WHAT COUNTER-MAJORITARIAN DILEMMA? EXPERIMENTALLY EVALUATING CITIZENS' VIEWS OF THE DEMOCRATIC NATURE OF THE SUPREME COURT

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ABSTRACT

Despite decades of debate over the counter-majoritarian dilemma (CMD), little scholarship explores public reactions to counter-majoritarian decisions. Using a survey experiment, we test whether ordinary Americans are concerned about the CMD. Varying the size of the majority overruled by the U.S. Supreme Court, whether the Court overruled Congress or the people themselves, and even if subjects were "taught" about the CMD before receiving the treatment, we find little evidence that counter-majoritarian rulings trouble Americans. Instead, people usually evaluate such decisions based on their policy preferences. We uncover suggestive evidence, however, that Americans' trust in Congress can affect their support for counter-majoritarian decisions.

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I. INTRODUCTION

Scholars have long argued over the democratic credentials of courts. Some view the judiciary as a positive force for democracy (Zemans 1983; Kelemen 2012; Almendares and Le Bihan 2015), whereas others see it as a pernicious institution that gets in the way of true democratic governance (Tushnet 1999; Hirschl 2004; Waldron 2006). One often-cited problem with courts is what Alexander Bickel (1962) called the "counter-majoritarian difficulty" and what many scholars since have referred to as the counter-majoritarian dilemma (CMD). Put simply, in a democracy how can it be that a group of unelected, politically unaccountable judges is free to overrule the will of the people and/or their elected representatives? While various facets of this issue have been debated for some time now, in this essay we address it from a novel angle. Specifically, we ask whether Americans are concerned about the democratic implications of counter-majoritarian behavior by the U.S. Supreme Court. While we have a wealth of theory about the CMD as well as empirical work on how often the Court's decisions are actually counter-majoritarian, there is very little work that asks if the public is concerned about this supposed dilemma *in practice*. Using a survey experiment, we test whether a ruling framed as explicitly counter-majoritarian affects the support Americans express for that decision.

Why is this important? After all, many people are not well versed in theories about the separation of powers in a democracy. Shouldn't we leave this question to the experts? We acknowledge that there is a distinction between democracy in practice and democratic theory. Even if it turns out that citizens do not care about the CMD, it may still pose a normative problem for those concerned with the ideal form of democratic governance and what role the judiciary should play in achieving it. Our assertion, however, is that if the individuals who can be overruled by the judiciary do not care, or even view the possibility as a positive, then the effects of the CMD "on the ground" may complicate scholarly worry about its threat to democracy. One mechanism by which the Court's counter-majoritarian use of judicial review might weaken a democracy is by affecting the attitudes and behavior of its citizens. In this paper, we attempt to find evidence of such effects.[2]

2. As we discovered much after beginning, our paper's motivations are similar to the argument in the popular press by Fontana (2015), and part of this project is similar to a working paper by Fontana and Bartels.

We begin by focusing on the main points of contention in the literature on the counter-majoritarian nature of the U.S. Supreme Court. In the second section, we explain our hypotheses, and in the third section we detail our experimental design. The fourth section contains the results of our experiment, and the fifth section offers a discussion of our results and our concluding thoughts.

II. THE COUNTER-MAJORITARIAN DILEMMA AND DEMOCRACY

The CMD underlies much of the debate over the role of courts in a democracy. Though Bickel saw a defensible role for judicial review, the CMD essentially questions the compatibility of a democratic form of government with a judiciary comprised of unelected judges who have the authority to overturn decisions of the elected branches and, by extension, the people themselves.[3] To the extent that majority rule in a democracy is important, the CMD is a crucial consideration (Solum 2014).

Intellectuals of all political persuasions have made critiques based on the counter-majoritarian nature of the Court. Bork (1971), for example, wondered why we should trust nine unelected lawyers to be agents of social change.[4] Of course, not all agree with this negative line of reasoning. To take just two examples, Graber (2005) makes the argument that the Court is not subverting the will of elected officials but is, rather, part of a power struggle between elected parties. Staffed with justices who share many policy preferences with Democrats or Republicans, the Court is simply another location for policy debates to play out. Pickerill (2011) also situates the Court within a larger power struggle between parties and institutions and argues that the branches are interdependent.

Beyond theoretical debates, empirical scholarship has tried to ascertain how often the Court actually behaves in a counter-majoritarian fashion. While Bickel was primarily concerned with courts overruling elected officials, these scholars have explored the CMD by asking whether, and how often, the Court contradicts *either* elected officials or public opinion itself. Regarding elected officials, Dahl (1957) famously found that the judiciary does not often use judicial review to overturn the decisions of the elected branches, concluding that "[e]xcept for short lived transitional periods . . . the Supreme Court is inevitably a part of the dominant national

3. Some scholars refer to this form of judicial review as strong-form review (as opposed to weak-form review, in which courts may have the ability to say whether a law is constitutional, but not the power to coerce other branches into compliance); see Tushnet 2008.

4. But see Rosenberg (2008), who argues the Court is an ineffective agent of social change, and Hall (2013), who makes an updated version of this argument, focusing on lower court compliance as well as enforcement by outside actors.

alliance" (Dahl 1957, 293). Casper (1976), on the other hand, considered cases concerning state legislation in addition to those concerning national legislation. Based on that evidence, he argued that the Court struck down local majorities in favor of national majorities, its civil rights jurisprudence being a prime example.

Relating public opinion to the CMD is complicated. Many have found that the Court tends to issue rulings that align with public opinion, even at the state level (Barnum 1985; Gates 1987; Persily et al. 2008). Sometimes, existing legislation may not reflect the current preferences of democratic majorities; so when courts strike this legislation down, they are actually honoring these preferences (Kastellec 2016, 2017). Even when the Supreme Court makes a decision many citizens disagree with, it may have a legitimizing effect such that public opinion falls in line with the Court's decision (Bass and Thomas 1984; Franklin and Kosaki 1989; Mishler and Sheehan 1993). There is debate, then, over the extent to which the Court behaves in a counter-majoritarian fashion by contradicting elected officials or public opinion. Our paper, however, seeks to understand how ordinary people react when it does.

