Measuring the Counter-Majoritarian Nature of Supreme Court Decisions

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Abstract

The counter-majoritarian difficulty is central to most contemporary constitutional theory. With that in mind, scholars have empirically tested implications of the counter-majoritarian difficulty by analyzing whether public opinion influences the Court, whether the Court is attentive to the preferences of elected institutions, and the extent to which the Court enacts policy change. The general conclusion of this research is that the Court is less counter-majoritarian than the theoretical perspective assumes. We move beyond testing implications of the counter-majoritarian difficulty by estimating a case-level counter-majoritarian score for every case the Supreme Court has decided between 1946 and 2018. Our results support the idea that the Court rarely engages in substantial counter-majoritarianism, but a plurality of cases do display some degree of counter-majoritarianism. We further explore the variation in the Court’s counter-majoritarianism and find that the Court is more counter-majoritarian when the Court is more institutionalized and there is less ideological diversity on the Court. Finally, we probe the implications of case-level counter-majoritarianism and find that cases that are more counter-majoritarian receive more media attention.

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One of the most enduring debates in the field of constitutional theory involves the counter-majoritarian design of the judiciary (Bickel 1962; Ward and Castillo 2012). Such debates go back to the development and ratification of the Constitution itself with the Federalists and Anti-Federalists debating the utility of a judiciary that was isolated from majoritarian considerations. Contemporary debates invoking the counter-majoritarian nature of the judiciary, stem from Alexander Bickel’s 1964 book “The Least Dangerous Branch: The Supreme Court at the Bar of Politics.” The general thesis of Bickel’s book is that the Supreme Court and judicial review are inherently undemocratic and that this creates a “difficulty” for democratic government. The solution then to this “difficulty” is that the Supreme Court play a minimalist role in politics to avoid thwarting democratic governance. Bickel’s perspective has been immensely influential and has been cited more than 7,489 times.

Considering the enduring and influential nature of Bickel’s perspective, scholars have sought to analyze the extent to which the counter-majoritarian difficulty and its assumptions and implications are empirically supported. To this end, scholars have analyzed the extent to which the Court is influenced by public opinion, rules against the preferences or overturns the actions of elected institutions, and creates significant policy changes. The thrust of this research demonstrates that many of the assumptions about the Court’s counter-majoritarian design leading to counter-majoritarian behavior are unfounded. That is to say, the Court is attentive to various majoritarian considerations when making its decisions, even if the Court is not formally tied to those majoritarian considerations. However, this does not mean that the Court is never counter-majoritarian.

Here, we seek to move away from testing assumptions or implications of the counter-majoritarian difficulty to measuring the counter-majoritarianism of individual Supreme Court decisions. We believe this allows for broader conclusions about the Court’s counter-majoritarian behavior than the current approach of testing one assumption or implication at a time. To accomplish this, we review how existing studies conceptualize counter-majoritarianism. We find that three conceptualizations are common, ruling against public
opinion, ruling against elected institutions, and creating policy changes. Using indicators from each of these three conceptualizations, we use item response models to estimate latent counter-majoritarian scores for each case decided by the Supreme Court between 1946 and 2018. This approach allows us to analyze counter-majoritarianism broadly, rather than focusing on a single indicator or approach at a time.

Our results indicate that the Court rarely engages in overt counter-majoritarian behavior. However, a majority of the Supreme Court’s decisions do contain some counter-majoritarian behavior. Thus, when viewing counter-majoritarianism broadly, our approach provides a slight challenge to the notion that the Court is rarely counter-majoritarian.

We then theorize about contexts in which it would be expected that the Court will behave in a more counter-majoritarian manner. Specifically, we argue when the Court is more ideologically homogenous, we should expect the Court to be more counter-majoritarian; and that when the Court is more institutionalized, we should expect more counter-majoritarian behavior. Finally, we probe the implications of case-level counter-majoritarianism and find that cases that are more counter-majoritarian receive more media attention.

The Counter Majoritarian Difficulty

Since the time of the constitutional convention, the institutional design of the federal judiciary and especially that of the Supreme Court has been a source of great debate. At the convention, a judiciary emerged in which the judges would serve life-long terms, and the executive and legislature would have no formal mechanisms to overturn those judges’ decisions. This design called into question the democratic character of the newly designed judiciary, which was vocalized by the Anti-Federalist’s argument that the Supreme Court would be “an exalted” power in the government and subject to no accountability (Ketcham 2003). Further, the Justices ability to interpret the constitution would put the Supreme Court in a position of supremacy relative to the executive and legislature. According to the Anti-Federalists, the judiciary’s design would be an affront to the newly formed democracy. The Anti-Federalists objections would become the essence of modern debates
over the judiciary’s institutional design and its relationship to democratic government.

Bickel (1962) refined many of the Anti-Federalist’s arguments, applied them to current events, and presented them as the counter-majoritarian difficulty. According to Bickel (1962), the counter-majoritarian difficulty’s essence is based on the power of unelected judges to invalidate laws passed by elected representatives; in other words, the root of the difficulty stems from judicial review and the Court’s ability to exercise unchecked authority against democratic values. First, when the Supreme Court invalidates laws as unconstitutional, “it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it” (p. 16-17). Secondly, judicial review acts against the central policy-making function that democratic theory assigns to the electoral process and the public (p.19). Third, while elected representatives remain accountable for their actions, judges who exercise judicial review are not responsible to the public or elected representatives (p.17-19).

The idea of the counter-majoritarian difficulty has had considerable influence over constitutional theory, constitutional law, and empirical studies of the judiciary. For example, normative constitutional theory engages in debates over whether the counter-majoritarian nature of the judiciary is a “difficulty” at all, with many theorists defending the counter-majoritarian design of the judiciary (Hart Ely 1981; Pildes 2011; Bassok and Dotan 2013). The normative debates over whether the counter-majoritarian design of the judiciary reflects a “difficulty” has influenced predominant theories of judicial review and the judicial philosophies adopted by many jurists (Breyer 2007; Sunstein 2001; Hart Ely 1981). The empirical research motivated by Bickel’s counter-majoritarian difficulty analyzes whether the Court actually acts in a way that is counter-majoritarian (Ward and Castillo 2012). In other words, instead of debating the normative implication or developing judicial philosophies that assume a counter-majoritarian institution, this line of research seeks to find evidence of whether or not the Court behaves in a counter-majoritarian fashion.

