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2011

## Judicial Backlash or Just Backlash? Evidence from a National Experiment

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### Recommended Citation

David Braman & David Fontana, Judicial Backlash or Just Backlash? Evidence from a National Experiment, 112 Colum. L. Rev. 731 (2011)

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## ARTICLES

### JUDICIAL BACKLASH OR JUST BACKLASH? EVIDENCE FROM A NATIONAL EXPERIMENT

*David Fontana\* and Donald Braman\*\**

*When the Supreme Court decides a controversial issue, does it generate a distinctive public backlash? Or would a similar decision by Congress generate a similar reaction? Surprisingly, although these questions pervade debates over constitutional law, little direct empirical research exists about this question. Indeed, very little in the way of empirical research exists about which institution citizens prefer to make a given constitutional decision, let alone how citizens go about contemplating these issues. To help remedy this, we conducted an experiment. Half of study subjects were assigned to a condition in which a constitutional right to gay marriage was protected, and the other half were assigned to a condition in which a constitutional right to carry a concealed weapon was protected. Half of each of those groups of subjects was told that the Court, and the other half that Congress, had decided the issue. We hypothesized that people develop beliefs about the competence of institutions and generate preferences for institutions by assessing whether that institution will reach a decision that supports or threatens their worldview. We also hypothesized that citizens would become more extreme in their beliefs about the underlying constitutional issue in reaction to a Supreme Court decision. The study results support these hypotheses. Conducted just prior to the midterm congressional elections in the fall of 2010, the study also provided evidence of distinctive effects on voting intentions. Our results complicate standard accounts of institutional choice that purport*

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For comments on survey design and/or the full Article, our appreciation goes to Michael Abramowicz, Bruce Ackerman, Nicholas Bagley, Paul Berman, Naomi Cahn, Thomas Colby, Kristina Daugirdas, Rosalind Dixon, William Eskridge, Barry Friedman, Jacob Gersen, Michael Gilbert, Tom Ginsburg, Jamal Greene, Aziz Huq, Vicki Jackson, Dan Kahan, Tsvi Kahana, Orin Kerr, David Law, Sanford Levinson, Saul Levmore, Chip Lupu, Jon Michaels, Gregory Mitchell, Tom Morgan, Douglas NeJame, Nathaniel Persily, Richard Pierce, Robert Post, David Pozen, Kitty Richards, Laura Rosenbury, Micah Schwartzman, Mike Seidman, Reva Siegel, Peter Smith, Brad Snyder, Nicholas Stephanopoulos, Steven Teles, Robert Tuttle, Amanda Tyler, Tom Tyler, and Mark Tushnet. Our appreciation goes to George Washington University Law School for their support for the survey, and to audiences at the University of Virginia and University of Wisconsin Law Schools.

*to rely on preferences independent of a particular outcome on controversial constitutional matters. Our results also have important implications for government actors, advocates in social movements, and constitutional theorists.*

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## INTRODUCTION

These are important times at One First Street, N.E., in Washington D.C. In these polarizing times, the Supreme Court of the United States either has or possibly shortly will be issuing decisions on the leading polarizing issues of the day—health care, immigration, and gay marriage, just to name a few. And each time a morning begins with news of a controversial Court decision, the reaction will feature similar themes: Supporters and opponents will react to the decision itself, but also to the fact that the Court was the institution deciding the case. The country will ask itself the same question Judge Vaughn Walker of the United States District Court for the Northern District of California asked himself at the close of the recent gay marriage trial: Do Americans want courts deciding these issues?<sup>1</sup>

In other words, is there a “countermajoritarian difficulty”<sup>2</sup> pervading the way we *think* about constitutional law, such that we respond differently to gay marriage being ordered by a court rather than by a legislature? This is the question of “backlash”: whether courts incur a special form of public response for deciding leading issues of the day. It is an important question, but one about which little direct empirical research exists—until now.<sup>3</sup>

The implications of the answer to this question are substantial. For scholars, those attracted to the Warren Court and its efforts to pursue an almost idyllic version of the “forms of justice”<sup>4</sup> would have a more difficult time justifying the Court doing precisely this if the public does not want it. The cause might be just, but instead of advocating for the next Chief Justice Earl Warren, it would be better to aim for House Speaker or Senate Majority Leader Warren. Conversely, the recent trend toward popular constitutionalism and the argument that we should “take the Constitution away from the courts”<sup>5</sup> is made more difficult if the public wants the courts to keep the Constitution all to themselves.