III. ORDINARY PEOPLE AND THE COUNTER-MAJORITARIAN DILEMMA: HYPOTHESES

Closer to our focus, some existing work has examined the factors that affect what the public thinks about Court decisions. Baird and Gangl (2014) and Christenson and Glick (2014), for example, find that media framing of Supreme Court decisions affects public acceptance of those decisions. Their works argue that the public is more willing to accept a decision that is framed as legal compared to one that is framed as political. Zilis (2015) furthers this line of reasoning, arguing first that the presence of dissenting opinions generates more critical media coverage and second that this critical coverage results in less support for a decision.

Malhotra and Jessee (2014) ask survey respondents how they would have decided ten recent Supreme Court decisions. By comparing respondents' positions in these cases to the Court's, the authors create a measure of ideological distance between respondents and the Court. They then propose a theory of heterogeneous responsiveness, "which posits that citizens' ideological distance from the Court should be negatively related to their approval of and trust in the institution, but positively related to their support for its counter-majoritarian function" (Malhotra and Jessee 2014, 817). Their design, however, is not intended to capture how citizens respond to specific instances of counter-majoritarian behavior or whether other factors might influence those responses, which is what we examine here.

A pair of studies spanning decades, and levels of the judiciary, have shown that when courts strike down laws, they experience a subsequent loss in public support (Caldeira 1986; Crabtree and Nelson 2019). The Crabtree and Nelson (2019) study in particular provides an excellent frame of reference for our paper. Drawing on work showing that individuals change their opinions on learning what a majority of others think (Furth-Matzkin and Sunstein 2018) and work demonstrating that laws with different levels of support in the legislature fare differently when subjected to judicial review (Hall and Ura 2015), they hypothesize that citizens will be less likely to accept decisions from state supreme courts that contradict public opinion compared to decisions that do not contradict public opinion. Surprisingly, their experimental evidence shows that while citizens are less likely to accept court decisions that nullify laws, they do not display lower rates of acceptance when those decisions also contradict the will of a majority of the public. They conclude that "future work should examine both the extent to which this finding replicates across other samples and why this might be the case" (Crabtree and Nelson 2019, 14).

We hope to contribute to that endeavor with this paper. We examine whether a similar dynamic holds when it comes to citizens' views of the U.S. Supreme Court. It cannot be assumed that people respond to decisions from state supreme courts in the same way they respond to decisions by the U.S. Supreme Court (Gibson 2008). Indeed, one of the motivations for Crabtree and Nelson's study was the fact that many state supreme court judges are elected, which allowed them to test whether individuals respond differently to instances of judicial review by elected versus unelected judges. Obviously, U.S. Supreme Court justices are not elected, and work on positivity theory shows that the powerful symbolism surrounding the Supreme Court leads the public to confer considerable legitimacy on the institution (Gibson et al. 2014). What this might mean for citizens' willingness to accept individual counter-majoritarian decisions is an open question. As such, we focus our attention on the U.S. Supreme Court.

Like Crabtree and Nelson, we believe it is important to distinguish between whether a law the Court strikes down has the support of legislative or popular majorities. As is well known, the U.S. Congress currently enjoys abysmally low levels of popular support, and as Figure 1 illustrates, this has been the case for some time now. As such, citizens in general may not be bothered by the Court overruling a branch they despise. Only among individuals who hold Congress in high esteem might we see evidence that the CMD is a real concern. On the other hand, when told that a majority of ordinary people like them supported a

law the Court struck down, we might expect people to respond more negatively. These observations are the basis for our first two hypotheses:

H1: Citizens should display lower levels of support for rulings that contradict the will of a majority of the public than a majority of Congress.

H2: Those with higher levels of trust in Congress should support counter-majoritarian decisions less than those with lower levels of trust in Congress.

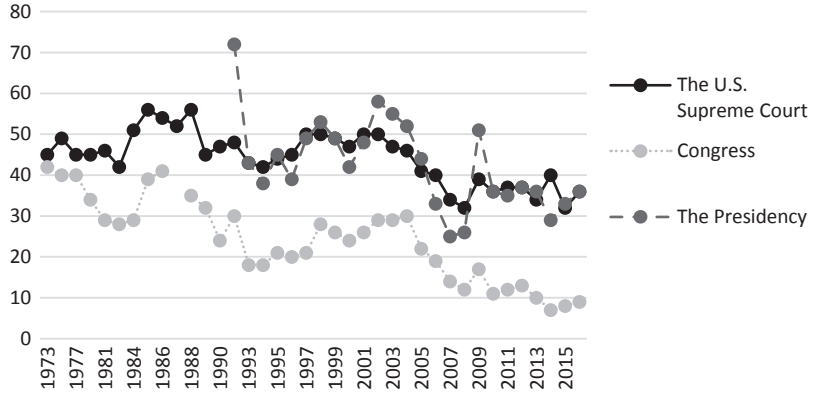


FIGURE 1. Percentage of Americans with "A great deal" or "Quite a lot" of Confidence in American Institutions

Source: McCarthy 2015; Gallup 2016.

Based on Hall and Ura's (2015) finding that judges are more likely to strike down laws that have less support in Congress, Crabtree and Nelson (2019) examine whether the public is concerned about the level of support for laws that state supreme courts strike down. In their experimental vignettes, they tell subjects that a law in question was or was not "favored by a majority of voters," and their results reveal that majority support did not make a difference to subjects' acceptance of a decision. We find this outcome provocative, as it constitutes direct evidence that the public is not concerned with a court's power to overrule their preferences. Our study can probe the robustness of this finding at the level of the Supreme Court by examining whether the size of the majority supporting a law the Court strikes down affects individuals' support for the decision.

Why might the size of the majority matter? Hall and Ura (2015) discovered that, at least among judges, laws with "high majority support" were less likely to

be struck down the year after enactment than laws with "low majority support." Perhaps the public similarly cares about how large the majority supporting a law is. If this is so, then when the Court strikes down laws with the support of especially large majorities, it may make more salient the counter-majoritarian nature of the decision.[5] However, if we find that people do not respond to differences in the size of the majority that supports a law, we have even greater reason to think that the public is not concerned about counter-majoritarian rulings. This leads to our third hypothesis:

H3: Support for counter-majoritarian rulings should decline the larger the majority overruled by the Court.