Here, we review the empirical studies that attempt to determine whether or not the Court acts in a counter-majoritarian way. Our review from these studies concludes that
while these studies are informative, they are limited. The studies are limited because they typically analyze one aspect of counter-majoritarianism. For example, a set of studies may analyze whether the Court frequently rules against public opinion, while another set of studies will independently analyze whether the Court frequently overturns legislation passed via the democratic processes. We then overcome the limitations of existing studies by developing a case-level counter-majoritarian score — which is based on multiple indicators of counter-majoritarianism — for each case the Supreme Court decided between 1946 and 2018.

Empirically Analyzing the Counter Majoritarian Difficulty

Many scholars have tested the empirical implications of Bickel’s (1962) counter-majoritarian difficulty. These studies examine an array of actions that can be considered counter-majoritarian. For example, some studies analyze whether the Court follows public opinion, whether the Court considers preferences of other political institutions, or whether the Court enacts significant policy changes. Across each of these conceptualizations, scholars find little evidence that the Court on average engages in pronounced counter-majoritarianism. Thus, existing research diminishes Bickel’s concern of a Court that is detached from formal democratic accountability. In the sections that follow, we briefly summarize this research. We then articulate a perspective that suggests that the current research may not provide the best insights to the nature of counter-majoritarian behavior on the Supreme Court. Specifically, existing studies focus on average trends, while counter-majoritarian behavior is best conceptualized as a case-level variable.

Is the Court Attentive to the Public?

Scholars often test implications of the counter-majoritarian difficulty by analyzing whether or not the Court’s decisions follow public opinion. If the Court’s decisions follow
public opinion, it cannot be said that the Court is counter-majoritarian. However, if the decisions conflict with public opinion, it can be said the Court is counter-majoritarian.

Currently, the scholarly evidence suggests that the Court does in fact follow public opinion. Marshall (1989, 2009) compares public opinion polls on specific issues to the Court’s decisions on those issues. He finds that the Court tends to side with the public in roughly 70% of cases. Other scholars have used aggregate measures of public opinion such as the Stimson (1998) public mood indicator to uncover a connection between public opinion and the Court’s decisions (Epstein and Martin 2010; Flemming and Wood 1997; Mishler and Sheehan 1993, 1996). In another study, Casillas, Enns and Wohlfarth (2011) account for social factors and demonstrate that public opinion influences the Justices directly, rather than indirectly through judicial selection politics. Providing a historical overview, Friedman (2009) observes the Court tends to follow public opinion and that public preferences seem to influence the Court’s decision-making.

While the bulk of existing studies do find that public opinion influences the Court’s decision-making, there are some that find little connection between public opinion and the Court’s decision-making. For example, Norpoth and Segal (1994) find no direct influence of public opinion. Instead, the Court seems to represent public opinion through new judicial appointments. Stimson (1998) finds that the influence ascribed to public opinion dissipates when accounting for the Court’s ideological composition. Giles, Blackstone and Vining Jr (2008) finds that the influence of public opinion is limited to a small percentage of the Justices. Johnson and Strother (2020) find outside of the Warren Court, there is little evidence that the Court follows or is aligned with public opinion. However, while these studies argue that there is no effect of public opinion or that effect is smaller than other studies assume, none of the studies cited find that the Court’s decisions are on average counter to the public’s preferences. Thus, the implication from the study of public opinion’s influence on the Court’s decision-making is that the Court—while perhaps ambivalent to public opinion— is not a counter-majoritarian in the sense that the Court does not frequently rule against the public’s preferences.
Is the Court Attentive to Preferences of Electoral Institutions?

There are many reasons why the Court might be attentive to the preferences of the executive and Congress, despite its institutional isolated from these institutions. From an institutional perspective, the Court does not have the means to enforce its own decisions and needs other actors to implement them on their behalf (Hamilton, Madison and Jay 1788/1982; Caldeira 1986). This is especially relevant in cases involving actors outside of the judiciary where these actors may have less incentive to implement the Court’s decisions (Hall 2014, 2015). This institutional setting creates a relationship in which the Court must anticipate how the elected branches will react to their decisions otherwise the Court risks being an effective policymaker. Thus, the legitimacy of the Court’s decisions rests in-part on its ability to gauge and strategically align with the preferences of majoritarian institutions. Beyond concerns over implementation, the Court will seek to avoid possible retaliation from the elected branches and therefore align with their preferences. When the Court issues unpopular decisions, the public calls upon the elected branches to sanction the Court (Clark 2009; Bartels and Johnston 2020; Badas 2019b). Thus to avoid potential sanctions, the Court has further incentive to align itself with majoritarian institutions.

The current literature on inter-institutional relationships provides evidence that the Courts tends to be deferential to the elected branches of government. When it comes to interactions with Congress, Mark and Zilis (2018) find the Court strongly considers potential sanctions from Congress when making their decisions. Further, Clark (2009) finds the Court is less likely to overturn laws when the Congress has been actively considering sanctions against the Court. Harvey (2013) and Harvey and Friedman (2009) find that the ideological composition of Congress influences the ideological leanings of the Court’s decisions and the cases which the Court decides to grant certiorari. Thus, the research demonstrates that the Court actively considered the preferences of Congress.

Outside of Congress, others scholars have focused on the relationship between the Court and the executive. Research demonstrates that the Court is typically deferential to the executive. First, it appears that the Court tends to be deferential to the executive on
matters of executive power. Yates and Whitford (1998) find the Court tends to defer to the executive when the executive makes executive power claims. Epstein and Posner (2017) come to similar conclusions and find the Court defers to the executive.

Beyond matters of executive power, the Court tends to defer to the position the executive’s lawyers make in non-executive power cases too. Research finds the Court defers to the Office of the Solicitor General (Black and Owens 2012, 2013; McGuire 1998). This deference is so strong that the Solicitor General is often referred to as the Tenth Justice (Caplan 1987). Black and Owens (2012, 2013) find that the Office of the Solicitor General enjoys a built-in advantage before the Court. This built-in advantage manifests in two ways. First, the Court grants certiorari to petitions supported by the Office of the Solicitor General at a much higher rate than other litigants. Second, the Office of the Solicitor General wins merit decisions in a vast majority of the cases in which it takes part. Black and Owens (2012) test many mechanisms for the Solicitor General’s success and finds that none of them are able to explain the differences between the Solicitor General and comparable lawyers. Thus, they conclude that the reason the Solicitor General is so successful is because the Court shows a general deference to the executive’s position.

