

Dysfunction, Deference, and Judicial Review

Barry Friedman* & Margaret H. Lemos**

Abstract. This symposium poses a provocative question: Should judges exercising the power of judicial review defer to the political branches as a means of giving voice to the “will of the people”? The inquiry assumes a connection between majority will and the outputs of the political branches—a connection we argue is frayed, at best, in the current political context.

In the first part of this Essay, we highlight how well-known aspects of our political system—ranging from representational distortions in federal and state governments to the relationship between partisan polarization and the behavior of elected officials—call into question whether political outcomes reliably reflect majority preferences.

We then turn to deference. As a normative matter, we argue, the extent of deference need not turn on the majoritarian nature of political outcomes. There are many reasons for deference—as well as many reasons to reject deference in favor of more aggressive judicial review—that have nothing to do with respect for majority will. Yet the relationship between deference and majoritarianism may tell us a great deal about the balance between the judiciary and the rest of government. Historically, our roughly majoritarian system provided mechanisms that helped keep the judiciary roughly in the mainstream of public opinion on issues that were salient over time. There are signs that system may be breaking down. In the second part of this Essay we return to the sources of political dysfunction catalogued earlier and argue that the same forces are leading to an increasingly polarized bench, while weakening the tools the people—acting through their elected representatives—traditionally have used to corral the judiciary.

* Jacob D. Fuchsberg Professor of Law, New York University School of Law. I want to thank Leni Kagan and Jonah Ullendorff for excellent research assistance. This work benefitted from the generous support of the Filomen D’Agostino and Max E. Greenberg Research Fund at New York University School of Law.

** Robert G. Seaks LL.B. ’34 Professor of Law, Duke University. Thanks to Christian Bale and Kristen Renberg for terrific research assistance.

Introduction

Although grateful to have been invited to participate in this discussion—“*Does the ‘Will of the People’ Actually Exist? Judicial Deference to Whom,*”—we have been tripping over the assignment itself, because it seems, at least initially, to be a bit of a *non sequitur*. We had not understood that judges exercising the power of judicial review were supposed to be deferring in any way to the popular will. And for that reason, the first question we were asked to address—whether such a will exists or is discoverable—seemed unrelated to the second—whether judges exercising the power of judicial review should defer to the political branches.¹

Still, a conclusion about deference to the political branches might follow from a premise about the will of the people, if we were to add another link to the logical chain: a belief that the outputs of the political branches track, in some meaningful sense, the preferences of a majority of the people. It is this, we suspect, our organizers had in mind. If so, they are not alone. Writing in 1962, Alexander Bickel argued in *The Least Dangerous Branch* that judicial review is a “deviant institution” in a democracy for just these reasons.²

As Bickel saw it, “[t]he root difficulty is that judicial review is a counter-majoritarian force in our system.”³ Bickel acknowledged “various ways of sliding over this ineluctable reality,” such as when the great Chief Justice John Marshall “spoke of enforcing, in behalf of ‘the people,’” constitutional limits on government.⁴ And Bickel understood that “the word ‘people’” itself was an “abstraction.”⁵ Still, he insisted, “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual

¹ We understand that many commentators explore the extent to which judicial outcomes mirror public views, including a recent entry from the *New York Times* as the Supreme Court wound its way into the final weeks of its October 2020 Term. Adam Liptak & Alicia Parlapiano, *The Supreme Court Aligned with Public Opinion in Most Major Cases This Term*, N.Y. TIMES (July 9, 2020), <https://perma.cc/27PA-ZY6Q>. One of us, in the book, *The Will of the People*, discussed how what once was academic heresy—the notion that judicial review reflected popular opinion as a descriptive matter—was becoming common wisdom among journalists. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 364–65 (2009). But as the book explains, no one seriously believed it was the normative job of judges simply to follow popular opinion. See *id.* at 364–66, 382.

² ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (2d ed. 1986).

³ *Id.* at 16.

⁴ *Id.*

⁵ *Id.*

people of the here and now.”⁶ There it is—the “representatives of the actual people.”⁷

To be clear, Bickel never suggested, nor has any serious scholar since, that judges simply should adhere to or enforce the naked popular will. If that were the case, the judiciary would serve as nothing other than some better-than-average Gallup Poll. Even if the vision made normative sense, it’s hard to know how the judiciary would do better than the pollsters, who are having their own problems these days.⁸

Rather, for Bickel, the challenge was to identify a role for judges that would justify their overturning the otherwise lawful decisions of institutional decisionmakers: legislators and executive officials.⁹ Why was it acceptable for judges to impose their own judgments about the Constitution over the conclusions reached (on constitutional grounds) by those lawfully empowered in our democracy to make law? That was the question Bickel set out to solve, and many scholars since have followed in his footsteps.¹⁰

Nonetheless, Bickel did hold to a fairly robust view that the political branches were tenable proxies for majority sentiment, and in this sense trumping their decisions was “counter-majoritarian.”¹¹ It’s a bit remarkable that, writing in the early 1960s, he was obsessed with the problem that the political branches were majoritarian, but the courts were not. It’s old hat that the Framers didn’t write the Constitution in a way designed to make the political branches mere trumpets for public preferences. Quite the contrary, many familiar institutions of American democracy were created to dampen the influence of such preferences, prominent among them bicameralism and the apportionment of the Senate.¹² Nor were the political branches particularly good proxies for popular views in the 1960s. Among other things, the House of Representatives was horribly malapportioned, something the Supreme

⁶ *Id.* at 16–17.

⁷ *Id.* at 17.

⁸ See, e.g., Dan Balz, *2020 Presidential Polls Suffered Worst Performance in Decades, Report Says*, WASH. POST (July 18, 2021, 11:59 PM), <https://perma.cc/7P2J-629J> (finding that polls in the 2020 presidential election were the most erroneous in forty years, importantly underestimating support for Donald Trump).

⁹ See BICKEL, *supra* note 2, at 19–23.

¹⁰ See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (noting discussions in academia regarding the “exercise of judicial review by unelected and ostensibly unaccountable judges in . . . a political democracy”).

¹¹ See BICKEL, *supra* note 2, at 16–19.

¹² See, e.g., ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 15–20 (2d ed. 2003) (highlighting seven undemocratic features of the Constitution).

Court aimed to fix (which Bickel, ironically, opposed) in *Wesberry v. Sanders*.¹³ Finally, Bickel had a sophisticated understanding of the political science of his day, which was taken up with discussions of the influence of “pressure groups,” and various other types of legislative dysfunction that might defeat majoritarianism.¹⁴ Despite all this, he fell back on the importance of the electoral process.¹⁵ “[I]t remains true nevertheless,” Bickel insisted stubbornly, “that only those minorities rule which can command the votes of a majority of individuals in the legislature who can command the votes of a majority of individuals in the electorate.”¹⁶

Whatever was true in 1962, it seems notably less true today that the political branches ought to be seen as close proxies for popular opinion. That is the point we make in Part I of this Essay, highlighting widespread dysfunction in our current political system that calls into question whether political outcomes mirror majority will in any meaningful way.