Our last substantive hypothesis is unguided by the literature on the CMD and as such is largely exploratory. However, in determining whether the Court's counter-majoritarian behavior is concerning to Americans, we need to consider the possibility that such concerns must be "awakened." Political science is home to no shortage of work demonstrating the powerful effects of experimental primes and frames (e.g., Chong and Druckman 2007). Existing work illustrates that concerns about broad norms related to government and democracy often need priming to become salient in concrete situations. For example, in examining how citizens reason about civil liberties, Chong (1993, 869) found that "[i]f the question [subjects were asked] brought to mind considerations of free speech, the right to a trial, or some other civil libertarian norm, then the respondent was more likely to take a tolerant position . . . if the question prompted thoughts about the potential costs of upholding individual rights, opinions tended to be less tolerant." Similarly, Kam and Mikos (2007) found that citizens primed by elites to think about the issue of federalism lowered their support for a federal ban on physician-assisted suicide. Given the rather academic nature of the CMD, it could be that ordinary people do not readily think about the democratic implications of an unelected Court overruling democratic majorities and therefore need to be primed to think in this way. We therefore come to our fourth hypothesis:

H4: Individuals primed to consider the democratic implications of a counter-majoritarian decision will support that decision less than individuals who are not primed.

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5. Moreover, it could be that in the wake of an extremely contentious election, simply telling people a law enjoyed majoritarian support might lead them to think in partisan terms, but a law with exceptionally broad support could mitigate this concern.

One final consideration is in order. Support for a Court decision, often called specific support, is different from support for the Supreme Court as an institution—its diffuse support, or legitimacy. "Diffuse support is institutional loyalty; it is support that is not contingent upon satisfaction with the immediate outputs of an institution" (Gibson et al. 2003, 356). A number of studies have found that the Court's legitimacy is relatively unharmed by individual disagreeable rulings (Gibson et al. 2003; Gibson 2007; Gibson and Caldeira 2009a, 2009b; Gibson and Nelson 2014, 2015), though recently there has been renewed debate over this topic (Bartels and Johnston 2013; Christenson and Glick 2014). Whether or not they influence the legitimacy people confer on the Court, it is almost certain that people's policy preferences affect their support for the individual rulings it hands down.

Of course, when the Court hands down a ruling, some people will be unhappy because the Court did the opposite of what they wanted, regardless of whether doing so went against the preference of a majority of citizens. Throughout the paper, we refer to these individuals as "losers" and to their counterparts—those who wanted the Court to rule the way it did—as "winners." If, as some work contends, policy concerns are salient when citizens judge the Court (Bartels and Johnston 2013; Christenson and Glick 2014), then we might expect that losers in a decision will be unhappy regardless of whether that decision is counter-majoritarian. If this is the case, that they are unhappy about losing may mean they are unlikely to lower their support for a counter-majoritarian decision much further. On the other hand, if winners lower their support for a ruling based on its counter-majoritarian nature—an unlikely expectation based on recent work (e.g., Crabtree and Nelson 2019)—we will have strong evidence that counter-majoritarian behavior is concerning to ordinary citizens. As such, we need to consider that the preceding hypotheses may be contingent on whether individuals are winners or losers by looking for evidence of "principled counter-majoritarianism"—that is, evidence that winners support a decision less because it is counter-majoritarian.[6]

H5: Principled counter-majoritarianism hypothesis: It may be that only winners adjust their support for counter-majoritarian rulings in the ways hypothesized above.

The purpose of the preceding hypotheses is to offer as robust a test as possible of *whether* Americans are concerned about the CMD. If they are, we should expect significant findings in testing these hypotheses; if they are not, we should expect null results. Given that null findings would indicate that Americans are seriously at odds with a number of scholars who worry about the CMD, they would be both substantively and theoretically important.

6. We thank Dave Redlawsk for suggesting this term.

IV. RESEARCH DESIGN

The CMD, our focus here, has been called a "central obsession of modern constitutional scholarship" (Friedman 1998, 334). However, embedded in work on the CMD are many assumptions and claims that have not been empirically evaluated, some of which we address here. The relatively low salience of the U.S. Supreme Court and the sparse public opinion data on it make observational studies challenging (Gibson and Caldeira 2009c). Experiments offer one way to overcome such challenges. Given complete randomization of subjects between treatments, experiments are high in internal validity: We can be sure that our manipulations are responsible for any differences we observe across treatment groups. As such, an experiment will allow us to directly test for the effects of the CMD that we have hypothesized.

A. Experiment

To test our hypotheses, we conducted a survey experiment in 2017 on a sample of 1,143 American adults. Fielded by Survey Sampling International, the survey was active from May 11 to May 17 and took place online utilizing Qualtrics software. Although our sample was not nationally representative, our subjects were diverse enough for us to have variance on many potentially moderating variables (Druckman and Kam 2011).[7] A full breakdown of the characteristics of our sample alongside comparisons to U.S. Census parameters and the nationally representative American National Elections Studies survey is available in Appendix A.

After giving consent, subjects completed a standard battery of questions on their party ID, ideology, and political knowledge. We also asked several batteries of questions related to our hypotheses. Subjects were first asked about the legitimacy they award the Supreme Court. These questions, which come from Gibson et al. (2003), ask subjects their level of agreement with proposed changes to the Court's functions or with doing away with the Court entirely.[8] The five legitimacy items were scaled together into a single variable with a Cronbach's alpha of .888.

7. Because this is not a probability sample, we do not calculate a response rate. As with any experiment, random assignment of participants to the treatments they received means we can be confident in the internal validity of the study.

8. We used the following questions from Gibson et al. (2003): "It is inevitable that the U.S. Supreme Court gets mixed up in politics; therefore, we ought to have stronger means of controlling the actions of the U.S. Supreme Court." "The U.S. Supreme Court ought to be made less independent so that it listens a lot more to what the people want." "Judges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judge." "If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether." "The right of the Supreme Court to decide certain types of controversial issues should be reduced."

Next, we asked subjects their level of "trust and confidence" in Congress and other institutions. Finally, subjects were asked to what extent they supported government surveillance of email and telephone calls to prevent terrorist attacks.[9] Since, as we detail next, our manipulations concerned a hypothetical surveillance law, we use this variable to isolate the effect of attitudes toward the policy. Importantly, as can be seen in the breakdown of our sample's characteristics in Appendix A, our subjects were divided almost exactly in half when it came to supporting (51%) or opposing (48%) surveillance.

