of 1919), and *United States v. Darby*, 312 US 100 (1941) (overruling *Hammer*).

<sup>487</sup> 424 US 1 (1976) (per curiam).

<sup>488</sup> On public opinion support for spending restrictions, see note 338 *supra*. For comparative perspective on campaign finance laws, see Keith Ewing and Samuel Issacharoff eds, *Party Funding and Campaign Financing in International Perspective* (Oxford 2006).

strong bipartisan legislative and public support at the time, the Court's 1976 decision has essentially ended debate on that option for the last 40 years, giving the United States the most unique system of election financing among democracies. The Court's decisions can involve consequential and enduring changes to the legislatively and popular preferred status quo, and to the extent the modern majoritarian thesis (or a certain version of it) obscures that truth, it should be resisted.

#### IV. The Semi-Autonomous Court

Nearly 50 years after Dahl first presented his argument and empirics to suggest a Court strongly constrained by national lawmaking institutions when reviewing national legislation, the legal academy has re-discovered Dahl's vision and run with it. The modern "majoritarian" scholarship has made many important contributions. For those still inclined toward a romanticized image of the Court as a regular protector of the powerless, the outcast, and the minority against the forces of majoritarian democracy, this literature provides a sobering dose of realism. The Court inevitably exists and works within a larger cultural and political context. Constitutional doctrine has changed over time, often in dramatic ways, and the Court's decisions are not purely a matter of autonomous legal reasoning, of the law working itself "pure" in a wholly internal process of distinctly legal reasoning. Viewed over longer periods of time, rather than case by case, the development of constitutional doctrine

is driven by some mix, perhaps ineffable, of external changes in politics and culture, as reflected particularly in appointments to the Court, and internal legal analysis.

Moreover, those who hold political power, whether presidents or legislative-executive coalitions, sometimes have rationally self-interested reasons on some occasions to prefer that courts resolve certain issues.<sup>489</sup> In these contexts, political leaders might be conceived as willingly delegating power to courts. Thus, decisions that appear countermajoritarian at one level, because they invoke the Constitution to invalidate enacted laws, might better be understood as majoritarian (or better, not so obviously counter-majoritarian) at a deeper level. We can always question, as well, the extent to which the elected branches of government accurately reflect "the majority's" preferences, as some of this literature reminds us.<sup>490</sup> Thus, in a variety of ways, the majoritarian literature has contributed to a much richer descriptive understanding of the dynamic relationship between judicial and political power.<sup>491</sup>

Yet if the majoritarian thesis was born in reaction to overly inflated conceptions of the Court's autonomy, that literature risks overreaction. Both descriptively and morally, the majoritarian thesis has been pushed beyond where it can be supported. To the extent some majoritarian theories now lapse into suggesting that virtually all individual Court decisions reflect "majoritarian positions," they go too far.

At the descriptive level, this literature slips back and forth between ill-defined and imprecise conceptions of the

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<sup>489</sup> Two important sources presenting this view are Graber, 7 *Stud Am Polit Dev* 35 (cited in note 342) and Whittington, *Political Foundations* (cited in note 350).

<sup>490</sup> The first to press this point was probably Richard Parker, *The Past of Constitutional Theory*

– *and its Future*, 42 *Ohio St. L J* 223 (1981). For a recent expression, see Graber, 4 *Ann Rev L & Soc Sci* (cited in note 301).

<sup>491</sup> See also Tushnet, 75 *Fordham L Rev* 755 (cited in note 424).

“majority” by which the Court is purportedly constrained: public opinion, or the current governing national lawmaking coalition, or the coalition that existed at the time individual justices were appointed, or the president, or some segment of “elite” public opinion, or some faction within the governing coalition. This looseness risks making the theory a tautology. There is always some conception of “the majority” to which the Court’s decisions can be said to cohere. And moral judgments about the institution of judicial review will vary depending on “the majority” by which the Court is constrained. These elusive and constantly-changing conceptions of “the majority” are particularly likely to infect historical narratives of the Court’s relationship to larger political forces. Yet surprisingly little comprehensive empirical work exists on the issue. Modern majoritarians often look back to Dahl for empirical support, yet within his own discipline, more recent investigations are recognized as having cast substantial doubt on his conclusions.

A clearer sense of which external constraints can plausibly be claimed to cabin in the Court would also enable better evaluation of the mechanisms by which the Court is purportedly kept within certain bounds. Is the Court constrained only when national lawmaking majorities are able to legislate to cut back on the Court’s powers? Or is the mere credible threat that they will do so sufficient to cause the Court to pull back? Does the Court consistently respond to widespread public criticism of its actions? Or only if that challenge finds voice through the President? Or through Congress? Alternatively, perhaps it is only the appointments process that provides a robust means by which majoritarian values, as refracted through the White House and the Senate, effectively shape the Court’s direction. In that case, does

the Court continue to reflect the values of the coalition that appointed (the median justice on) it? Or does it nonetheless reflect the current coalition in power? 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.