In Part II, we turn to deference. If we’re right that political decision-making cannot easily be equated with the will of the people, does it follow that deference becomes less relevant, or that more aggressive judicial review is warranted? We think not.

As a normative matter, the extent of deference need not have any relationship to the majoritarian nature of political outcomes. On the one hand, there are many reasons for deference—as well as many reasons to reject deference in favor of more aggressive judicial review—that have nothing to do with respect for majority will. On the other hand, the relationship between deference and majoritarianism may tell us a great deal about the balance between the judiciary and the rest of government. Historically, our roughly majoritarian system provided mechanisms that helped keep the judiciary roughly in the mainstream, on the issues that were salient over time. There are signs that the system may be breaking down. The same sort of political dysfunction described in Part I is leading to an increasingly polarized bench, while breaking down the tools the

¹³ 376 U.S. 1, 18 (1964) (requiring congressional districts to have roughly equal populations). At the time of *Wesberry*, in all but five states the difference in population between the largest congressional district and the smallest was greater than 100,000. *Id.* at 21 (Harlan, J., dissenting). Yet, Bickel was critical of proportional representation and particularly the Supreme Court’s ruling in *Baker v. Carr*. See Alexander M. Bickel, *Reapportionment & Liberal Myths*, COMMENTARY, June 1963, at 483, 489–90 (challenging the idea that proportional representation is feasible or even desirable).

¹⁴ See, e.g., BICKEL, *supra* note 2, at 18–19 (discussing the role of interest groups in the political system).

¹⁵ *Id.* at 19.

¹⁶ *Id.* Bickel likewise was unconcerned that many decisionmakers in our democracy, from the Joint Chiefs of Staff to the Federal Reserve to quotidian administrative officials, were themselves not electorally accountable: “For admirals and generals and the like are most often responsible to officials who are themselves elected and through whom the line runs directly to a majority.” *Id.*

people traditionally have used to corral the judiciary. This should give pause to anyone concerned about the long term health of our tripartite system.

I. The Will of the People?

Let's assume the people have a "will" on at least some sizeable subset of constitutional questions, which we could identify if we could look into the hearts and minds of the American public.¹⁷ The question we want to explore is whether such a popular will (i.e., preferences shared by a majority of people) is reflected reliably in the work of the political branches. Bickel's optimistic answer to that question was penned at a time that, to the modern eye, looks like a remarkable period of bipartisanship, running roughly from the end of World War II to the 1980s.¹⁸ Today's politics, by contrast, are marked by what some have termed "hyperpartisanship": not only are elected officials from the two major parties "more ideologically polarized than they have been in over a century," but "when they engage in legislative redistricting and other forms of election law, Democrats and Republicans regularly rig the rules of the game in their favor and gouge the other party in outrageous fashion."¹⁹ Whatever was the case for legislative majoritarianism in Bickel's day, we think modern political realities cast serious doubt on any claim that the outputs of the political branches track, by and large, the will of the people.

To begin with, there is the problem that our legislatures—both federal and state—often fail to reflect the bare minimum requirement of majoritarianism (i.e., that "[t]he party with the most votes wins").²⁰ This is not entirely new. As noted above, low-population states hold an advantage in the Senate, not by chance but by constitutional design. Someone who lives in Wyoming (population approximately 580,000) is represented by the same number of senators as someone who lives in California

¹⁷ This obviously is a stylized assumption, and other contributions to this Symposium rightly question it. The more complex matters of legislation become, the less likely a discernible popular "will" is to exist. In many cases, the details will be beyond the ken of all but the most informed; even if the topic of legislation is accessible, opinion will fracture in the face of many choices. Still, once issues become a matter of controversy, discussions tend to become polarized and binary. That certainly is the form many Supreme Court decisions take on. Cf. FRIEDMAN, *supra* note 1, at 16–18 (discussing how the will of the people can be discerned, particularly retrospectively).

¹⁸ See Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379, 1381–82 (2020).

¹⁹ *Id.*

²⁰ Steven Levitsky & Daniel Ziblatt, *End Minority Rule*, N.Y. TIMES (Oct. 23, 2020), <https://perma.cc/4A8P-HLSB>.

(population approximately 39.5 million).²¹ Low-population states are overrepresented in the Electoral College as well, thanks to the fact that each state gets at least three electors: each of Wyoming's three electors represents roughly 195,000 people, whereas California's fifty-four electors speak for approximately 732,000 people each.²²

What is new is our political geography, in which the urban-rural divide increasingly maps the division between the two major parties, translating into a significant Republican advantage in both the Senate and the Electoral College. Republicans won more votes than Democrats in only four of the fifteen Senate races from 1990 to 2018 but held a majority of seats in nine.²³ During the same period, two Republican presidents (George W. Bush and Donald Trump) prevailed in the Electoral College despite losing the popular vote.²⁴

More surprising is that the same political geography translates into representational distortions in the U.S. House of Representatives and many state legislatures—bodies whose members are selected from single districts rather than statewide tallies. Since the reapportionment decisions of the 1960s, districting is supposed to equalize population differentials, with each district containing roughly the same number of voters.²⁵ Yet single-member districts nevertheless can produce minority rule if co-partisans are concentrated in ways that transform statewide majorities into minorities in most districts. Today's urban-rural polarization increasingly produces precisely those patterns—which then are magnified in many states by partisan gerrymandering.²⁶ The upshot is that the party that wins a majority of votes may remain a minority in

²¹ *Quick Facts: California*, U.S. CENSUS BUREAU, <https://perma.cc/PLH8-8VLH> (providing population statistics for California following the 2020 Census); *QuickFacts: Wyoming*, U.S. CENSUS BUREAU, <https://perma.cc/Y2PB-TFM7> (providing population statistics for Wyoming following the 2020 Census).

²² Denise Lu, *The Electoral College Misrepresents Every State, but Not as Much as You May Think*, WASH. POST (Dec. 6, 2016), <https://perma.cc/9WL4-MWPE> (noting such data based on prior population and elector statistics); see also Katy Collin, *The Electoral College Badly Distorts the Vote. And It's Going to Get Worse*, WASH. POST (Nov. 17, 2016), <https://perma.cc/UC3L-LRRT> (calculating that each Wyoman's vote weighs 3.6 times that of each Californian). The number of electors representing California was reduced by one pursuant to the 2020 Census, whereas the number of electors representing Wyoming was unchanged. *E.g.*, Mike Schneider, *Winners and Losers from First Release of 2020 Census Data*, AP NEWS (Apr. 26, 2021, 4:50 PM), <https://perma.cc/MY96-6ZW2>.

²³ JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 1–2 (2019).

²⁴ Dave Roos, *5 Presidents Who Lost the Popular Vote but Won the Election*, HISTORY (Nov. 2, 2020), <https://perma.cc/DV47-EA4W>.