B. Experimental Design

Next, subjects received one of our experimental manipulations. The manipulations were short vignettes that described a hypothetical yet plausible Supreme Court case about the federal government's surveillance of a U.S. citizen. In each manipulation, subjects read about a man named Aaron Ingle who was flagged and monitored by the National Security Agency because of his communication with friends abroad, one of whom was suspected of ties to a terrorist organization. Although Mr. Ingle and his friend were eventually cleared of suspicion, he sued, claiming the surveillance violated his right to privacy and free speech. The Supreme Court agreed and struck down the law that allowed the NSA to surveil Americans. The facts of the case were identical in all treatments. We experimentally manipulated three factors. First, we varied whether subjects were primed to think about the implications of the CMD by assigning half to read a brief description of it and how it has concerned scholars for decades. Second, we manipulated whether the law enjoyed the support of a majority of Congress or the people, and, third, whether that support was broad (73% of Congress or the people) or narrow (52% of Congress or the people). This left us with a 2×2×2 factorial design, for a total of eight conditions. Table 1 contains the full text of our treatments. Appendix B contains our manipulation checks, which where relevant we also discuss in our results section.

Before continuing, it will be useful to briefly address the external validity of our study. Vignettes are extremely common in experimental research on attitudes toward the Court (see work by James Gibson and colleagues) and in survey experiments more generally.[10] Moreover, the nature of an online survey experiment

9. The original response categories of "strongly support," "support," "oppose," and "strongly oppose" were collapsed into "support" and "oppose" to facilitate discussion of "winners" and "losers" in the case.

10. Also see Bartels (2014), who provides an overview of the use of experimental methods in the study of law and courts.

TABLE 1. Treatments

[**Primed treatments** started with the following: For decades, scholars of the United States Supreme Court have debated what they call "the counter-majoritarian dilemma." Some see it as a problem that the Court is made up of unelected, unaccountable judges who do not have to represent the will of the people when they rule on important issues facing the country. Many believe it is undemocratic to have a Court that can substitute its will for the will of Americans by doing away with laws that were passed by elected officials or supported by a majority of American citizens. This issue surfaced once again in the case described below.]

The United States Supreme Court recently heard a case involving the right of governmental agencies to monitor the email accounts and phone calls of private citizens. The case, *Ingle v. United States*, revolved around Aaron Ingle, a math teacher in Gainesville, Florida. Ingle and his wife have traveled widely, and they often communicate with friends they make abroad via phone and email. In 2014, federal agents questioned Mr. Ingle when the National Security Agency flagged his email account because one of his friends was suspected of ties to a terrorist organization. Though both Ingle and his foreign friend were eventually cleared of all suspicion, Ingle sued the federal government, saying that its surveillance violated his right to privacy and free speech. The Supreme Court agreed, declaring the law unconstitutional and ordering the government to stop its surveillance. Some have criticized the Court's decision because the law it declared unconstitutional was supported by an [**overwhelming**] majority of [**Democrats and Republicans in Congress/Americans**]—indeed, [**73/52**]% of [**Congress/Americans**] supported it [**according to public opinion polls**]. "It is a sad day for democracy," said [**a spokesman for the Senate Judiciary Committee/one commentator**], "when a group of unelected judges, who can never be held accountable by voters, does away with a law that so many [**of the people's elected officials/citizens**] want to remain in place."

utilizing vignettes is such that many of our subjects read about our hypothetical Court decision the same way they would read about a real decision: sitting at the computer. Finally, for many experimentalists, the fact that our sample consists of a large number of adults in the United States has obvious advantages over the common use of much smaller "convenience samples" of college undergraduates (see discussion in Lau and Redlawsk 2006).

C. Dependent Variables

Our hypotheses concern support for the Supreme Court's decision, and, to reiterate, this means we are primarily focused on specific support rather than diffuse support, or legitimacy. To measure our subjects' reactions to the hypothetical ruling, we created three measures of the dependent variable based on responses to questions subjects answered after reading our vignettes. These measures increase in terms of how "demanding" they are of subjects: The least demanding asks subjects'

normative reactions to the decision, and the most demanding asks if they would be willing to join a movement to undo it.

First, and most simply, we asked subjects, "To what extent do you think the Supreme Court reached the right decision in the case you just read about?" and "In the case you just read about, how satisfied are you with the Supreme Court's decision?" These items were scaled into a single ***satisfaction with the decision*** variable with a Cronbach's alpha of .841. This is our most basic measure of support for the decision, but at the same time it should allow us to capture any apprehension our subjects may have felt about the Court's counter-majoritarian behavior.

Next, we used questions from Gibson et al. (2005) on ***willingness to acquiesce to the decision***. Subjects were asked, "Do you accept the decision that you just read about? That is, do you think that the decision ought to be considered the final word on the matter or that there ought to be an effort to challenge the decision and get it changed?" This was followed up by a question on how strongly respondents felt about their opinion. The result is a four-point measure, with higher values indicating greater acceptance of the decision. This variable captures whether respondents believe that the Court's decision should represent the final say on governmental surveillance, a different sort of support for the decision than mere satisfaction with the ruling.

Finally, we examined whether subjects would be willing to take action in the face of a counter-majoritarian decision. We created a variable that captures respondents' reported ***likelihood of working to undo the decision***. To do so, we used the questions, "How likely would you be to join a movement or group that would work to undo the Supreme Court's decision you just read about?" and "The Constitution gives Congress the ability to limit the types of cases the Supreme Court can hear. How likely would you be to join a movement to convince Congress to take away the Court's ability to hear cases about government surveillance?" This scale is reliable with a Cronbach's alpha of .846, and higher values indicate greater likelihood of working to undo the decision. While still tapping support for the decision, this variable is perhaps a step closer to diffuse support than our other dependent variables. Similar to some of the questions for the judicial legitimacy battery (Gibson et al. 2003; Gibson and Nelson 2015), this scale examines the extent to which the public would support court-curbing efforts because of the decision.

Recent literature focusing on specific support for a court's ruling tends to use a set of questions from Gibson et al. (2014) to measure subjects' acceptance of a decision (Crabtree and Nelson 2019). In an earlier paper, Gibson et al. (2005) refer to acceptance as the public's willingness to respect a ruling and therefore cease opposition to it. Our acquiescence variable aims to capture this sentiment, but we also seek to measure additional forms of support for the ruling by asking

about subjects' normative reaction to it as well as their willingness to get personally involved in getting it overturned. We consider this a strength of our paper; operationalizing a dependent variable in different ways strengthens the external validity of experimental findings (Mutz 2011). Moreover, if in using our expanded operationalizations of specific support we find, in line with recent research, that counter-majoritarian rulings are not much of a concern to ordinary Americans, then we have even stronger evidence for those conclusions.