As a moral matter, the majoritarian thesis also does not dissolve Bickel’s countermajoritarian concern. Even assuming the thesis is descriptively true, it cannot and does not answer the moral question. The Court does have the power to change the rules under which we live by imposing national solutions to issues the national political process would never address – out of widespread judgment that the issue is not appropriately addressed at the national level. Many of the state laws the Court strikes down are not outliers, but even when they are, the moral question remains: why should this unelected institution have the authority to override the preferences and judgments of the representative institutions of state governments? In addition, once the majoritarian theory is limited to the more defensible position that, over long enough periods of time, with enough appointments available to presidents, the Court will come into line with “majoritarian views,” it is easier to remember the periods in which the Court managed to delay major national policies for a significant time. There are moral defenses of judicial review, of course, which seek to answer these kind of questions. But the majoritarian theories cannot answer these kind of questions.

Finally, the majoritarian theories can easily suggest a false inevitability about

the limited power of judicial review. But the past might well not be prologue. Even if the Court has been as constrained in the past as the strongest versions of the majoritarian thesis suggest, the Court going forward might not be. If the appointments process is the key means of popular or political control of the Court, the fact that vacancies occur much less frequently than in the past (if that pattern continues) inevitably means that the linkage between presidential electoral success and the opportunity to shape the Court will be weakened. In addition, to the extent the success of that linkage in the past depended on regularly recurring successful electoral coalitions dominating American politics and government for extended periods of time, if we continue to experience the opposite structure of politics – frequent shifts in partisan control over national political institutions and no governing coalitions that dominate over many years – the ability of the appointments process to control the Court will be even further diminished.

If another key mechanism for constraining the Court is Congress's ability to enact, or credibly threaten to enact, laws to rein in the Court, that constraint, too, will be diminished if we continue to experience the kind of deeply divided political system that has characterized American politics since the 1980s. In addition to more frequent shifts in partisan control over parts of the national government, that system is also more likely to generate divided government; even when it produces unified government, the hyperpolarized political parties that define our era, combined with the

routine use of Senate filibusters, will make effective legislative action ever more difficult. The more paralyzed the political process, the greater the space for Supreme Court independence (if the threat of political response is what constrains the Court). Moreover, political paralysis and hyperpolarized parties and politics is almost certain to diminish the stature of Congress and the President, relative to that of the Court, in public opinion – as we have seen in recent decades. To the extent public opinion is offered as the constraint on judicial review, that constraint too might well diminish over time if the configuration of politics remains as it has been over the last generation or more.

*Citizens United* is the most counter-majoritarian decision invalidating national legislation on an issue of high public salience in the last quarter century.<sup>492</sup> The decision's practical consequences remain to be seen, but the Court can hardly be said to have acted on a misunderstanding of the likely political reaction. Striking down legislation that had been bipartisan when enacted, the Court's decision was also issued in the teeth of Democratically-controlled executive and legislative institutions with larger partisan majorities likely to be hostile to the decision than at any time in the last 30 or so years. Though the decision has been intensely criticized in some quarters, there has been virtually no suggestion of any legislative effort to retaliate against the Court or bring it to account, nor to challenge the ruling directly by enacting new legislation that tests the Court's commitment to the decision.

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<sup>492</sup> For national legislation, one probably has to go back to the flag-burning decisions to find an even faintly analogous circumstance. The Court in a controversial 5-4 decision, *Texas v. Johnson*, 491 US 397 (1989), initially overturned on First Amendment grounds a criminal prosecution under state law for flag desecration. Congress responded

by passing the Flag Protection Act of 1989, which was designed to protect the flag against various acts of desecration. In *United States v. Eichman*, 486 US 310 (1990), a 5-4 Court again invalidated on First Amendment grounds a criminal prosecution, this time under the federal statute, for flag desecration.

Under more extreme versions of today's majoritarian understanding, the Court would never have issued *Citizens United* (except as a mistake). Under other versions, Congress would have effectively threatened or enacted legislation to defang the Court. Still other versions of the thesis would predict that the Court will back down in the face of the reaction to *Citizens United*. Yet other versions rest on the view that over the "long run," new appointments to the Court will eventually bring the Court into line with "majoritarian" views about corporate spending in elections.

Judicial review, perhaps America's most distinctive and enduring contribution to the design of democratic self-government, exists somewhere between a realm in which judges are free to reach any outcome, regardless of the likely

public or political response, and a world in which judicial decisions are so heavily constrained by the power of other institutions and actors that those decisions simply mirror the preferences of these other actors. *Citizens United* is a powerful reminder that, despite the best efforts of modern majoritarian theorists, Bickel's countermajoritarian difficulty endures. *Citizens United* may prove to be an isolated but important reminder – or a harbinger of an assertive new era of judicial review.

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