²⁵ See *Wesberry v. Sanders*, 376 U.S. 1, 5, 7, 10–11 (1964); *Baker v. Carr*, 369 U.S. 186, 192, 197 (1962).

²⁶ See RODDEN, *supra* note 23, at 2–4.

Congress, as was true for Democrats in the House after the 1996 and 2012 elections.²⁷ Minority rule is even more pronounced in state legislatures: between 1968 and 2016, there have been 146 minoritarian outcomes in state senates and 121 in state houses.²⁸

These electoral systems affect not only who is elected, but also how those in office exercise their power. The use of single-member districts “tend[s] to produce what the literature calls a ‘winner’s bonus,’” disproportionately exaggerating the size of the winning coalition beyond what a system of proportional representation would produce.²⁹ Add in geographical clustering and/or gerrymandering, and the bonus can be inflated significantly. That is, if voters from one party are packed into certain districts, the other party may win a narrow majority of votes statewide but prevail in a far greater proportion of districts, ending up with “very large legislative supermajorities.”³⁰ And “[l]egislators with such artificial cushions may be less responsive to the concerns of both the median voter and of partisan minorities.”³¹

Extraordinarily high rates of political polarization in state and federal legislatures provide additional reasons to doubt that legislative outputs will reflect majority preferences reliably. Polarization can be understood in a variety of ways, but two important measures are *partisan sorting* and *ideological divergence*.³² *Partisan sorting* involves a tighter association between ideology and party identification, typically measured by the degree of overlap between the most conservative Democrats and the most liberal Republicans.³³ Where in the Congress there once was considerable overlap between members of the parties on ideology, today there is none.³⁴

²⁷ *Id.* at 1–3.

²⁸ Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1764 (2021) (defining “minoritarian outcomes” as scenarios in which “the party controlling the chamber did not receive the most votes” (emphasis omitted)); *see also id.* at 1765 (“[T]he election results after the 2018 election alone were such that ‘nearly 60 million Americans live under minority rule in their U.S. state legislatures.’” (quoting CHRISTIAN R. GROSE, JORDAN CARR PETERSON, MATTHEW NELSON & SARA SADHWANI, *THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES* 6 (2019), <https://perma.cc/AKG6-68GF>)).

²⁹ *Id.* at 1767.

³⁰ RODDEN, *supra* note 23, at 184, 184 fig.6.8 (describing such results after recent elections in several states and noting that “[t]hese legislative outcomes” of “supermajorities on the order of 65 percent or more . . . are well beyond the typical winner’s bonus”).

³¹ Seifter, *supra* note 28, at 1762.

³² Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1694 (2015) (emphasis added in part).

³³ *Id.* at 1694–95.

³⁴ *See* Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 416 fig.1 (2014) (showing ideological dispersion of the parties in Congress from 1879–2013); *see also* Andrew Prokop, *See Congress Polarize over the Past 60 Years, in One Beautiful Chart*, VOX

Ideological divergence typically is measured by the distance between the party medians and it, too, has increased dramatically.³⁵ In short, “[t]he Democratic and Republican [p]arties are more polarized today than they have been in decades—maybe more than a century, according to some measures.”³⁶

Although the causes of polarization are debated hotly, few researchers view polarization among elected elites as a simple reflection of polarization in the public at large. Instead, most agree that polarization in Congress (the focus of most studies) is significantly more pronounced than polarization among the public. If the people’s representatives are polarized in ways the people themselves are not, “then Congress may not reflect the underlying views it is supposed to represent.”³⁷ Polarization, on this view, is contributing to a “[d]isconnect” between voters and elected officials, a “[b]reakdown in [r]epresentation.”³⁸

Like the electoral systems sketched above, polarization has consequences both for the makeup of federal and state legislatures and for how those institutions operate. Although the direction of the causal arrow is hard to pin down, it is clear that today’s high rates of polarization coincide with pronounced “‘team play’ behavior—the will to win and desire to beat the other party,” and the refusal to break rank with one’s own party and engage in bipartisan compromise.³⁹ In periods of unified

(Oct. 27, 2015, 10:06 AM), <https://perma.cc/B4Z3-8MLU> (charting the considerable increase, since 1949, in the likelihood that House Democrats and Republicans will vote with their own party).

³⁵ See Jeff Lewis, *Polarization in Congress*, VOTEVIEW.COM (June 4, 2020), <https://perma.cc/SDAD-UH9V> (showing party means on the liberal-conservative dimension over time, by chamber); *Parties: Parties Overview*, VOTEVIEW.COM, <https://perma.cc/NQ9C-HTSJ> (plotting party median ideology from 1800 to present).

³⁶ Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 51–52 (2018) (citing Hare & Poole, *supra* note 34, at 411–13).

³⁷ Seth J. Hill & Chris Tausanovich, *A Disconnect in Representation? Comparison of Trends in Congressional and Public Polarization*, 77 J. POL. 1058, 1059 (2015); see also Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 24 (Nathaniel Persily ed., 2015) (“The emerging consensus is that most voters have and remain overwhelmingly moderate in their policy positions.”).

³⁸ See MORRIS P. FIORINA WITH SAMUEL J. ABRAMS, *DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS* (2009). *But cf.* Hill & Tausanovich, *supra* note 37, at 1060 (arguing that senators have long been “unrepresentative of most of their constituents”).

³⁹ Farina, *supra* note 32, at 1700 (quoting FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE* 71–73 (2009)); Nolan McCarty, *What We Know and Don’t Know About Our Polarized Politics*, WASH. POST (Jan. 8, 2014), <https://perma.cc/PSAY-EKNF> (“The combination of high ideological stakes and intense competition for party control of the national government has all but eliminated the incentives for significant bipartisan cooperation on important national problems.”); cf. Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 286–87 (2013) (describing changes in Congress that “paved the way for increases in party discipline”).

government, polarization and team play are likely to produce legislation that is ideologically extreme.⁴⁰ Importantly for present purposes, research indicates that such legislation may well “overshoot” the preferences of many of the majority party’s own constituents.⁴¹

But when government is divided, the probable consequence of polarization plus team play is gridlock.⁴² As political scientists Michael Barber and Nolan McCarty have explained, “[i]ncreased policy differences shrink the set of compromises that both parties are willing to entertain,” while simultaneously exacerbating “the incentives to engage in brinkmanship in bargaining and negotiation, thereby endangering even the feasible compromises.”⁴³

Gridlock is common today even under unified government, thanks to how polarization and party discipline interact with various features of the legislative process that require supermajority consensus—most notably, the filibuster in the Senate. The filibuster allows the minority party to block proposed legislation by engaging in extended debate, which (under current rules) can be ended only by a vote for cloture by at least sixty senators.⁴⁴ The filibuster is not new—the Senate’s rules have permitted unlimited debate since the early 1800s—but it has changed.⁴⁵ Historically, filibustering Senators actually spoke on the floor of the Senate, and no other work could proceed while a filibuster was ongoing.⁴⁶ In 1972, however, the Senate moved to a “two-track” system that permits Senators to filibuster, while the chamber considers other business.⁴⁷ And filibusters today are often “silent”—that is, objecting senators do not have to speak for hours on end but simply can “tell[] the leadership that 41 senators

⁴⁰ See, e.g., Morris P. Fiorina, *America’s Missing Moderates: Hiding in Plain Sight*, AM. INT. (Feb. 12, 2013), <https://perma.cc/L58P-CYX9> (discussing excesses by both parties during recent periods of unified government).