The Supreme Court lacks an enforcement mechanism and must rely on the Congress and executive to ensure the efficacy of its decisions. The Justices are also aware that these institutions can attempt to enact sanctions against the Court. Thus, despite its counter-majoritarian design, the Court has an incentive to consider the preferences of majoritarian institutions. The empirical research demonstrates that this incentive is one that weighs heavily upon the Court. Across many studies, scholars have found that the Court is generally deferential to the Congress and the executive and is responsive to statements of their preferences.

**Does the Court Enact Policy Changes?**

The concerns of the counter-majoritarian difficulty are especially salient if the Court enacts meaningful policy changes. If the Court enacts meaningful policy changes, it would
indicate that the Court is limiting the democratic process and enacting its own preferences over the public’s. While, the Court is certainly a policy-maker (Dahl 1957), scholars have been interesting in determining whether the Court on its own can producing significant policy changes and how often the Court produces policy changes relative to the elected branches of government.

Dahl (1957) argued the Court by itself is powerless to embrace the role of significant policy-maker. However, as part of the dominant national alliance, the Court can help enact significant changes. When the Court attempts to enact significant policy changes without the agreement of the dominant coalitions the results are typically negative for the Court (293-294). That conclusion is shared by research that shows that the consent and willingness of other institutions is a key factor to implement the Court’s decisions. When this support is absent, agencies will find a way of circumventing the Court’s decisions and carry on with their preferred practices (Boldt and Gizzi 2018; McGuire 2009). Thus, indicating the Court’s limited ability to enact policy changes.

Other research comes to similar conclusions. Rosenberg (2005) challenges the idea that courts are capable of producing significant policy changes. To come to that conclusion, Rosenberg (2005) examines landmark cases where the Court as been ascribed to initiating significant policy change, such as Brown v. Board of Education (1955) and Roe v. Wade (1973). In his analysis, Rosenberg (2005) found that the Court’s decision was not enough to produce a policy change. Instead, the Court had to wait until other institutions decided to implement the Court’s decisions before policy change was realized. For example, in the aftermath of Brown v. Board of Education (1955), Rosenberg (2005) found that most schools remained segregated for decades and it wasn’t until Congress and the president took action did schools begin to meaningfully desegregation. Thus, Rosenberg (2005) concludes that even in areas in which the Court has been viewed as creating policy changes, that change is actually limited. Thus, the extent to which the Court acts in a counter majoritarian fashion and enacts policy changes is rather limited.

While research has portrayed the Court’s ability to enact policy change as limited,
some recent research has found evidence that the Court can implement significant policy changes. Hall (2010) finds that the Court is able to create significant policy changes when the issues involved are issues that must be implemented by within the judicial hierarchy. To this end, Hall (2015) finds that the Court has significant influence on criminal justice policies and Rice (2020) finds that the Court contributed to many policy changes related to civil rights. Moreover, Grossmann and Swedlow (2015) find federal courts have made influential policy changes outside the areas of criminal justice and civil rights and liberties, and in fact, that courts have made or influenced significant federal policy changes in a wide range of policy domains. Yet when compared to the policy changes initiated by Congress or the executive, the Court’s contributions to policy change are rather limited and across a broad range of issues the Court tends to produce the least amount of policy changes (Grossmann and Swedlow 2015).

Overall, the research on whether the Court can enact significant policy changes is somewhat mixed. Some scholars come to the conclusion that the Court is a “hollow hope” when it comes to creating policy changes, yet other scholars do find evidence that the Court is sometimes able to implement policy changes. Thus, it appears that any ability for the Court to enact policy change is conditional upon other factors and the Court’s ability *ipso facto* to implement policy changes as a result of its institutional design is ambiguous. Thus, current research tends to suggest that the Court is not making widespread policy changes and the extent to which the Court engages in counter-majoritarian behavior through the process of enacting policy changes is minimal.

**Conceptualizing and Measuring the Counter-Majoritarianism**

Existing research demonstrates that the concerns of the counter majoritarian-difficulty are somewhat overstated. The research has demonstrated that the Court tends to follow public opinion, avoids overturning laws, is deferential to elected political institutions, and rarely creates broad policy changes. While this research examines facets of potential counter-majoritarian behavior, the existing research does not produce a case-level measure
of counter-majoritarianism. A case-level measure of counter-majoritarianism has many benefits. One, a case-level measure of counter-majoritarianism will give a more accurate presentation of the extent to which the Court is counter-majoritarian. The current research typically speaks to one indicator of counter-majoritarianism—i.e., is the Court following public opinion or is the Court invalidating legislation. Further, establishing a case-level measure of counter-majoritarianism will allow for more thorough analyses of when the Court will engage in counter-majoritarian behavior rather than asking is the Court broadly counter-majoritarian.

Indicators of Counter-Majoritarianism

So far we have described many ways in which previous scholars have sought to test implications of the counter-majoritarian difficulty. As we have discussed, prominent research agendas have analyzed whether the Court declares laws unconstitutional, rules against public opinion, rules against the preferences of the elected political institutions, and creates policy changes. A generalized summary of this research is that despite the Court’s counter-majoritarian institutional design, the Court rarely behaves in a counter-majoritarian manner. Our goal is somewhat different, rather than test implications of the counter-majoritarian difficulty, we seek to estimate a case-level counter-majoritarian score. This is somewhat difficult because counter-majoritarianism is a latent concept which we cannot directly observe. However, there are indicators of counter-majoritarianism identified by previous research that we can use to estimate latent case-level counter-majoritarianism scores.

Indicators of Counter-Majoritarianism: Preferences of the Mass Public

One aspect of counter-majoritarianism is whether the Court rules against the preferences of the mass public. To establish when the Court rules against public opinion we use data from the Spaeth Supreme Court database and the Stimson (1999) public mood indicator. The public mood is a generalized aggregate-level indicator of how liberal or con-
ervative the mass public is based on the combination of multiple surveys and is estimated yearly. The Stimson (1999) measure of public mood is the conventional measure of public opinion used in studies of public opinion’s influence on the Court and political science more generally (Bryan and Kromphardt 2016; Badas 2021; Epstein and Martin 2010; Johnson and Strother 2020; Flemming and Wood 1997; Mishler and Sheehan 1993). The public mood indicator is continuous and there is no standard value at which it is said the public mood becomes liberal or conservative. Thus, we define the mass public to be liberal when the public mood indicator is one standard deviation above its mean value and we define the mass public to be conservative when the public mood indicator is one standard deviation below its mean value. This conceptualization ensures that the public mood is clearly liberal or conservative. While the Justices are attentive to media and public opinion, it is unclear how effective they are able to distinguish smaller movements in public opinion (Enns and Wohlfarth 2017). Therefore, this conceptualization is preferable to alternatives, such as defining liberal as an above average public mood and defining conservative mood as a below average public mood.\(^1\) We then define the Supreme Court as ruling against public opinion when there is incongruence between the ideological direction of the Court’s decision as defined by the Spaeth Supreme Court database and the public mood indicator. For example, when the mass public is liberal and the Court makes a conservative decision or when the mass public is conservative and the Court makes a liberal decision. When the Court rules against public opinion this indicator takes the value of 1 and 0 when the Court is aligned with public opinion.