1. See Transcript of Proceedings at 3095, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW) (inquiring about danger that, “as in other areas where the Supreme Court has ultimately constitutionalized something that touches upon highly-sensitive social issues . . . the political forces that otherwise have been frustrated . . . [may] plague our politics”). For further discussion of this statement, see Linda Greenhouse & Reva B. Siegel, *Before (And After) Roe v. Wade: New Questions About Backlash*, 120 *Yale L.J.* 2028, 2030 (2011).

2. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”).

3. We have discussed the findings of our research for a more general audience in David Fontana & Donald Braman, *Supreme Anxiety*, *New Republic*, Feb. 2, 2012, at 8.

4. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1 (1979) (arguing Supreme Court has unique role to play in pursuing justice).

5. See Mark Tushnet, *Taking the Constitution Away from the Courts*, at ix–xii (1999) (arguing for limiting constitutional decisions by courts).

It is not just in the ivory tower that this question has substantial importance. Measuring institutional preferences can tell us whether then-Senator Barack Obama was right to say in *The Audacity of Hope* that “in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy.”<sup>6</sup> And if the new Republican majority in the House of Representatives wants us to have a narrower vision of the Constitution, a better understanding of public institutional preferences could guide Speaker John Boehner either to the floor of the House or to the courtroom. This Article therefore asks an important but heretofore unexamined question: *Does it matter to members of the public whether it is the Supreme Court or Congress deciding important constitutional issues of the day?*

We examined this question experimentally, utilizing a representative national sample of American citizens questioned right before the hotly contested midterm elections in November of 2010. The study focused on an issue that liberals have pursued in the courts (gay marriage) and an issue that conservatives have pursued in the courts (gun rights). Subjects in the four conditions read news stories describing a recent decision by the Supreme Court or Congress varying only the issue or the institution deciding the issue (and the overwhelming majority of subjects believed these stories had actually and recently transpired).<sup>7</sup> We utilized an experimental design because of its causal rigor, but also because it permits us to see whether institutional preferences endure in the face of a recent and salient constitutional development.

Rather than having institutional preferences in the way conventionally asserted, the public has contingent institutional preferences. The public may or may not like it when the Court restrains majoritarian action in the name of the Constitution or when Congress intervenes in constitutional issues, but this is contingent on whether it likes or dislikes the *valence of the result* commanded rather than a sense that the wrong institution is commanding the result. Because citizens disagree with one another over many policy ends, there is likely to be significant variance in beliefs about whether the Court or Congress was acting within its legitimate purview in any particular case. This variance, we found, can be explained by whether a given citizen views the Court’s decision or Congress’s legislation as threatening or privileging her core worldview. We examined a range of possible ways in which that valence materializes, meaning a range of different types of prior worldviews (“priors”) that might be motivating one’s institutional preferences. For the core of our findings and our discussion of its implications, it does not matter which priors are driving individuals’ institutional preferences. But while we did find that all of these types of priors have explanatory power, we found

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6. Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* 83 (2006).

7. The news stories were fictional, and participants were debriefed after completing the experiment.

that cultural priors tend to explain more, and so we focus more on those overall.