⁴¹ See, e.g., Barber & McCarty, *supra* note 37, at 24 (“In studies that produce estimates of voter-issue positions that are comparable to legislator positions, representatives were found to take positions that are considerably more extreme than those of their constituents.” (first citing Joshua D. Clinton, *Representation in Congress: Constituents and Roll Calls in the 106th House*, 68 J. POL. SCI. 397 (2006); and then citing Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519 (2010))); Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 164 (2012) (finding that “states tend to ‘overshoot’ relative to the median voter’s specific policy preferences”).

⁴² Lemos & Young, *supra* note 36, at 53.

⁴³ Barber & McCarty, *supra* note 37, at 40.

⁴⁴ Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 182, 184 (1997).

⁴⁵ See generally *id.* at 187–209 (discussing history and evolution of the filibuster).

⁴⁶ See *id.* at 201.

⁴⁷ *Id.*

won't vote for a bill."⁴⁸ The consequence has been a steep increase in the use of the filibuster. In 1962, when Bickel published *The Least Dangerous Branch*, the Senate logged four motions to invoke cloture and end debate; in 2020, that number was 328.⁴⁹ Today we have a Senate in which the de facto threshold for legislation now stands at 60 votes—"a Senate, in other words, where minorities reign."⁵⁰

Gridlock may thwart popular preferences in various ways, including—most obviously—by giving the people stasis when they want change.⁵¹ But policy making doesn't simply stop during periods of divided government; instead, political outputs tend to be reshaped and redirected into different channels. In the Senate, for example, legislators increasingly use reconciliation processes to sidestep the filibuster.⁵² Reconciliation was created by the Budget Act of 1974 as a way of fast-tracking measures that would reconcile long-term spending programs with the goals of the annual budget and appropriations process.⁵³ Originally designed "as a modest tool that would align legislation with revenue and spending targets set forth in the budget resolution, [reconciliation] has since risen in importance."⁵⁴ Writing in 2013, Tonja Jacobi and Jeff VanDam observed

⁴⁸ Barry Friedman & Andrew D. Martin, *A One-Track Senate*, N.Y. TIMES (Mar. 9, 2010), <https://perma.cc/3463-7AH4>; see also Sarah A. Binder, Eric D. Lawrence & Steven S. Smith, *Tracking the Filibuster, 1917 to 1996*, 30 AM. POL. RSCH. 406, 411–12 (2002) (explaining how two-track system and "silent" rather than "talking" filibuster decrease the costs of filibustering for the minority).

⁴⁹ *Cloture Motions*, U.S. SENATE, <https://perma.cc/9KMS-JK7T>. To be fair, low rates of cloture in Bickel's time and before may have had to do with aversion to cloture as well as the relative rarity of the filibuster. See Jacobi & VanDam, *supra* note 39, at 275 (noting senators' unwillingness to invoke cloture prior to the 1970s, while emphasizing that "it must also be said that majorities regularly passed legislation in this era; it had simply not come to pass yet that every bill had the threat of a filibuster hanging over it, as is the case today, and thus every bill did not have to acquire 60 votes to pass").

⁵⁰ Jacobi & VanDam, *supra* note 39, at 278; see also Ezra Klein, *Let's Talk: The Move to Reform the Filibuster*, NEW YORKER (Jan. 20, 2013), [https://perma.cc/6K4W-DN\]2](https://perma.cc/6K4W-DN]2) ("[J]ust about all matters, controversial or not, require a three-fifths majority.").

⁵¹ Barber & McCarty, *supra* note 37, at 41, 45 ("The most direct effect of polarization-induced gridlock is that public policy does not adjust to changing economic and demographic circumstances.").

⁵² See 2 U.S.C. § 641(e)(2) (providing that debate on reconciliation bills is capped by statute at twenty hours).

⁵³ MEGAN S. LYNCH & JOHN V. SATURNO, CONG. RSCH. SERV., R44058, THE BUDGET RECONCILIATIONS: STAGES OF CONSIDERATION 1 (2021) ("The purpose of reconciliation process is to allow Congress to use an expedited procedure when considering legislation that would bring existing spending, revenue, and debt limit laws into compliance with current fiscal priorities established in the annual budget resolution."); see also WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY & JOSH CHAFETZ, 2021 SUPPLEMENT TO CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 2–3 (6th ed. Supp. 2021) (offering a concise overview of reconciliation and its effects on process and policy).

⁵⁴ Rebecca M. Kysar, *The New Tax Legislative and Regulatory Process*, 73 NAT'L TAX J. 1135, 1137 (2020).

that “[m]any of the major legislative battles of the previous decade involved reconciliation bills in a central role, including, notably, President George W. Bush’s tax cuts and President Barack Obama’s health care reform.”⁵⁵ Eight years later, we can add the massive 2017 Tax Cuts and Jobs Act to that list.⁵⁶ Like other forms of what Barbara Sinclair dubbed “unorthodox lawmaking,” reconciliation offers a means of breaking the logjam—but it does so by bypassing congressional committees and other important procedural sites for input, debate, and compromise.⁵⁷

Gridlock in Congress also means more matters are left to “an ever-increasing array of states, agencies, private actors, and quasi-private actors.”⁵⁸ Little about that list screams “will of the people.” States, as described above, are prey to the same political pathologies that affect the legislative process.⁵⁹ Administrative agencies, for their part, have inspired mountains of scholarship wrestling with the “serious legitimacy problem” presented by lawmaking by unelected bureaucrats.⁶⁰ And administrative law is replete with doctrines designed to ensure that agencies are sites for “reasoned decision-making”; an agency that defended a new regulatory policy on the ground that it tracks majority preferences would likely meet a swift rebuke in court.⁶¹

⁵⁵ Jacobi & VanDam, *supra* note 39, at 264.

⁵⁶ Kysar, *supra* note 54, at 1138–44 (describing reconciliation and enactment of the Tax Cuts and Jobs Act).

⁵⁷ BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 264 (5th ed. 2016); Rebecca M. Kysar, *Interpreting by the Rules*, 99 *TEX. L. REV.* 1115, 1141 (2021) (“The rushed [reconciliation] process sometimes results in less-than-perfect legislation; to put it charitably.”). On the prevalence of unorthodox lawmaking in the current Congress and its effects, see Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 *COLUM. L. REV.* 1789, 1812–13 (2015); and also see Barber & McCarty, *supra* note 37, at 47–48 (summarizing “studies . . . argu[ing] that polarization has altered Congress’s deliberative and policy-making procedures and capacities”).