V. RESULTS

Before discussing our results, a word about our methodology and our presentation of the results is in order. Whenever we directly test an experimental manipulation, we do so using analyses of variance and report the standard F statistic. Because Hypothesis 2 and the principled counter-majoritarianism hypothesis do not test experimental manipulations, that our sample is not nationally representative means these hypotheses should be treated as entirely exploratory. For both hypotheses, we pool across treatment conditions and estimate ordinary least squares (OLS) regressions that include a number of demographic control variables in addition to a subject's ideological distance from SCOTUS (Supreme Court of the United States),[11] views of the Court's legitimacy, and political knowledge. In presenting the results of our regressions, we display the results of a model including only the variables in the hypothesis alongside the results of the full model with controls. We do this to assuage any concerns that our controls are driving the findings. Finally, each of our dependent variables has been rescaled to range from 0 to 1 in order to facilitate comparison.

Because a robust test of the questions in this paper necessitated a number of hypotheses and operationalizations of "support for the decision," we summarize our results in Table 2 so that readers may use it as a reference if necessary. In brief, and consistent with recent work, we find very little evidence that Americans are concerned with counter-majoritarian behavior by the Court, with a few possibly important exceptions.

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11. Subjects' ideological distance from the Court is a measure of the absolute value of the difference between respondents' self-reported political ideology (whether they were liberal or conservative on the standard seven-point scale) and where they place the Court on the same spectrum, with higher values meaning respondents view the Court as ideologically more distant from them. See Bartels and Johnston (2013) for a discussion of computing ideological distance based on individuals' placement of themselves and the Court on the same ideological spectrum.

TABLE 2. Summary of Results

	Satisfaction w/ Decision	Willingness to Acquiesce	Likelihood of Working to Undo
H1: Americans will show less support for decisions contradicting the public's will rather than the will of Congress.	No	No	No
H2: Americans with higher levels of trust in Congress support CM* rulings less than those with less trust in Congress.	Only winners become less satisfied w/ greater trust in Congress	No	Subjects with higher trust in Congress 8% more likely to work to undo
H3: Americans support CM rulings less, the larger the majority overruled by SCOTUS.	No	No	Winners told the Court overruled a large majority *less* likely to work to undo
H4: Those "primed" to think about the CMD will support CM rulings less than those not primed.	No	No	No

*CM = Counter-majoritarian.

A. Hypothesis 1

Our first hypothesis was that citizens should be less supportive of rulings that contradict the will of a majority of the public compared to rulings that contradict a majority of Congress. In our experiment, however, those who were told the ruling contradicted the public's will rather than the will of Congress did not report lower satisfaction with the decision ($F(1, 1136) = .143$, $p = .706$); a lower willingness to acquiesce to the decision ($F(1, 1135) = .954$, $p = .329$); or a higher willingness to work to undo the decision ($F(1, 1133) = 1.885$, $p = .170$).

To test our principled counter-majoritarianism hypothesis, we estimated a series of OLS regressions in which we interacted whether subjects were on the winning end of the decision with a dummy variable indicating whether a subject received a treatment in which the Court was depicted as overruling Congress. As is clear in Table 3, the interaction is not significant in the models for any of the dependent variables. The variable "winner," however, is significant in the models predicting satisfaction with the decision as well as willingness to acquiesce to the decision.

TABLE 3. Checking Principled Counter-Majoritarianism Hypothesis for H1

Variable	Satisfaction w/ Decision	Satisfaction w/ Decision + Controls	Willingness to Acquiesce	Willingness to Acquiesce + Controls	Likelihood: Work to Undo	Likelihood: Work to Undo + Controls
Constant	.487*** (.016)	.289*** (.047)	.495*** (.022)	.422*** (.063)	.212*** (.017)	.755*** (.042)
Congress frame	.010 (.022)	.020 (.022)	.019 (.030)	.024 (.030)	.020 (.023)	.007 (.020)
Winner	.171*** (.022)	.153*** (.023)	.210*** (.030)	.176*** (.031)	–.030 (.023)	–.032 (.021)
Congress frame* winner	–.015 (.032)	–.026 (.031)	–.064 (.043)	–.069 (.042)	.000 (.033)	–.002 (.028)
Income		.001 (.006)		–.006 (.009)		.008 (.006)
White		.013 (.024)		.023 (.033)		–.024 (.022)
Woman		–.006 (.016)		–.064** (.022)		–.084*** (.015)
Distance from SCOTUS		–.007 (.005)		–.003 (.006)		.002 (.004)
PID		.021*** (.004)		.013** (.005)		–.004 (.003)
SCOTUS legitimacy		.051*** (.010)		.044** (.014)		–.127*** (.009)
Political knowledge		.015* (.007)		.018 (.010)		–.029*** (.006)
Age		.000 (.007)		–.034** (.010)		–.042*** (.007)
Education		.010 (.005)		.021** (.007)		.005 (.005)
R^2	.086	.157	.060	.114	.004	.286
σ_{est}	.267	.258	.362	.351	.276	.233

Note: Coefficients are unstandardized with standard error in parentheses. Total N = 1,143.
*Significant at p <.05, **Significant at p <.01, ***Significant at p <.001, two-tailed test.

Given the interaction effect, we can interpret this variable as the effect of being on the winning end of the decision and receiving a treatment in which the Court was depicted as overruling the will of the people rather than Congress: Compared to losers who received those same treatments, winners were about 15 percent more satisfied with the decision (column 2) and about 18 percent more willing to acquiesce to it (column 4).

B. Hypothesis 2

Hypothesis 2 was that those with higher levels of trust in Congress should support counter-majoritarian rulings less than those with lower levels of trust in Congress.[12] In the regressions, we include an additional control for whether subjects received a treatment in which the Court overruled Congress, hoping to isolate the effect of trust in Congress from the effect of receiving a treatment in which Congress was mentioned explicitly. Table 4 contains the results of four models for each dependent variable. The first model for each variable contains only "trust in Congress," and the second adds the control variables to the first. The third model contains the interaction testing the principled counter-majoritarianism hypothesis that only winners behave according to expectations, while the fourth adds controls to the third model. Looking at just the first two models, we see that trust in Congress significantly predicts only subjects' likelihood of working to undo the decision—our most demanding operationalization of support for the decision. In the model with controls, subjects with higher trust in Congress were about 8 percent more likely to work to undo the decision.