**Indicators of Counter-Majoritarianism: Preferences of Elected Institutions**

Another feature of counter-majoritarian behavior is ruling against elected government institutions. We capture this facet of counter-majoritarianism using two indicators. The

\(^1\)This idea might capture whether the Court’s decisions are ambivalent to public opinion, which we believe is theoretically different from counter-majoritarianism. For a decision to be considered counter-majoritarian, we believe that the decision must be contrary to the majority preferences. With that said, we re-estimate our measure of counter-majoritarianism using this specification of disagreement with public mood. We find that the measure is correlated with this measure at .86. We re-estimate our models and come to the same substantive conclusions. This results can be found in the online appendix.
first indicator is whether the Court has ruled against the executive of the federal, state, or local government.\footnote{Some might content that the Court invalidates policies of state and local governments that represent outliers in terms of national consensus. However, this is not supported by extant research. Hall and Black (2013) demonstrates that the Court is more likely to invalidate state laws that are closer to the national regime. Thus, it appears that the Court is not keeping state and local outliers in line by declaring their laws unconstitutional. However to ensure the robustness of our results, we re-estimate our counter-majoritarian scores without invalidation of state and local laws included. The results are substantively similar, with the small exception that the p-value for institutionalization now is $=.08$ rather than below the .05 conventional threshold. The results to these models are presented in the online appendix.}. To determine which cases the Supreme Court ruled against a government, we use the Spaeth Supreme Court database (Spaeth et al. 2018). Specifically, we identified cases in which the federal government, or a state or local government were a petitioner or respondent and whether the Court ultimately ruled in favor or against the government arguing before them. This indicator takes a value of 1 if the Court ruled against the government and 0 otherwise. The second indicator is whether the Court rules against the preferences of Congress on issues likely to be salient to Congress. We define ruling against the preferences of Congress as making decisions incongruent with Congress’ ideology when one party has unified control of both the House and Senate. For example, the Court making a liberal decision when Republicans control the House and Senate or making a conservative decision when Democrats control the House and Senate. We conceptualize salience to Congress as cases that involve statutory interpretation. If both of these conditions are met the ruled against Congress indicator takes the value of 1 and if either are not the indicator takes the value of 0.

**Indicators of Counter-Majoritarianism: Creating Policy Changes**

The final aspect of counter-majoritarianism we consider is creating policy changes. We use two indicators that capture this feature of counter-majoritarianism. The first is whether the Court’s decision enacted a significant policy change. To measure this we rely on the list generated by Grossmann and Swedlow (2015) who consulted policy histories to determine when the Court’s decisions created a significant policy change. If the Court’s decision creates a policy change, this indicator takes the value of 1 and 0 otherwise. The second indicator is whether the Court made a policy change by declaring a federal, state, or
local law unconstitutional\textsuperscript{3}. We identified cases in which the Court’s decision invalidated federal, state, or local laws using the Spaeth Supreme Court database.

**Estimating Counter-Majoritarianism Scores**

Table 1 summarizes the percentage of each cases that have each indicator.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Percentage of Cases</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ruled Against Public Opinion</td>
<td>14.2%</td>
<td>8276</td>
</tr>
<tr>
<td>Ruled Against Govt.</td>
<td>22.6%</td>
<td>8975</td>
</tr>
<tr>
<td>Ruled Against Congress</td>
<td>11.6%</td>
<td>8975</td>
</tr>
<tr>
<td>Declared Law Unconstitutional</td>
<td>07.2%</td>
<td>8965</td>
</tr>
<tr>
<td>Created Policy Change</td>
<td>01.1%</td>
<td>8486</td>
</tr>
</tbody>
</table>

Using the indicators of counter-majoritarianism described above, we estimate a case-level continuous measure of counter-majoritarianism. We refer to our score as the counter-majoritarian score. We do so using an item-response theory (IRT) model. IRT models generate continuous latent measures from binary indicators. Here our binary indicators are whether the Court has ruled against public opinion, against the government, ruled against Congress, declared a law unconstitutional, or created a policy change and our continuous latent concept is counter-majoritarianism. IRT models have many benefits that make them more suitable than alternative scaling techniques. These includes flexibility to missing data, indicators can contribute different weights to the latent concept rather than assuming each indicator contributes equally to the underlying latent concept, and there is no assumption of linearity for indicators (Raykov and Marcoulides 2018). IRT models are widely used in the social sciences. For example, they have been used to estimate the ideology of Members of Congress (Poole and Rosenthal 1984), political knowledge (Lizotte and Sidman 2009), and the ideology of the mass public (Treier and Hillygus 2009). In the context of judicial politics, IRT models have been used to produce measures of judicial independence (Linzer

\textsuperscript{3}Treating these as one indicator is somewhat required by the modeling strategy used to estimate the latent counter-majoritarian scores. We use IRT models. One assumption of IRT models is that each indicator is conditionally independent. If we treated each of these as a separate indicator, the assumption of conditional independence would be violated.
and Staton 2015), case salience (Clark and Kastellec 2015), promotion potential for judges within a hierarchy (Badas 2020), judicial legitimacy (Badas 2019a; Cann and Yates 2016), and judicial ideology (Martin and Quinn 2002).

The specific IRT model we estimate is the Rasch model, which is also known as the one-parameter logistic model. The Rasch model has indicator specific difficulty parameters and a fixed discrimination parameter for all indicators. The difficulty parameter represents the indicators intercept, while the discrimination parameter represents the indicators slope. These parameters allow for each indicator to contribute different weights to the scale based on how “difficult” they are. Differential indicator weights are not possible in other measurement approaches such as summated scales. Using the Rasch model, we estimate a counter-majoritarian score for each case the Supreme Court has decided between 1946 and 2018. Some of our data are not available for the entire 1946-2018 time-frame. For example, the public mood indicator is available between 1952 and 2018 and policy histories on policy changes are available between 1946 and 2004. However, the Rasch model estimated here is flexible to missing data. Thus, observations for which these data are missing can be included in our models.