⁵⁸ WILLIAM N. ESKRIDGE JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 89 (6th ed. 2020) (describing “[m]assive and [v]ariegate[d] [d]elegation” under the “new normal” of hyperpartisan polarization).

⁵⁹ See Seifter, *supra* note 28, at 1762; see also *supra* notes 26–43 and accompanying text.

⁶⁰ Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 *U. MIAMI L. REV.* 577, 580–89 (2011) (summarizing literature and questioning whether oversight of agencies by Congress or the President creates meaningful democratic accountability); see also Miriam Seifter, *Further From the People? The Puzzle of State Administration*, 93 *N.Y.U. L. REV.* 107, 110–13 (2018) (critiquing assumption that state agencies are more attentive and responsive to the public’s needs).

⁶¹ See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 5–6, 16 (2009) (“[A]gencies, courts, and scholars alike generally seem to have accepted the view that influences coming from one political branch or another cannot be allowed to explain administrative decisionmaking . . .”). On the intriguing question of what role politics may play when

There's much more we could say here about the failure of political outputs to reflect majority views. We could talk about the realities of modern campaign finance, burgeoning voter-suppression efforts in the states, and much more. But we believe the basic point is plain enough: if representation in the political branches supplies the logical link between the will of the people and the question of deference to the legislative and executive outputs, the link is—at best—frayed. And that seems a very generous assessment.

II. Deference and Judicial Review

Which brings us to the question at the heart of this symposium: whether deference is due the decisions of the political branches. If political outcomes do not reliably reflect majoritarian preferences, is there any reason for judges to defer to what politics renders? Or should judges abandon deference altogether?

In this Part, we argue that this conclusion—that deference is unnecessary if institutional outcomes are not majoritarian—is too quick. Put simply, there are many reasons for and against judicial deference that have nothing to do with majority will. Yet majoritarianism *does* matter to the functioning of judicial review. The reason rests not in normativity and law, but in a historical and social-scientific understanding of how majority will and judicial will interact. Rather than thinking solely about whether judicial review thwarts majoritarianism, it is important to understand that majoritarianism has served as a check on judicial review over the ages.⁶² In modern times, majority will and judicial review have been in equilibrium. But dysfunction in the political branches is breeding similar dysfunction in the judiciary, and there is a risk that the equilibrium will collapse. If so, as we explain, dysfunction may have the effect of causing action to be taken against the judiciary; or it may leave the judiciary out of sync with the public, with the political branches unable to respond.

A. *Deference and Majority Will*

The question of how judges should review the decisions of other institutional actors is a complicated one (to put it mildly) that has generated vast literatures. Some theories hold that judges should defer to the constitutional judgments of the political branches; others seek to justify non-deferential review of political outputs. Despite their many

the administrative agency resolving a matter is actually a city council or other legislative body, see generally Maria Ponomarenko, *Legislative Administration*, 2021 WIS. L. REV. 1231.

⁶² For a broader discussion of this phenomenon, see generally FRIEDMAN, *supra* note 1, at 370.

differences, theories of judicial review—deferential or not—share two features that are key for our purposes. First, they are normative, focusing on how judges *ought to* act vis-à-vis the political branches. Second, many theories of judicial review have little, if anything, to do with whether the outputs in question reflect majority will. Some do, but it seems safe to say that there is no necessary connection between deference (or lack thereof) and majoritarianism.

Take theories of deference. Some of these turn on the notion that there are better and less good ways of finding answers to complicated policy questions, and deference is due the former. For example, if extra-judicial entities have superior fact-finding capabilities or other epistemic advantages, that may be a reason to defer to outcomes they render.⁶³ The capacity to speak with one voice, rather than a cacophony, may be another reason for deference—as in the context of executive action on foreign affairs.⁶⁴ In other cases, there simply may not be a right or clear answer to some questions, and absent a clear constitutional answer, it may be better to leave legislative or executive settlements undisturbed. This was the view of James Bradley Thayer, or at least part of the reasoning for his position that judicial review should not trump the determinations of the political branches—whose decisions will “accomplish results throughout the country of the profoundest importance before any judicial question can arise or be decided”—absent “clear” error.⁶⁵

By the same token, it hardly is the case that theories that seek to justify non-deferential judicial review of political outputs necessarily turn on whether an outcome is majoritarian. Indeed, most theories of judicial review—that is, about whether and how judges should invalidate the enactments of political actors—are to the contrary. The point holds even

⁶³ See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1171 (2001) (arguing that the Supreme Court should defer to congressional factfinding when Congress has comparative institutional strengths). See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (arguing that legal reforms are more effective when done through institutions with comparative institutional advantage); Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L.J. 159, 166 (2016) (arguing that “epistemic humility” should encourage judges to defer to administrative agencies).

⁶⁴ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100–01 (2008) (noting “super-strong deference to executive department interpretations in matters of foreign affairs and national security”); see also *Zivotofsky v. Kerry*, 576 U.S. 1, 17 (2015) (noting that for international diplomacy to be effective, the President must be able to speak for the Nation as a whole); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–21 (1936) (noting that the unique status of the President as a single individual makes international relations his “plenary and exclusive power”).

⁶⁵ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135–36, 144 (1893).

for Bickel. He started with the countermajoritarian *problem*, but his ultimate answer was that courts were forums of “principle,” serving as “republican schoolmaster[s]” for the rest of the nation.⁶⁶ (Suffice to say his answer hardly solved his own dilemma.⁶⁷)

Then there’s originalism, which is the antithesis of majoritarianism. Originalism holds that judges are to hew to the [insert your favorite flavor of] the original meaning of the Constitution.⁶⁸ In its purest form, one supposes deference to the political branches is not part of the equation at all—indeed it might be heresy if those branches are treading upon the original Constitution. Steven Calabresi makes this clear in an essay rejecting James Bradley Thayer’s “clear mistake” rule.⁶⁹ As Calabresi puts it, “the Supreme Court ought to decide constitutional cases in accord with the original public meaning of the relevant text as it applies to the circumstances of our modern world.”⁷⁰ For that reason, it would be “unconstitutional for the Supreme Court to erase constitutional rights that actually are in the Constitution, and that is what the adoption of Thayerian reasoning [i.e., deference] would lead to.”⁷¹

Even one of the theories of judicial review most attentive to fostering majoritarian politics still does not tell judges to defer to majoritarian outcomes. For John Hart Ely, representation reinforcement was the order of the day.⁷² Putting it (too) crisply, courts were to do two things. One was to scrutinize closely political decisions that disadvantaged “discrete and insular” minorities (i.e., those who could not find protection in the

⁶⁶ BICKEL, *supra* note 2, at 26; Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 128, 156, 180 (arguing that the role of the Supreme Court has been to teach the public about the “manners, morals, and beliefs that sustain republican government”); *see also* Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreward: The Passive Virtues*, 75 HARV. L. REV. 40, 49–50 (1961) (discussing the Supreme Court’s role as a body of neutral principle rather than political expediency).