Regarding the interaction of being on the winning end of the decision with trust in Congress, two findings are worth noting. First, the interaction is significant only for satisfaction with the decision. Figure 2 displays the marginal effects graphically and illustrates that winners became less satisfied with the decision the more trust they had in Congress. Second, in these models the variable for being on the winning end of a decision is a significant predictor of each dependent variable. Given the interaction term we can interpret these results as the effect of being on the winning end of a decision when trust in Congress is zero. In that case, winners with no trust in Congress are 23 percent more satisfied with the decision than losers with no trust in Congress. Moreover, winners with no trust in Congress are 19 percent more willing to acquiesce to the decision and about 6 percent less likely to work to undo the decision than losers with no trust in Congress.

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12. Originally a four-point measure, we collapsed the categories representing "a fair amount" and "a great deal" of trust because of the low number of respondents who fell into these categories. The variable has been rescaled to have a one-point range.

TABLE 4. H2 Results

Variable	Satisfaction w/ Decision: Trust in Congress	Satisfaction w/ Decision: Trust in Congress + Controls	Satisfaction w/ Decision: Trust in Congress, Winners, and Interaction	Satisfaction w/ Decision: Trust in Congress, Winners, Interaction + Controls
Constant	.596***	.355***	.456***	.189***
	(.016)	(.051)	(.023)	(.053)
Trust in Congress	–.043	.038	.060	.138***
	(.024)	(.025)	(.033)	(.033)
Winner			.241***	.234***
			(.030)	(.030)
Trust in Congress* winner			–.140**	–.162***
			(.046)	(.045)
Congress frame		.002		.012
		(.016)		(.015)
Income		–.008		.002
		(.006)		(.006)
White		.016		.011
		(.025)		(.024)
Woman		–.017		–.013
		(.017)		.016
Distance from SCOTUS		–.004		–.007
		(.005)		(.005)
PID		.027***		.022***
		(.004)		(.004)
SCOTUS legitimacy		.058***		.054***
		(.011)		(.010)
Political knowledge		.022**		.017*
		(.007)		(.007)
Age		–.009		.003
		(.007)		(.007)
Education		.013*		.010*
		(.005)		(.005)
R^2	.003	.103	.094	.171
σ_{est}	.278	.265	.265	.256

(*Continued*)

TABLE 4. H2 Results (con't)

Variable	Willingness to Acquiesce: Trust in Congress	Willingness to Acquiesce: Trust in Congress + Controls	Willingness to Acquiesce: Trust in Congress, Winners, and Interaction	Willingness to Acquiesce: Trust in Congress, Winners, Interaction + Controls
Constant	.616*** (.021)	.523*** (.069)	.487*** (.031)	.377*** (.073)
Trust in Congress	–.043 (.032)	.019 (.034)	.029 (.044)	.081 (.046)
Winner			.218*** (.041)	.191*** (.041)
Trust in Congress* winner			–.073 (.062)	–.085 (.062)
Congress frame		–.015 (.022)		–.007 (.021)
Income		–.014 (.009)		–.005 (.009)
White		.026 (.034)		.020 (.033)
Woman		–.075** (.022)		–.068** (.022)
Distance from SCOTUS		–.001 (.006)		–.003 (.006)
PID		.019*** (.005)		.014** (.005)
SCOTUS legitimacy		.050** (.014)		.046** (.014)
Political knowledge		.022* (.010)		.020* (.010)
Age		–.045*** (.010)		–.033** (.010)
Education		.025*** (.007)		.022** (.007)
R^2	.002	.081	.059	.114
σ_{est}	(.372)	.358	.362	.351

TABLE 4. H2 Results (con't)

Variable	Likelihood Work to Undo: Trust in Congress	Likelihood Work to Undo: Trust in Congress + Controls	Likelihood Work to Undo: Trust in Congress, Winners, and Interaction	Likelihood: Work to Undo: Trust in Congress, Winners, Interaction + Controls
Constant	.112*** (.015)	.663*** (.045)	.133*** (.023)	.695*** (.049)
Trust in Congress	.172*** (.023)	.076*** (.022)	.148*** (.033)	.050 (.030)
Winner			–.039 (.031)	–.055* (.027)
Trust in Congress* winner			.043 (.046)	.048 (.041)
Congress frame		.010 (.014)		.007 (.014)
Income		.010 (.006)		.008 (.006)
White		–.023 (.022)		–.025 (.022)
Woman		–.086*** (.015)		–.085*** (.015)
Distance from SCOTUS		.004 (.004)		.004 (.004)
PID		–.002 (.003)		–.002 (.003)
SCOTUS legitimacy		–.124*** (.009)		–.123*** (.009)
Political knowledge		–.028*** (.006)		–.025*** (.006)
Age		–.038*** (.007)		–.040*** (.007)
Education		.005 (.005)		.004 (.005)
R^2	.047	.297	.049	.295
σ_{est}	.271	.233	.269	.232

Note: Coefficients are unstandardized with standard error in parentheses. Total N = 1,143.
*Significant at p <.05. **Significant at p <.01. ***Significant at p <.001, two-tailed test.