Our model is summarized in Figure 1. The lower-right pane of Figure 1 displays the models parameters. These parameters demonstrate that enacting policy change is the most difficult item, following by declaring a law unconstitutional, ruling against Congress, ruling against public opinion, and finally ruling against a government. Thus, enacting policy change is given more weight in the counter-majoritarian score than indicators with smaller difficulty parameters. The lower-left pane of Figure 1 displays a summary of the scores ± one standard error. After estimation, we rescaled the counter-majoritarian

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4The Rasch model fits our data best. A two-parameter model produces worse fit for our data. The two-parameter model allows the discrimination parameter to vary across indicator. Other approaches for measures latent concepts include factor analysis or a summed scale. We believe IRT models are best because they specifically estimate continuous latent concepts from binary indicators, they are flexible to missing data, and they allow for differential indicator weighting whereas other estimation approaches may assume equal weighting of indicators. However, we estimate our counter-majoritarian measure using these alternatives and find a high degree of correlation between estimation approaches. A correlation matrix of estimation approaches can be found in the online appendix.

5Using listwise deletion of indicators that have missing data produce substantively similar results to those presented here.
score to range between 0 and 1. The mean counter-majoritarian score is .142 and the standard deviation is .17. The median counter-majoritarian score is .04. The low average and median scores support prior research that demonstrates that the Court infrequently engages in drastic counter-majoritarian behavior. Although our estimates do demonstrate that in a majority of cases, the Court does engage in at least some counter-majoritarian behavior. The scores are plotted by decision-date of each case in the top pane of Figure 1. The scores contain a slight jitter and are shaded to denote density of scores. The blue line represents a generalized additive smoother. This plot shows some variation in the Court’s willingness to be counter-majoritarian over time. Table 2 provides a tabulation of all the values that the counter-majoritarian score takes and the number of cases with each score. In total, there are 13 unique values of the score.
Figure 1: Counter-majoritarian Score Descriptive Plots

Table 2: Distribution of Scores

<table>
<thead>
<tr>
<th>Counter Majoritarian Score</th>
<th>Cases with Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>4202</td>
</tr>
<tr>
<td>.0027</td>
<td>277</td>
</tr>
<tr>
<td>.0177</td>
<td>1</td>
</tr>
<tr>
<td>.0351</td>
<td>434</td>
</tr>
<tr>
<td>.250</td>
<td>2792</td>
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<tr>
<td>.253</td>
<td>181</td>
</tr>
<tr>
<td>.286</td>
<td>225</td>
</tr>
<tr>
<td>.500</td>
<td>720</td>
</tr>
<tr>
<td>.503</td>
<td>22</td>
</tr>
<tr>
<td>.536</td>
<td>29</td>
</tr>
<tr>
<td>.750</td>
<td>80</td>
</tr>
<tr>
<td>.788</td>
<td>2</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>
When is the Court Counter Majoritarian?

Estimating a case-level counter-majoritarian scores has revealed that the Court rarely engages in server counter-majoritarian behavior. In a large percentage of cases, the Court displayed no counter-majoritarian behavior. This finding affirms much of the existing literature which tests implications of the counter-majoritarian difficulty and finds minimal support for a counter-majoritarian Court. However, in a majority of cases, the Court does engage in some counter-majoritarian behavior. What exactly explains when the Court is willing to engage in counter-majoritarian behavior? Below we theorize about two potential contexts, ideological homogeneity and institutionalization, that will predict when the Court will be more likely to engage in counter-majoritarian behavior.

Ideological Homogeneity and Counter-Majoritarian Behavior

One context in which the Court may be more likely to engage in counter-majoritarian behavior is when there is little ideological diversity on the Court. Social psychology research demonstrates that when groups are homogenous, they are more likely to come more extreme decisions than would heterogeneous groups (Sunstein 2002, 2009). This process occurs because homogenous groups produce less alternatives and deliberation of alternatives (Janis 1972). Further, individuals feel a loyalty to the salient group identity and this creates a pressure toward conformity and uniformity in decision-making (Janis 1972). However, when groups are diverse, the tendency towards conformity and extremity is broken as out-group members present moderate alternatives and encourage deliberation of alternatives (Nemeth 1986; Stasser and Birchmeier 2003).

The effects of ideological homogeneity and decision-making in the context of the judiciary have been analyzed by other scholars. Maltzman, Spriggs and Wahlbeck (2000) find that the Justices bargain over opinion content and produce more draft opinions when the Court is more ideologically diverse. These results suggest in the context of the judiciary, diversity does in fact increase deliberation over potential outcomes. Other studies examine the implications of ideologically homogeneous or diverse groups for judicial outcomes. For
example, Staudt, Friedman and Epstein (2007) find that when the Court is more ideologically homogeneous, the Court is more likely to issue consequential decisions. In another study, Goelzhauser (2011) finds that an ideologically homogenous Court is more likely to decide constitutional cases. In the context of the Circuit Courts, Reid, Schorrpp and Johnson (2020) find that all male panels are less likely to issue pro-civil liberty decisions during war time than mixed-sex panels. Together these studies demonstrate that the psychological factors involving homogeneity and diversity influence decision-making in the context of the judiciary.

Thus, there is a rich literature demonstrating that the ideological distribution of a panel of judges influences their decision-making. We anticipate that the ideological composition of the Supreme Court will influence the extent to which the Court will engage in counter-majoritarian behavior. Specifically, we predict that when the Court is ideologically homogeneous, the Court will engage in more counter-majoritarian behavior. In the context of judging, there is a strong norm of judicial deference. This includes avoiding counter-majoritarian behavior by granting deference to elected branches and avoiding creating major policy changes (Knight and Epstein 1996; O’Brien 2012; Goelzhauser 2011). Thus, engaging in counter-majoritarian behavior can be viewed as an “extreme” outcome in the sense that it goes against strong judicial norms. When deliberating in an ideological homogeneous context, the pressures of in-group conformity will be strong enough to prevent any individual Justice from alerting the rest to the potential norm violation of engaging in counter-majoritarian behavior. However, when deliberating in an ideological heterogeneous context, out-group members will be present to alert the majority to the potential norm violation of engaging in counter-majoritarian behavior. This will trigger a negotiation process in which leads the Court away from counter-majoritarian behavior. Thus, we posit Hypothesis 1.