⁶⁷ *See* Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567, 1567–68 (1985) (noting that many scholars disagree with Bickel, and that “[i]n the decade [following] his death, constitutional theory . . . turned away from the ideas that Bickel championed”).

⁶⁸ *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412 (2013) (contrasting “new” originalism, which is about original public meaning, with “old” originalism, which is about the Framers’ intent). *See generally* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 12–41 (Grant Huscroft & Bradley W. Miller eds., 2011) (providing a background of originalism, its history, and its differing strains).

⁶⁹ Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1420–21 (2019).

⁷⁰ *Id.* at 1421.

⁷¹ *Id.*

⁷² John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 469–71 (1978).

political process because of built-in bias).⁷³ The other was to “[c]lear[] the [c]hannels of [p]olitical [c]hange,” which is to say, facilitate democratic governance.⁷⁴ And what Ely often wanted to facilitate was majoritarianism. Thus, whereas Bickel disagreed with the Supreme Court entering “the political thicket” in the reapportionment cases, for Ely this was precisely what the Court should be doing: fostering a vibrant majoritarianism.⁷⁵ That’s different, though, from striking or upholding decisions based simply on whether they are majoritarian. It’s hard to see Ely cottoning to that.

We don’t purport to offer anything like a comprehensive survey of theories of judicial review, but the point by now should be clear: majoritarianism *qua* majoritarianism is hardly a central part of the theory of how judicial review should operate. Rather, it was a frame for various theories of judicial review in the post-New Deal era. Legal scholars became “obsessed” with the majoritarian problem beginning around Bickel’s time, for reasons that were historically contingent. Progressives had attacked the courts in the first part of the twentieth century for striking down popular enactments designed to regulate market failures.⁷⁶ After Franklin Roosevelt had the opportunity to remake the Supreme Court, the justices eschewed challenging economic legislation but slowly started to strike down other sorts of laws denying the safeguards of the Bill of Rights.⁷⁷ Liberals thus faced a dilemma: how could they like judicial review in the latter instance, while having deplored it in the former? *This* was the root of Bickel’s countermajoritarian problem and that of the liberal academy that followed him. (It was not a problem that much concerned conservatives, although they too have deployed the countermajoritarian concern strategically at times.⁷⁸) The countermajoritarian difficulty is a jumping-off point for theories of judicial review, not a theory in and of

⁷³ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 151–52 (1980) (internal quotation marks omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

⁷⁴ *Id.* at 105–34.

⁷⁵ BICKEL, *supra* note 2, at 190–98 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946)); ELY, *supra* note 73, at 116–25.

⁷⁶ See, e.g., Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 829 (2005) (noting this criticism).

⁷⁷ Compare, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (upholding an economic regulation that *could* be rationally related to legitimate legislative purpose), with, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 346–48 (1960) (overturning state action that violated petitioner’s Fifteenth Amendment right).

⁷⁸ See, e.g., Josh Hawley, *Why I Won’t Stop Asking Judicial Nominees If They Will Follow the Constitution*, FEDERALIST (Feb. 27, 2019), <https://perma.cc/US2B-FSY6> (criticizing activist judges who “invent new ‘implied rights’ out of thin air and usurp the will of We the People”).

itself. And it has not been a core of the most prominent theories of judicial review.

B. *Judicial Review and Majority Will*

All that said, there is a view of judicial review that sees a relationship between majority will and judicial review. One of us wrote a book about it (entitled *The Will of the People*), and both of us were co-authors on a casebook (*Judicial Decision-Making: A Coursebook*) that explores the matter at length.⁷⁹ That theory, however, is descriptive—not normative. It suggests how judicial review in fact operates, rather than prescribing how judges should exercise the power of judicial review.

The descriptive theory of the relationship between judicial review and the popular will is that over time, on salient issues, the judiciary tends to come into line with public opinion.⁸⁰ Note all the caveats. It's over time, not immediately. It is salient issues, not all of them. And, although the theory tends to suggest that the judiciary comes into line with prevailing views, there is some evidence that the judiciary affects popular views as well. The direction of the causal arrow is not entirely clear.

Although this is a descriptive and not a normative theory, it contains a seed of concern for a judiciary that ignores the theory's fundamental insight. The theory was intended as a partial response to Bickel's supposed countermajoritarian problem: on the issues that mattered, over time, the judiciary did not in fact trump the will of the people. So, everyone who worried over the countermajoritarian difficulty simply could relax a bit.

But the flip side of the insight—that the judiciary is not often out of line with the public in the long run—is that there is peril if it *gets* out of line. Time and again since the founding of the Republic, judges have paid a price when they have defied the popular will. “Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction.”⁸¹ The point is that the public—and more aptly the political branches—has not lacked for tools to discipline a judiciary that had no care for the deeper mores of the American people, as represented by deep public opinion over time.

The extent of peril the judiciary has faced itself has been historically contingent. Modern times have seen fewer attacks and even fewer successful ones. Of course, it is impossible to tell if that is because the

⁷⁹ See generally FRIEDMAN, *supra* note 1; BARRY FRIEDMAN, MARGARET H. LEMOS, ANDREW D. MARTIN, TOM S. CLARK, ALLISON ORR LARSEN & ANNA HARVEY, *JUDICIAL DECISION-MAKING: A COURSEBOOK* ch. 10 (2020).

⁸⁰ FRIEDMAN, *supra* note 1, at 14–15, 267–68.

⁸¹ *Id.* at 375; see also FRIEDMAN ET AL., *supra* note 79, at 704–20.

political weapons have lost their luster, or if the judges have been attentive to the threat of discipline. Even if an aroused public wants the Court's head on a platter, political actors—such as our countermajoritarian Senate—can protect it from any measures that require legislative assent. There is a deep respect for the judiciary, so deep that even at a time of great anger with the judiciary, Franklin Roosevelt's court-packing plan failed.⁸² (Of course, the Court also acceded to popular views, and had it not, the outcome may have been different.⁸³)

We discuss all of this because what is discernible, and concerning, is that the political dysfunction described in Part I is having its impact on the judiciary. To put the point sharply, not only is the judiciary not immune to ideological partisanship, but the increased partisanship and non-majoritarian nature of politics may be driving the judiciary in the same direction. And should that get out of hand, the judiciary may well find itself in trouble. Or, perhaps worse, the judiciary may deserve to be checked but avoid reform because the political branches are unable to act. Once the system falls out of equilibrium, it's difficult to say what the result might be, but historically it has not been good.

1. A Broken Selection Process Leads to a More Extreme Bench

Let's start with a broken selection process. It is hardly a new insight that over the last few decades the process for choosing federal judges has gone off the rails. What used to be a fairly quiet and deferential affair, certainly for courts other than the Supreme Court, has become highly contentious and partisan.⁸⁴ There's a battle royale over what constitutes the original sin, and both parties have a list of grievances about the other as long as a freight train.⁸⁵ There's no point in adjudicating who's right. The result is a nasty game of tit for tat.