Part I sets out the debate about institutional preferences and explains the distinctive methodology we utilize to join this debate. Our experimental design tests the assumption that people care about institutional choice in the face of polarizing conflicts. Part II sets out our methodology and our research design and reports the results of our survey experiment. The results demonstrate that subjects' priors explained their responses to different institutional action, with some interesting internal variations, and with cultural priors showing the most significant effects. This means that supporters of a decision favored the institution supporting their priors more after the decision than before, and opponents of a decision favored the institution even less. Across the board, the effect was more substantial the more one knew about the issue in question. We found that neither the Court nor Congress changes net support for the underlying constitutional issue it is deciding, but Court decisions polarize public sentiments on constitutional issues more than congressional acts. We also found that decisions by the Court shifted anticipated electoral turnout more than decisions by Congress.

Part III discusses what these findings mean for key constituencies of constitutional law. For the Supreme Court, it means that there is at least some reason to believe that the Court can pursue a constitutional agenda without immediate and uniform backlash. Our data provide only some evidence of a Court-specific backlash against the Court's decision because it is the *Court*. Nor was the balance of opinion regarding the competence of the Court to decide such issues altered by the Court's decision. Although opponents became enraged, supporters of the controversial decisions rallied behind a Court delivering them the constitutional goods they so ardently desired. Advocates of an emboldened Court, however, should take note of more cautionary findings in the data. The Court, although generating no shift in the *balance* of public opinion, did generate significantly greater *polarization* than Congress. If our data suggest the Court may be less constrained by concerns about backlash, they should also generate concern about further embattling an already divided public. There are caveats about this implication, but it is one worth pursuing in greater detail.

For the public, our results suggest that, if priors affect institutional preferences, it will be difficult to trigger a unifying public discussion about the Court when it comes to controversial issues. We therefore discuss insights provided by existing research about how talking about an issue—including the Court—in a more realistic and open fashion can overcome existing biases.

For Congress, our results suggest that popular constitutionalism has some empirical weight to it and that there are politically plausible paths for Congress to assert a role in constitutional law. For social movements, they suggest that arguments over which institution is the best institution

to enlist present a far more complex question than previously thought, and one that will be almost impossible to disentangle from divided predictions about the results they produce—not only in disputes over constitutional law, but also in the accompanying normative and political struggles they reflect. For constitutional theorists, our results suggest that there are some parts of our “obsession”<sup>8</sup> with the countermajoritarian difficulty and the role of the Court that need to be revisited because there are many ways in which the public does not care deeply about this alleged “difficulty.”

## I. INSTITUTIONAL CHOICE IN CONSTITUTIONAL LAW

In the first week of most constitutional law classes, the question arises<sup>9</sup>—and the question persists throughout the class, and dominates the discussion about constitutional law in our classrooms, our scholarship, our courtrooms, and our political debates: What is the proper role of the Supreme Court in deciding what the Constitution means? There are many types of arguments one can make in response to that question. Some of these arguments are related to democratic or legal theory,<sup>10</sup> some related to legalist considerations like constitutional history,<sup>11</sup> text,<sup>12</sup> or precedent,<sup>13</sup> and some to pragmatic considerations like institutional capacity<sup>14</sup> or social structure.<sup>15</sup> But another form of argument that both

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8. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, Part Five, 112 *Yale L.J.* 153, 159 (2002) [hereinafter Friedman, *Birth*] (“The academic obsession with the countermajoritarian problem has been with us for a long time.”).

9. Most of the time, the question derives from the discussion about *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). Even for those who do not teach *Marbury* in constitutional law, though, this question is still at the core of constitutional law. See Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 *Wake Forest L. Rev.* 553, 570 (2003) (arguing constitutional law is about teaching that “the Constitution is, at the very least . . . what a *variety* of institutional actors say it is”).

10. For notable recent examples of these arguments see generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346 (2006), and the response by Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 *Harv. L. Rev.* 1693 (2008).

11. See William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* 54–71 (2000) (describing history of *Marbury*).

12. See Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not to)*, 115 *Yale L.J.* 2037 (2006) (reviewing Akhil Reed Amar, *America's Constitution: A Biography* (2005)).

13. See David Strauss, *The Living Constitution* 36–49 (2010) (describing and advocating courts' common law approach to constitutional change).