**Hypothesis 1** The Supreme Court will be more counter-majoritarian when the Justice’s are more ideologically homogenous.
Institutionalization and Counter-Majoritarian Behavior

Another context that the ought to influence the extent to which the Court is willing to engage in counter-majoritarian behavior is the degree to which the Court is institutionalized. Institutionalization indicates a regularized system of policy making (McGuire 2004). More specifically, institutionalization is the set of procedures and norms that enable an organization to exercise its authority (McGuire 2004). In essence, institutionalization determines the range of choices available to actors within an institution (North 1990). As institutionalization grows, actors have more choices on potential outcomes and those choices are viewed with greater legitimacy by external actors (McGuire 2004; North 1990).

Existing studies have demonstrated how institutionalization influences the decision-making of the Supreme Court. Vining Jr (2009a,b) demonstrates that institutionalization influences the Justices’ retirement strategies. McGuire (2004) show that when the Court has greater institutionalization, it is more likely to exercise judicial power. This is because the Justices on the Court are strategic actors and make calculations about their ability to implement their policy preferences (Epstein and Knight 1998).

A higher degree of institutionalization is likely to increase the extent to which the Court engages in counter-majoritarian behavior. First, greater institutionalization expands the potential choice set of the Court. As the potential choice set increases, this includes the greater potential for counter-majoritarian behavior. Second, institutionalization signals greater power and legitimacy. This power and legitimacy will protect the Court from potential responses from Congress, the executive, or the public (Clark 2009). In a context of low-institutionalization, the Court is unlikely to engage in behavior that may arouse a response in other institutions fearing that it will not have the appropriate tools to adequately respond. Thus as a result of the institutional conflict, the Court’s institutional standing would be further diminished. However, in a context of high institutionalization, the Court has the power and credibility to respond in a meaningful way (Clark 2011). Thus, the Justices will make strategic calculations about how their institutional context will enhance or diminish their ability to engage in counter-majoritarian behavior. For these reasons, we
pose Hypothesis 2.

**Hypothesis 2** The Supreme Court will be more counter-majoritarian when the Court has greater institutionalization.

**Data and Analysis: When is the Court Counter-Majoritarian?**

To test Hypothesis 1 and Hypothesis 2, we estimate an ordinary least squares linear regression model predicting case-level counter-majoritarianism. Our model includes clustered standard errors on each individual Supreme Court term.

To measure the ideological diversity of the Justices, we calculate the standard deviation of the Justices’ Martin and Quinn (2002) ideology scores for each term. A higher standard deviation, signifies greater ideological diversity. Using the standard deviation of the Justices’ Martin and Quinn (2002) is a common measure of the Court’s ideological diversity and has been used in many studies (Reid, Schorpp and Johnson 2020; Goelzhauser 2011; Owens and Wedeking 2012; Staudt, Friedman and Epstein 2007). If Hypothesis 1 is supported by our analysis, we anticipate that as ideological diversity increases, counter-majoritarianism will decrease.

To conceptualize the extent of the Supreme Court’s institutionalization, we rely on the institutionalization index developed by McGuire (2004). The institutional index is estimated by using factor analysis on criterion of Supreme Court capacity. These criterion are information on the breadth of the Supreme Court’s rules, the Supreme Court’s location\(^6\), the extent to which the Supreme Court controls their own docket, the Justice’s prior judicial experience, the number of law clerks granted to the Justices, whether the Justices have Circuit duties, and the Justices’ salaries to create a yearly institutionalization measure. McGuire (2004) argues\(^7\) and demonstrates that the estimated institutionalization scores are

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\(^6\)While some of these may no longer be relevant to the modern Court, which has had its own building since 1935 or have not had to ride circuit since 1911, McGuire estimates the institutionalization index from 1790 to 1996. In this context it is important to capture these factors to demonstrate that variability of institutionalization in earlier periods, even if they do become a constant for the modern era. In the modern era, the variation in institutionalization will largely be determined by the salary of the Justices, the prior experience of the Justices, and the breadth of the Supreme Court’s rules.

\(^7\)For example, it can be said the Court had less institutional capacity prior to the passage of the
valid. He does this by demonstrating the institutionalization variable predicts exercising judicial authority and predicts judicial capacity. McGuire’s measure of institutionalization has been adopted in a number other studies (Vining, Zorn and Smelcer 2006; Vande Kamp 2021; Moffett et al. 2016; Bumin, Randazzo and Walker 2009). We update the McGuire (2004) index through the 2019 term. If Hypothesis 2 is supported by our analysis, we anticipate that as institutionalization of the Court increases, counter-majoritarianism of the Court’s decisions will also increase.

In addition to our primary variables of interest, other factors may influence the Court’s willingness to engage in counter-majoritarian decision-making. For example, the Court may be attentive to the ideological distance between them and the other institutions of government. There are two possible explanations for why the Court will be attentive to the ideological distance between themselves and other institutions. First, the Court may be more counter-majoritarian when they are ideologically close to other political institutions. Dahl (1957) argued that the Court is not a counter-majoritarian institution and instead works as part of the current regime to overturn policies of the previous regime. If Dahl’s (1957) thesis is correct in this context, it could be anticipated the Court act more counter-majoritarian when the Court is aligned with other institutions. Second, the Court may be more counter-majoritarian when they are ideologically distant from the other institutions of government because these institutions are producing policies with which the Court disagreed (Segal and Spaeth 2002). Further, the Court’s response to ideological distance may vary across institution (Harvey 2013). Thus, while the theoretical expectation of ideological distance is not exactly clear, it is something we must account for in our model. We measure ideological distance using the judicial common space (Epstein et al. 2007). Specifically, we take the absolute difference between the Supreme Court median ideology.

Judiciary Act of 1988. The Judiciary Act of 1988 gave the Court almost entirely a discretionary docket. Before the Act, the Court had to hear a lot of mandatory criminal appeals. These cases were relatively straight-forward and were typically decided unanimously, but they did increase the Court’s workload and as limited the number of cases discretionary cases the Court had time to decide Owens and Simon (2011). After the passage of the Act, the Court had greater institutional capacity to pursue its power and not be burdened by the routine mandatory appeals (McGuire 2004; Owens and Simon 2011). For full justification for each variable’s inclusion in the measure see McGuire (2004).
and the median ideology of both the Senate and House, and the president’s ideology. The end result is three variables capturing the Court’s ideological distance from the Senate, House, and president respectively.

The Court’s ideology may also influence the extent to which the Court will engage in counter-majoritarian behavior. Therefore, we control for the Court’s median Martin and Quinn (2002) ideology score. Finally, we include law type and issue area fixed-effects to account for the potential that the Court’s counter-majoritarianism likely varies across legal issue. For law type and legal issue, we rely on the Spaeth database’s coding. The results to our model are presented in Table 3 and Figure 2.