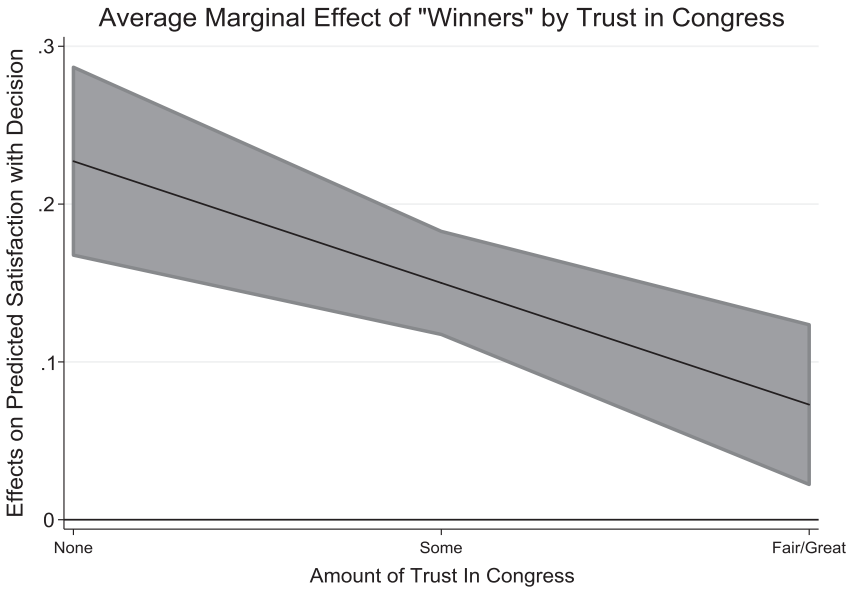


FIGURE 2. Marginal Effects

C. Hypothesis 3

Our third hypothesis was that citizens should display lower levels of support for counter-majoritarian rulings the larger the majority overruled by the Court. Similar to Crabtree and Nelson's (2019) findings at the state level, our respondents were no less satisfied with the decision ($F(1, 1136) = 1.035$, $p = .309$), no less likely to acquiesce to the decision ($F(1, 1135) = 2.854$, $p = .091$), and no less likely to work to undo the decision ($F(1, 1133) = .175$, $p = .675$) the larger the majority the Court overruled. Here, however, we note that just over half the subjects who received a frame in which the Court overruled the largest majority of the public or Congress passed the relevant manipulation check (see Appendix B).

To test for evidence of principled counter-majoritarianism, we interacted a dummy variable indicating whether a subject received a treatment in which the Court overruled a broad majority of the public or Congress with whether the subject was on the winning end of the decision. In addition to the standard demographic and substantive controls mentioned in the introduction to this section, we control for subjects' level of trust in Congress and whether they received a treatment in which the Court overruled Congress (rather than the public) on the theory that the generally low opinions of Congress among the American public might overwhelm the results. Table 5 contains our findings. Only in our most demanding dependent variable, ***likelihood of working to undo the decision***, is the

TABLE 5. Checking Principled Counter-Majoritarianism Hypothesis for H3

Variable	Satisfaction w/ Decision	Satisfaction w/ Decision + Controls	Willingness to Acquiesce	Willingness to Acquiesce + Controls	Likelihood: Work to Undo	Likelihood: Work to Undo + Controls
Constant	.541*** (.035)	.294*** (.061)	.565*** (.047)	.446*** (.083)	.206*** (.036)	.627*** (.055)
Broad majority treatment	–.033 (.022)	–.037 (.022)	–.040 (.030)	–.028 (.029)	.011 (.023)	.037 (.019)
Winner	.109* (.050)	.072 (.049)	.170 (.068)	.144* (.067)	.033 (.052)	.072 (.044)
Broad majority* winner	.036 (.032)	.047 (.031)	.005 (.043)	–.001 (.043)	–.042 (.033)	–.067* (.028)
Congress frame		.009 (.016)		–.008 (.021)		.009 (.014)
Trust in Congress		.055* (.024)		.036 (.033)		.075** (.022)
Income		.001 (.006)		–.006 (.009)		.008 (.006)
White		.013 (.024)		.020 (.033)		–.026 (.022)
Woman		–.008 (.016)		–.065** (.022)		–.087*** (.015)
Distance from SCOTUS		–.006 (.005)		–.002 (.006)		.005 (.004)
PID		.022*** (.004)		.014** (.005)		–.002 (.003)
SCOTUS legitimacy		.054*** (.010)		.047** (.014)		–.123*** (.009)
Political knowledge		.018* (.007)		.021* (.010)		–.026*** (.006)
Age		.003 (.007)		–.033** (.010)		–.040*** (.007)
Education		.009 (.005)		.021** (.007)		.005 (.005)
R^2	.088	.163	.060	.114	.005	.298
σ_{est}	.266	.257	.362	.352	.276	.231

Note: Coefficients are unstandardized with standard error in parentheses. Total N = 1,143.
*Significant at p <.05. **Significant at p <.01. ***Significant at p <.001, two-tailed test.

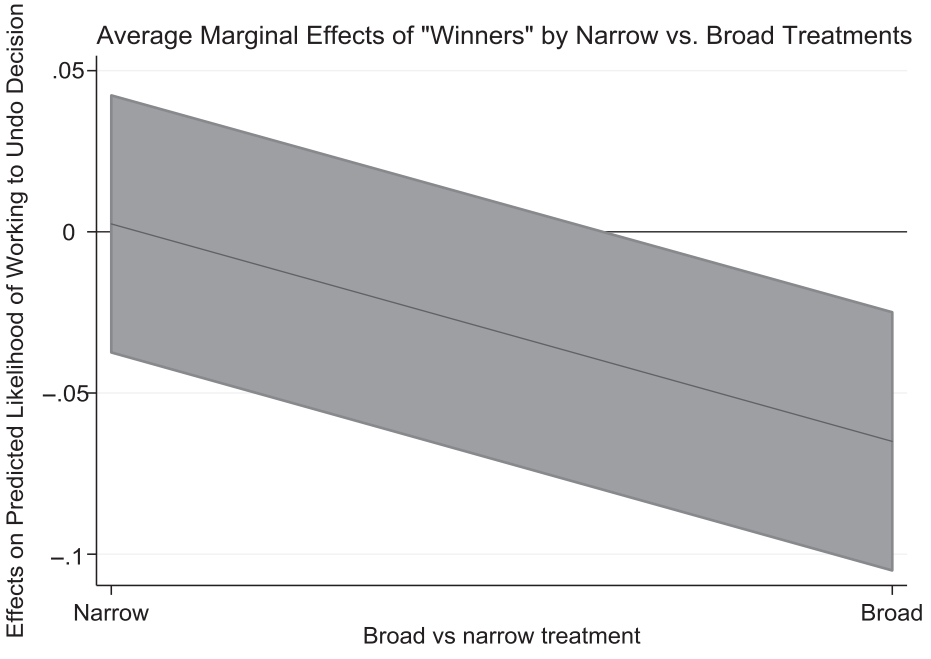


FIGURE 3. Marginal Effects

interaction significant (column 6). Figure 3 displays the marginal effects graphically and reveals that winners who received a broad treatment were less likely to work to undo the decision, counter to expectations. This time, being on the winning end of the decision significantly predicts only willingness to acquiesce to the decision. In that case, winners who received a narrow majority treatment were about 14 percent more willing to acquiesce than losers who received the same treatments.

D. Hypothesis 4

Our fourth and final hypothesis was that individuals primed to think about the CMD will support a counter-majoritarian decision less than those who are not primed. However, in our experiment those who were "taught" about the CMD before reading the treatment were no less satisfied with the decision ($F(1, 1136) = .121$, $p = .728$), no less likely to acquiesce to the decision ($F(1, 1135) = 1.881$, $p = .170$), and no more likely to work to undo it ($F(1, 1133) = .778$, $p = .378$).