14. See generally Donald L. Horowitz, *The Courts and Social Policy* 22–25 (1977) (“[I]f courts cannot do certain things well, other institutions may perform the same tasks even less capably.”); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 1–26 (2008) (“Uniquely situated, courts have the capacity to act where other institutions are politically unwilling or structurally unable to proceed.”).

15. See generally Stuart A. Scheingold, *The Politics of Rights* 13–21 (2004).

stands alone and permeates many of these other types of argument is the claim that the public has preferences about which branch of the government should be deciding deeply contested questions.

As this Part discusses, important parts of our scholarly, legal, and political discussion about constitutional law either explicitly or logically presume that people have outcome-independent institutional preferences when it comes to deciding constitutional issues. We divide the institutional choice literature into two camps. First, many arguments about institutional choice hinge on differences in *perceived competencies*—that is, these arguments regarding institutional choice focus on the capacities and capabilities of the institutions broadly understood, concerns that are ostensibly independent of a specific legal outcome. We highlight and note the differences between competency-related concerns and the *perceived results* the Court might tend to produce—the effects on politics that an institution tends to produce because of the outputs this institution produces may also motivate differential institutional preferences. The first camp focuses on preferences for an institution simply because it is that institution, while the second camp focuses on preferences for an institution because of a sense of the results that the institution tends to produce.

It turns out, though, that the most closely related empirical literature is poorly suited to answering either type of concern about institutional choice. The existing literature focuses on dependent variables that are only of indirect relevance to institutional preferences, or at least more research is needed to prove their relevance (variables like “legitimacy” or “approval”). This literature also includes research designs that prevent it from being able to say anything about institutional choice in the face of high political and cultural stakes. Our experimental design, as Part II will discuss in greater detail, tries to accommodate this by both asking subjects about useful variables in light of a decision (Which institution should decide this issue? How do you feel about the underlying issue that has been decided? How likely are you to vote in an upcoming election?) and asking about these variables using polarizing and stimulating independent variables.

#### A. Versions of Institutional Preferences

Arguments about institutional choice can be subdivided into at least two types. The first focuses on the distinctive capacities or capabilities of the Supreme Court and Congress, and this focus itself might trigger certain institutional preferences. Call these “preferences about *perceived competencies*,” as they relate to the perception that one institution has distinctive qualities that better suit it to making a decision on this kind of issue, independent of any legal outcome. We mean “competencies” to cover a broad range of forms of competencies, some more technical and practical and some more normative. We use this term to refer to some intrinsic capacity or incapacity that an institution might possess, at whatever level



(technical, practical, political, normative) that competency might exist. What matters to those involved in debates over competencies of our law-making institutions is that it is the Court or Congress (with their idiosyncratic decisionmaking processes and capabilities within our democratic structure) making the law, not the law that is made. If Congress produced the same form of outcome, according to the competencies approach, the public sentiment would be different because it is something about the perceived intrinsic competency of an institution triggering preferences. The intense and important scholarly debate about backlash enters in here: Backlash becomes the way of describing how competency violations are enforced. The public has a sense of which institution is more or less competent, and if that sense is violated then backlash ensues.

The second type of institutional preference focuses on the various shifts in norms and politics that the institutions can produce. Call these preferences about *perceived results*, as it is the perception about the types of the results an institution tends to produce that underwrites the preference for one institution over the other. The claim relies on an interaction between an institution's forms of politics as well as perceived competencies, rather than simply on perceived competencies. It might be that the institution is producing a worse result because of some difference in competency (e.g. perhaps its lesser political competency leads it to produce worse results), but it is the results that are motivating the reaction. Put another way, "[t]he claim is comparative. . . . [Some] institutions . . . will ordinarily not choose to make the same backlash-producing decisions as [others]."<sup>16</sup> If an institution—the Court or Congress—did make the same decision, then the same backlash would ensue. It is because of the *perceived result* of the decision (rather than the institution that delivered it) that backlash ensues. In other words, whereas the competencies approach assumes reactions to institutions, the results approach assumes reactions based on what kinds of things those institutions tend to do and the reactions they tend to trigger.