Table 3: OLS: Counter Majoritarianism

<table>
<thead>
<tr>
<th></th>
<th>(1) Counter-Majoritarian Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideological Diversity</td>
<td>−0.0279*</td>
</tr>
<tr>
<td></td>
<td>(0.0140)</td>
</tr>
<tr>
<td>Supreme Court Institutionalization</td>
<td>0.0397*</td>
</tr>
<tr>
<td></td>
<td>(0.0199)</td>
</tr>
<tr>
<td>Senate Distance</td>
<td>−0.0871</td>
</tr>
<tr>
<td></td>
<td>(0.0809)</td>
</tr>
<tr>
<td>House Distance</td>
<td>0.0906</td>
</tr>
<tr>
<td></td>
<td>(0.0624)</td>
</tr>
<tr>
<td>President Distance</td>
<td>0.0469</td>
</tr>
<tr>
<td></td>
<td>(0.0297)</td>
</tr>
<tr>
<td>Median Justice Ideology</td>
<td>−0.0154</td>
</tr>
<tr>
<td></td>
<td>(0.0151)</td>
</tr>
<tr>
<td>Law Type Fixed Effects?</td>
<td>Yes</td>
</tr>
<tr>
<td>Issue Area Fixed Effects?</td>
<td>Yes</td>
</tr>
<tr>
<td>Constant</td>
<td>0.214***</td>
</tr>
<tr>
<td></td>
<td>(0.0398)</td>
</tr>
<tr>
<td>Observations</td>
<td>7560</td>
</tr>
</tbody>
</table>

*Term clustered standard errors in parentheses
*p < 0.05, **p < 0.01, ***p < 0.001

The results presented in Table 3 support both Hypothesis 1 and Hypothesis 2. Figure 2 displays the predicted counter-majoritarian score across the range of ideological
diversity and Supreme Court institutionalization. The dashed-line represents the mean Counter-Majoritarian score. The left pane presents the effect of ideological diversity and shows that moving from the minimum to maximum level of ideological diversity decreased the expected the counter-majoritarian behavior by .083. The increase observed in the counter-majoritarian score as a function of ideological diversity represents roughly half (48%) of a standard deviation increase. The right pane presents the effect for Supreme Court institutionalization and demonstrates that as the Court becomes more institutionalized, it becomes more counter-majoritarian. Specifically, moving from the minimum to maximum level of institutionalization increased the expected counter-majoritarian score by .075, which amounts to a 43% of a standard deviation increase in expected counter-majoritarianism.
Figure 2: Results from OLS Regression. Dashed line represents mean Counter-Majoritarian score.
Consequences of Counter-Majoritarianism

Thus far we have explored the conditions that lend themselves to counter-majoritarian decision-making by the Supreme Court. We theorized and found support for the idea that an ideologically homogeneous Supreme Court will be more counter-majoritarian than an ideologically diverse Supreme Court and that as the Supreme Court becomes more institutionalized, it will be more counter-majoritarian. Moving from analyzing the contexts which facilitate the Court’s potential for counter-majoritarian behavior, we now discuss potential consequences of that counter-majoritarian behavior. Demonstrating specific consequences of the counter-majoritarian score we developed will further validate and demonstrate its usefulness as an analytical concept.

Media Attention to the Counter-Majoritarian Decisions

One potential consequence of the Court’s counter-majoritarian decision-making is greater media scrutiny to its decisions. Understanding media scrutiny towards the Supreme Court is important because individuals primarily learn about the Court through the media (Strother 2017) and there is evidence the Court is somewhat responsive of media coverage (Badas and Justus 2022). Previous research has demonstrated that journalists anticipate public interest and act strategically in choosing which cases to cover and which cases to ignore (Collins and Cooper 2015). The conclusions of this research is that journalists deem cases “newsworthy” when they are politically and legally salient (Strother 2017). Salience may be determined by the specific issues involved in the case. For example, Epstein and Knight (2000) and Salamone (2018) find that constitutional cases are more likely to be covered than non-constitutional cases. Salience may also be indicated by the amount of conflict that involved in a case’s outcome. Salamone (2018) finds that cases which alter precedent are more likely to be covered. Likewise, Strother (2017) finds cases with more dissenting Justices are likely to receive more coverage. Many scholars also find that liberal decisions are more likely to be covered than conservative decisions, likely because liberal decisions are more likely to update the status quo (Unah and Hancock 2006; Collins and
When the Court engages in counter-majoritarian decision-making it produces “newsworthy” content. For example, a fundamental aspect of counter-majoritarianism is conflict with majorities. This conflict manifests itself in many ways, whether conflict with other institutions of government, or conflict with public opinion. Further, when the Court engages in counter-majoritarianism, it raises potential conflict frames regarding the Court’s appropriate role in democracy. Additionally, when the Court engages in counter-majoritarianism, it traditionally upsets the status-quo policy. This manifests itself by either making direct policy changes, or by overturning the policies of other institutions. Because counter-majoritarian decision-making taps into many factors which journalist consider newsworthy, we anticipate when the Court engage in counter-majoritarian decision-making, these decisions will receive increased media attention. This is stated as formally in Hypothesis 3.

**Hypothesis 3** Cases with higher counter-majoritarian scores will attract more media attention.

**Data and Analysis: Media Attention to Counter-Majoritarian Decisions**

To Test Hypothesis 3, which posits that cases with high counter-majoritarian scores will attract more media attention, we use two measures of media salience. First, we use the Epstein and Knight (2000) measure which conceptualizes appearance on the front page of *The New York Times* as an indicator of media attention. Data is available between 1946 and 2009. This variable takes the value 1 if a case is mentioned on the cover of *The New York Times* and 0 if it does not. In total, 12% of all cases appear on the cover of *The New York Times*. The second measure we rely on is the media salience measure developed by Clark, Lax and Rice (2015). The Clark, Lax and Rice (2015) measure conceptualizes media salience as a latent concept that is partially observed in the number of times cases were mentioned in three major newspapers; *The New York Times, The Los Angeles Times*,

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[^8]: Media attention to an issue does not imply a certain public mood. Public mood captures whether the public has liberal or conservative views on a particular issue, not how important the public thinks an issue is. So for example, a case may receive a lot of media coverage but this media coverage does not imply whether the public is liberal or conservative on that issue.