What's notable is how this mirrors what happens generally in Congress in these partisan times. During times of divided government (and here what matters is party division between the presidency and the

⁸² See William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), <https://perma.cc/P9UE-JVU9> (noting that despite a large Democratic majority and anger at the judiciary, many feared that court packing would undermine the Court's institutional independence).

⁸³ FRIEDMAN, *supra* note 1, at 196, 236.

⁸⁴ See, e.g., Keith E. Whittington, *Partisanship, Norms, and Federal Judicial Appointments*, 16 GEO. J.L. & PUB. POL'Y 521, 521 (2018).

⁸⁵ See Jonathan H. Adler, *On Judicial Confirmations—History and Numbers*, VOLOKH CONSPIRACY (Mar. 13, 2013, 11:38 PM), <https://perma.cc/2U4C-2KMV> (“The reality, however, is that there are no clean hands in these fights any more.”).

Senate), there are signs fewer judges will be appointed at all.⁸⁶ Both parties have figured out how to slow down confirming judges that are nominated by the opposing party.⁸⁷ The highest profile example of this is how the nomination of Merrick Garland languished, but the same phenomenon is true of nominees to the lower courts.⁸⁸ Commentators suggest that, taken to an extreme, one party simply could stop confirming almost any judges.⁸⁹ This in part is because, in highly polarized times, even individuals previously deemed moderate will be seen as players for the other team. But the greater motivation is to save the seats in the hope that in the next cycle your team will get to make the appointments.

Again, matters look different under unified government, when the President and Senate majority are of the same party. We saw above that hyperpartisanship combined with unified government can produce extreme policy; in the context of courts, the likely product is extremism in judicial appointments. Part of the story here involves the decline or demise of institutional features designed to promote moderation, including the filibuster (discussed in Part I) and the so-called “blue slip” process, which historically gave home-state senators from either party an effective veto over judicial appointments.⁹⁰ Although the filibuster continues to stymie regular legislation, the Senate has abandoned it for

⁸⁶ See David A. Graham, *What Happens If Republicans Refuse to Replace Justice Scalia?*, ATLANTIC (Nov. 1, 2016), <https://perma.cc/4LXS-BP2C> (quoting Senators Burr, Cruz, and McCain expressing intention to block any justice nominated by Hillary Clinton); see also Ilya Shapiro, *The Senate Should Refuse to Confirm All of Hillary Clinton's Judicial Nominees*, FEDERALIST (Oct. 26, 2016), <https://perma.cc/YQ7U-Q8XK>.

⁸⁷ See, e.g., Whittington, *supra* note 84, at 525, 530 (arguing that the modern Senate has obstructed circuit court nominees at an unprecedented rate, starting during the second half of the Clinton Presidency through the Trump Presidency); Adler, *supra* note 85 (chronicling the success both parties have had delaying and obstructing the confirmation of the other party's nominees, starting during the Clinton Administration). See generally BARRY J. MCMILLION, CONG. RSCH. SERV., R42732, LENGTH OF TIME FROM NOMINATION TO CONFIRMATION FOR “UNCONTROVERSIAL” U.S. CIRCUIT AND DISTRICT COURT NOMINEES: DETAILED ANALYSIS (2012) (finding that wait times from nomination to confirmation have steadily increased from the Reagan Presidency, including for uncontroversial nominees from both parties).

⁸⁸ See Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done with Them?*, BROOKINGS: FIXGOV BLOG (June 4, 2018), <https://perma.cc/K7DM-6RJH> (finding that the Republican-controlled Senate in the last two years of the Obama Administration confirmed far fewer lower court judges than its recent other-party predecessors during the Reagan, Bush, and Clinton Presidencies).

⁸⁹ See, e.g., Whittington, *supra* note 84, at 530 (suggesting that during times of divided government, the Senate increasingly will refuse to seat circuit-court nominees from the opposing party).

⁹⁰ See, e.g., Sarah A. Binder, *Where Do Institutions Come From? Exploring the Origins of the Senate Blue Slip*, 21 STUD. AM. POL. DEV. 1, 2 (2007).

judicial appointments, which are now subject to a simple majority vote.⁹¹ Meanwhile, “recent, frequent alteration[s]” to the blue-slip process have weakened it substantially.⁹² With those minority-empowering tools gone, the party in power can confirm pretty much anyone it wants.⁹³

None of this is hypothetical; both dynamics have been on display during the last decade under the leadership of former Senate Majority Leader Mitch McConnell.⁹⁴ McConnell himself has identified judicial appointments as a “top priority,” and there is some evidence he and his party compatriots rode the Trump coattails in large part for this reason.⁹⁵ McConnell purposefully engineered a slowdown in confirmations during the Obama Administration, creating a large number of vacancies for Trump to fill.⁹⁶ And fill them he did: during his one term in office, Trump filled as many appellate seats as most presidents fill in two, not to speak of his three appointments to the Supreme Court.⁹⁷

⁹¹ See Seung Min Kim, Burgess Everett & Elana Schor, *Senate GOP Goes ‘Nuclear’ on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 3:01 PM), <https://perma.cc/BA3Z-3VVU>.

⁹² Sarah Binder, *Dodging the Rules in Trump’s Republican Congress*, 80 J. POL. 1454, 1455 (2018); see also Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), <https://perma.cc/L4Q8-MS93> (describing Senator Grassley’s announcement that minority-party Senators would no longer be able to “wield veto power” over appellate nominees).

⁹³ See, e.g., Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL’Y REV.:INTERALIA 1, 23 (2018) (arguing that the blue-slip requirement forced parties to build consensus around their nominees); Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Majoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 457 (2020) (finding that the demise of the filibuster has allowed for the confirmation of highly controversial judges who could not have been confirmed before).

⁹⁴ To be clear, we are emphatically not saying this is a game only one party plays. Both plainly do, and we don’t want to get lost in a battle of which if either is worse. But we’ve now got a full account of the Obama and Trump Presidencies as recent instances of divided and unified government, and the story for those years is pretty evident.

⁹⁵ See Susan Davis & Kelsey Snell, *Mitch McConnell on Filling the Federal Bench: ‘This is My Top Priority’*, NPR (May 24, 2019, 7:54 PM), <https://perma.cc/6XEZ-9QWD>; see also JP Keenan & Ivan Pereira, *For Many White Evangelicals, the Supreme Court Makeup Solidifies Their Support for President Trump*, ABC NEWS (Oct. 16, 2020, 6:07 AM), <https://perma.cc/SU3R-D2XH>; cf. *200 Judges: Since 2017, The Senate Republican Majority Has Confirmed 200 Article III Judges, ‘A Generational Remaking of the Courts’*, SENATE REPUBLICAN LEADER (June 24, 2020), <https://perma.cc/V2N9-Y546> (discussing an official statement by Senator McConnell about how many judges Trump has nominated and been confirmed by Senate).