Turning to the interaction of being primed to think about the CMD with being on the winning end of the decision, we see in Table 6 that the interaction is not significant for any of the dependent variables. Being on the winning end of the decision, though, was a significant predictor of all three. Winners who did not receive a primed treatment were 16 percent more satisfied with the decision, about

TABLE 6. Checking Principled Counter-Majoritarianism Hypothesis for H4

Variable	Satisfaction w/ Decision	Satisfaction w/ Decision+ Controls	Willingness to Acquiesce	Willingness to Acquiesce + Controls	Likelihood Work to Undo	Likelihood Work to Undo + Controls
Constant	.481*** (.016)	.225*** (.053)	.518*** (.021)	.415*** (.073)	.224*** (.016)	.678*** (.048)
Primed treatment	.022 (.022)	.026 (.022)	–.025 (.030)	–.020 (.029)	–.004 (.023)	.007 (.019)
Winner	.180*** (.023)	.159*** (.023)	.182*** (.031)	.146*** (.031)	–.052* (.023)	–.043* (.021)
Primed treatment* winner	–.033 (–.032)	–.033 (.031)	–.008 (.043)	–.007 (.042)	.043 (.033)	.030 (.028)
Congress frame		.009 (.016)		–.008 (.021)		.009 (.014)
Trust in Congress		.058* (.024)		.037 (.033)		.074** (.022)
Income		.001 (.006)		–.006 (.009)		.008 (.006)
White		.012 (.024)		.019 (.033)		–.024 (.022)
Woman		–.008 (.016)		–.065** (.022)		–.086*** (.015)
Distance from SCOTUS		–.006 (.005)		–.002 (.006)		.004 (.004)
PID		.022*** (.004)		.014** (.005)		–.002 (.003)
SCOTUS legitimacy		.054*** (.010)		.047** (.014)		–.123*** (.009)
Political knowledge		.018* (.007)		.020* (.010)		–.025*** (.006)
Age		.002 (.007)		–.033** (.010)		–.040*** (.007)
Education		.010 (.005)		.021** (.007)		.005 (.005)
R^2	.087	.162	.059	.114	.006	.296
σ_{est}	.266	.257	.362	.352	.276	.232

Note: Coefficients are unstandardized with standard error in parentheses. Total N = 1,143.
*Significant at p <.05. **Significant at p <.01. ***Significant at p <.001, two-tailed test.

15 percent more willing to acquiesce to it, and about 4 percent less likely to work to undo it than losers who did not receive a primed treatment.

VI. CONCLUSION

At best, then, counter-majoritarian behavior by the Supreme Court is only a conditional dilemma: conditional, at times, on whether individuals trust the body the Court overrules when it strikes down a law and their personal preferences for or against the policy upon which the Court is ruling. Even when we set the bar low for uncovering concerns about counter-majoritarian behavior, asking about simple satisfaction with the decision, we found no real evidence that the public is troubled by the Court's behavior.

While our findings align with existing scholarship, we also find evidence that individuals' attitudes toward Congress affected their willingness to work to undo the decision and that the same was true for winners' satisfaction with the decision. While these results are suggestive at best, we believe they warrant further research. If Congress were not so universally disliked, perhaps people would express more concern about the CMD. One obvious avenue for future research is a study of the CMD outside the United States. Do citizens in countries where the legislature enjoys higher levels of public support than its U.S. counterpart react differently to counter-majoritarian decisions by their courts? Moreover, the nature of legislatures and courts varies considerably from one democracy to the next. How citizens respond to the CMD in multiparty contexts or systems of strong party rule, for example, are open questions.

Finally, based on literature that has uncovered strong priming and framing effects, we looked for evidence that people would respond differently to the Court's counter-majoritarian behavior if "taught" about the CMD. We found no support for this hypothesis, however. Even when primed to consider the troubling aspects of the CMD, people's policy preferences hold sway. We believe this is further evidence that the public does not consider the counter-majoritarian dilemma much of a dilemma at all.

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APPENDIX A: SAMPLE CHARACTERISTICS

	Percentage of Sample	U.S. Census[13]	ANES[14]
Gender			
Male	40	49.2	46
Female	59	50.8	52
Other	0.4		0.2
Race			
Non-white	14	39.3	28
White (non-Hispanic)	87	60.7	71
Age			
18–24	4	9	7.6
25–34	13	14	16.6
35–49	19	19	23.3
50–64	32	19	27.3
65+	32	16	22.3
Party ID			
Republican	39		40.5[15]
Independent	12		13.5
Democrat	49		45.4
Ideology			
Liberal	30		24.1
Conservative	37		32.2
In between	34		20.9[16]
Political knowledge			
0–3 correct	45		64
4–5 correct	55		36
0–2 correct[17]			
3–4 correct			
Support for surveillance			
Don't support (*winners*)	48		
Support (*losers*)	52		

13. Gender and Race: https://www.census.gov/quickfacts/fact/table/US/PST045218; Age: https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPSYASEXN&prodType=table.

14. ANES 2016 Time Series.

15. Collapsed version of ANES seven-point party identification (ID) question.

16. Collapsed version of ANES seven-point ideology question.

17. ANES knowledge questions were different from those used here; we include them simply for the sake of broad comparisons between the two samples.

APPENDIX B: MANIPULATION CHECKS

Manipulation Check 1

In the example you just read about, did the Supreme Court rule that the law in question was unconstitutional or constitutional?

- Unconstitutional (74.2%): CORRECT ANSWER
- Constitutional (25.8%)

Manipulation Check 2

In the article you just read, about what level of support did the law allowing surveillance have?

- Those in a "broad" treatment:
  - Less than 25% (20.2%)
  - About 50% (24.4%)
  - About 75% (55.4%): CORRECT ANSWER
- Those in a "narrow" treatment:
  - Less than 25% (13.4%)
  - About 50% (76.9%): CORRECT ANSWER
  - About 75% (9.7%)

Manipulation Check 3

In the article you just read, the author mentioned the "counter-majoritarian dilemma." Which of the following comes closest to the counter-majoritarian dilemma?

- SCOTUS overrules elected branches (72.4%): CORRECT ANSWER
- Incorrect answers (27.6%)