Our key independent variable of interest is the case-level counter-majoritarian score. If Hypothesis 3 is supported, we anticipate that as the counter-majoritarian behavior presented in a case increases the media’s coverage of that case will increase. As previously discussed, media coverage of the Supreme Court typically focuses on salient political and legal disputes. For this reason, we control for indicators of these factors. Specifically, we control for whether the Court altered a precedent, the number of dissenting votes, the type of law at issue in the case, and the ideological direction of the Court’s decision. We also control for whether the case is complex, which we define as involving more than one legal issue. In addition, we include term level fixed-effects to account for the changing nature of media coverage of the Court during the period of study. Because the Clark, Lax and Rice (2015) measure is continuous, we estimate a linear regression model (OLS). The results to the linear regression model are presented in Column 1 of Table 4. Since the Epstein and Segal (2000) measure is binary, we estimate a logistic regression model. The results to the logistic regression model are presented in Column 2 of Table 4. To facilitate the interpretation of our models, we present them in the form of a figure in Figure 3.
Table 4: Media Attention and Counter Majoritarianism

<table>
<thead>
<tr>
<th></th>
<th>(1) OLS: Clark et al 2015 Salience</th>
<th>(2) Logit: <em>New York Times</em> Salience</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counter-Majoritarian Score</td>
<td>0.113* (0.0545)</td>
<td>0.765*** (0.207)</td>
</tr>
<tr>
<td>Number of Dissenting Votes</td>
<td>0.0795*** (0.00606)</td>
<td>0.254*** (0.0245)</td>
</tr>
<tr>
<td>Complex Case</td>
<td>−0.0165 (0.0246)</td>
<td>−0.0656 (0.106)</td>
</tr>
<tr>
<td>Liberal Decision</td>
<td>0.0668*** (0.0189)</td>
<td>0.271*** (0.0772)</td>
</tr>
<tr>
<td>Altered Precedent</td>
<td>0.208*** (0.0592)</td>
<td>1.174*** (0.178)</td>
</tr>
<tr>
<td>Law Type Fixed Effects</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Term Fixed Effects</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Constant</td>
<td>−0.169* (0.0853)</td>
<td>−2.892*** (0.357)</td>
</tr>
<tr>
<td>Observations</td>
<td>6090</td>
<td>7021</td>
</tr>
</tbody>
</table>

Standard errors in parentheses
* p < 0.05, ** p < 0.01, *** p < 0.001
Column 1 analyzes terms 1955-2008; Column 2 analyzes terms 1946-2009
The results presented in Table 4 and Figure 3 support Hypothesis 3. In the context of both the Clark, Lax and Rice (2015) and Epstein and Segal (2000) measure of salience, as a case’s counter-majoritarian score increases, the media’s attention of that decision increases. Specifically, moving from the minimum to the maximum counter-majoritarian score, increases the expected (Clark, Lax and Rice 2015) media salience score of the case by .112. Moving from the minimum to the maximum counter-majoritarian score also increases the probability of the case appearing on the cover *The New York Times* by .10. Thus across two distinct measures of media salience, we demonstrate that when the Court engages in counter-majoritarian behavior, this arouses media interest and as a result the media is more likely to provide coverage to these cases.
Figure 3: Graphic Display of Results. Dashed line represents mean salience score or total percentage of cases on the NYT cover.
Implications and Conclusions

The counter-majoritarian difficulty is central to constitutional theory and politics. This centrality has led empirically-minded scholars to test the implications of the counter-majoritarian difficulty. Much of this research concludes — contrary to the expectation of the Court’s institutional design and the theory — that the Court rarely engages in counter-majoritarian behavior. This has led scholars to reframe the difficulty as a “non-difficulty” and question its place in constitutional theory (Graber 1993). Here, rather than testing specific implications of the counter-majoritarian difficulty, we have estimated a latent counter-majoritarian score for every Supreme Court case decided between 1946 and 2018. Our estimates reinforce the idea that the Court is infrequently counter-majoritarian. Indeed, the modal estimate in our index is 0. However, there are cases in which the Court does engage in counter-majoritarian behavior. Our estimates capture that and show that 53% of cases do have some degree of counter-majoritarianism. Thus, we move the empirical debate surrounding the counter-majoritarian difficulty from testing implications of the argument (i.e., does the Court follow public opinion?), to a direct case-level measure. This allows for theorizing about specific contexts in which the Court will engage in counter-majoritarian behavior. Here we hypothesize that the Court will be more counter-majoritarian when there is ideological homogeneity among the Justices and when the Court has greater institutionalization. We found support for both of these hypotheses. Further, we probed the implications of counter-majoritarian decisions and found that counter-majoritarian decisions aroused greater media coverage of the Court.

Our results have many implications. The first is for the study of the counter-majoritarian difficulty. Existing studies theorize potential implications of the counter-majoritarian difficulty and then empirically investigate them. We offer a better way. We create case-level estimates that capture the extent to which each Court decision is counter-majoritarian. This is an improvement over existing approaches because it understands that counter-majoritarianism is multifaceted and does not limit the study to one facet of counter-majoritarianism. Further, a case-level measure allows researchers to now ask when and
under what contexts or circumstances the Court is more or less counter-majoritarian rather than making broad inferences about whether or not the Court functions counter-majoritarian broadly. Thus, we hope in the future scholars who investigate the counter-majoritarian difficult, use our measure to do so.

Our results have further implications for our understanding of judicial decision-making on the Supreme Court. Epstein and Knight (1998) posit that Supreme Court Justices act in a strategic way to achieve their goals. Our results lend further support to the idea that the Justices are strategic actors. We have found that the Court is more likely to engage in counter-majoritarianism when the Court has a high degree of institutionalization. Having a high degree of institutionalization puts the Court in a more advantageous position to protect itself against backlash from other political actors. Thus, the Court seems to be more likely to understand their authority relative to other political actors and decide accordingly. This provides evidence of strategic decision-making outside the context of simply pursuing ideological goals and further demonstrates that Justices strategically pursue institutional legitimacy.

Our results also lend support to a growing body of literature that demonstrates that judges are influenced by psychological biases. For example, Braman (2006, 2009); Braman and Nelson (2007) demonstrate that judges are susceptible to motivated reasoning. Collins Jr (2011) demonstrates that cognitive dissonance influences the opinion writing behavior of the Supreme Court Justices. Epstein, Parker and Segal (2018) show that the Justices are susceptible to in-group biases when deciding free speech cases. Our results provide evidence that Justices are influenced by the heterogeneous or homogenous nature of the decision-making group. Our results support ideas of “groupthink” which posits that individuals go to extremes when they are part of homogenous groups (Reid, Schorpp and Johnson 2020).
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