⁹⁶ When Trump entered office, 9.5 percent of circuit court judgeships and 12.8 percent of district court judgeships were vacant, compared to 7.3 percent and 5.9 percent when Obama entered office. BARRY J. McMILLION, CONG. RSCH. SERV., R45622, JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977–2020, at 4–5 (2021).

⁹⁷ Trump appointed 54 federal appellate court judges during his term, while Presidents Obama and Bush appointed 55 and 62 judges respectively, over the course of their two terms in office. Chris Morran, *The Government Donald Trump Left Behind*, PROPUBLICA (Jan. 27, 2021, 3:36 PM),

What's really interesting is the evidence of increased partisanship and ideological extremism of those appointees. Some of the evidence points in different directions and it is difficult to arbitrate what is going on. For example, Trump's nominees garnered far more "no" votes from the opposing party than is typical, which could suggest those nominees were more partisan and ideological, or could simply reflect growing partisan battles generally.⁹⁸ Other evidence is more clear, especially because supporters of the appointees crowed about it enthusiastically.⁹⁹ The Federalist Society had a huge hand in picking Trump judges, from the famous pre-election list from which Supreme Court nominees would be chosen, to the lower courts more generally.¹⁰⁰ Republicans, fed up with disappointment over "stealth" nominees, have chosen judges who were far more ideologically engaged before their nomination—and a good deal younger—than had historically been the case.¹⁰¹ And there is some indication in the output of those judges that they are holding true to the increasingly polarized commitments that put them on the bench in the first place.¹⁰²

<https://perma.cc/37F2-N9WP>. The rush to control the courts has not stopped with Trump. See Mark Sherman & Darlene Superville, *Biden's Judges: More Diverse and More of Them*, AP NEWS (Aug. 2, 2021), <https://perma.cc/PG7G-N6WA> ("President Joe Biden and Senate Democrats are putting judges on federal trial and appellate courts at a much faster clip than any of Biden's recent predecessors, including former President Donald Trump.").

⁹⁸ Trump appointees have cumulatively received three times more "no" votes than all confirmed judges in the twentieth century combined. Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020) <https://perma.cc/Z5WY-M7PV>.

⁹⁹ See, e.g., Jordain Carney, *GOP Plays Hardball in Race to Confirm Trump's Court Picks*, HILL (Oct. 19, 2018, 6:00 AM), [https://perma.cc/5Z\]L-LL57](https://perma.cc/5Z]L-LL57) (quoting Senator McConnell promising that "[t]he president is, with our Republican Senate, transforming the American court system").

¹⁰⁰ Ginger Gibson & Lawrence Hurley, *Trump Identifies 11 Potential Supreme Court Nominees*, REUTERS (May 18, 2016, 2:23 PM), <https://perma.cc/5RT7-P8AT>; see also Ruiz et al., *supra* note 98 (finding that all but eight of President Trump's appellate nominees had ties to the Federalist Society, nearly twice as many as did judges nominated by President Bush).

¹⁰¹ See, e.g., Mairead McArdle, *'No More Secret Moderates': Hawley Doubles Down on Call for Anti-Roe SCOTUS Nominee*, NAT'L REV. (Sept. 22, 2020, 11:28 AM), <https://perma.cc/V63R-JLKE> ("No more stealth nominees. No more secret moderates. We need a strong, tough conservative, someone who understands that Roe, for instance, was wrongly decided."); see also Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden.*, WASH. POST (Feb. 16, 2021, 12:33 PM), <https://perma.cc/SW9M-RDAN> (finding that Trump nominees for federal judgeships were on average forty-seven years old when nominated, five years younger than the average age of Obama nominees).

¹⁰² See generally Neal Devins & Allison Orr Larson, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1380–82, 1410, 1414–15, 1431–36 (2021) (analyzing en banc decisions from the 1960s through 2020 and finding a dramatic spike in partisan splits and partisan reversals between 2018 and 2020).

2. Legislative Stasis Empowers the Judiciary

It's not just the selection process, though, that is leading to heightened extremism in judicial results; congressional gridlock too is a contributor. Congressional stasis makes judges all the more important. First, as noted in Part I, hyper-partisanship and polarization make it difficult for Congress to agree on anything.¹⁰³ Legislation, when it passes, has more holes to be filled by judges, or by administrative actors whose work judges review.

Second, Congress is less able to supervise the judiciary on matters of statutory interpretation and the like. Outside of the realm of most constitutional cases, if Congress doesn't like what the judges are doing, it can override judicial decisions. As other scholars have shown, at other times in history, this has happened with some frequency.¹⁰⁴ But if Congress is at a partisan standoff, then overrides become impossible.¹⁰⁵ This not only empowers the judiciary—by rendering even statutory decisions effectively immune to revision by other actors—but also causes those same decisions to take on the importance generally associated with constitutional rulings.¹⁰⁶

Finally, the very tools that have been used throughout history to curb the judiciary become almost impossible to wield if Congress cannot agree. Reforms like court-packing and jurisdiction-stripping require legislation, and a gridlocked Congress will not be able to deliver it—even if the reforms enjoy widespread public support. The consequence, once again, is to liberate the judiciary still further.

¹⁰³ See, e.g., Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 94–98 (2015) (finding that even in times of unified government, Congressional deadlock is becoming more intractable and legislative capacity is reaching new lows).

¹⁰⁴ See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1329 (2014) (finding 286 statutes overriding 275 Supreme Court decisions between 1967 and 2011).

¹⁰⁵ See *id.* at 1340–53 (showing that override activity dried up after 1998, when gridlock set in); Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 272 (2019) (noting that during times of increased polarization Congress is more deadlocked and finds it harder to override court statutory interpretations); see also Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 785–86 (2011) (noting that increased party polarization tends to make it harder to hold constitutional hearings related to Supreme Court decisions).

¹⁰⁶ See, e.g., Tyler Olson, *Democrats Renew Court Packing Calls, Blast the Supreme Court's Final Two Decisions of Term*, FOX NEWS (July 1, 2021), <https://perma.cc/CW4R-66DQ> (noting that Democrats are advocating for court packing in response to Supreme Court's interpretation of the Voting Rights Act).

Conclusion

We don't have a crystal ball and won't pretend to know where this all ends up. The Senate may find a way to break its downward cycle. The public may adjust to rampant judicial partisanship. Or the judiciary could get wildly out of sync with the public, and the public could get angry enough that politics responds in some way. Maybe the political branches will be too dysfunctional to respond, and the whole system craters. It's not like these are optimistic times.

Whatever the case, though, *this* seems to us the ultimate relationship of judicial deference and majority will. Majoritarianism is not some normative lodestar for when judicial review should be exercised. Rather, it is a key to when the system will be in equilibrium and when it will fall out. On the one hand, judges should not defer to the political branches or the public out of sheer majoritarianism. On the other hand, there often are plenty of other reasons to defer, which vary with the case. Judges should be attentive to those reasons and thoughtful in the actions they take. That's what it means to judge, rather than to play on an ideological or partisan team.