Debates over perceived competencies have been a less central part of the debate than perceived results—in other words, attention has been devoted more to whether the Court does things that might inspire or antagonize people than whether the simple fact that it is the Court doing them that might cause that dynamic. Still, debates over competencies

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16. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 392 (2007). For other discussions briefly noting these differences between competencies and results, see *id.* at 410–11 (“Americans who entered politics to oppose *Roe* were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy.”); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153, 1216 (2009) (referencing “more general category of backlash against any public or political decision”); *id.* at 1218 (“Consider this counterfactual: suppose that the Hawaii or Massachusetts legislature—and not a court—had taken the first step on same-sex marriage. It seems highly likely that cultural conservatives would have seized on the issue with equal gusto.”).

have featured in the discussion. These debates have typically divided between those who assume an institutional preference for the Court over Congress or the reverse, with each describing a set of competing claims about why a particular institution should decide a contentious constitutional question. Those in support of the Court tend to make a series of familiar arguments: The Court is independent from politics, it is principled, and it has a number of other institutionally distinct features increasing its perceived competence in the eyes of the public.

In legal scholarship, since at least the time of the Warren Court, the largely liberal legal academy struggled with these issues.<sup>17</sup> After opposing the New Deal Court for invalidating progressive legislation—partly by arguing that the public would not stand for a Court resolving issues in a depression economy—the same constitutional theories were left to handle a Court expanding progressive constitutional norms. The result was that “the scholarly tradition”<sup>18</sup> was supportive of the Court deciding major constitutional issues, and not often troubled about whether the public wanted the Court to be the institution deciding these issues.

At least before popular constitutionalism started to emerge, something approaching conventional wisdom among scholars held that when it came to deciding major constitutional issues, people preferred the Court, or at least did not mind it taking the lead.<sup>19</sup> This was part of the reason why heroic theories of the Court like John Hart Ely’s “representation-reinforcement,”<sup>20</sup> Ronald Dworkin’s “Hercules the judge,”<sup>21</sup> or Bruce Ackerman’s “dualist democracy”<sup>22</sup> could exist, thrive, and dominate legal scholarship. If the people did not want the Court deciding constitutional issues, then whatever grand theory of the Court

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17. See generally Friedman, *Birth*, *supra* note 8 (discussing difficulties scholars had with liberal Court they supported and series of theories skeptical of aggressive judicial role).

18. See J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 *Harv. L. Rev.* 769, 770–72 (1971) (examining scholarly tradition related to Warren Court).

19. See Jamal Greene, *Giving the Constitution to the Courts*, 117 *Yale L.J.* 886, 911 (2007) (reviewing Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (2007)) (“[M]embers of the public, more than institutional political actors, have laid the foundations for judicial supremacy.”); Norman R. Williams, *The People’s Constitution*, 57 *Stan. L. Rev.* 257, 257 (2004) (reviewing Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004)) (“[W]e have accepted that, once the federal courts have spoken, the judiciary’s word on the matter is final—that we the People are obligated to accede to the judiciary’s interpretation of the Constitution, no matter how erroneous we think that interpretation may be.”).

20. See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (arguing judicial review should focus on failures of democratic process).

21. See Ronald Dworkin, *Law’s Empire* 238–40 (1986) (advocating model of “Hercules” judge who respects integrity of law while balancing demands of precedent and needs of future).

22. See generally 1 Bruce Ackerman, *We the People: Foundations* (1991); 2 Bruce Ackerman, *We the People: Transformations* (1998).

one had would be complicated because the public would punish the Court for its excessive activism. Why bother advocating that the Court *should* codify constitutional moments if, when the Court did, the political response would overwhelm the result? Instead, an implicit pro-Court assumption was part of the reason Congress did not interfere with the Court's assertion of judicial supremacy: The people did not want Congress to interfere with the Court because the public preferred the Court.<sup>23</sup>

Armed with the tools of modern social science, many social psychologists and political scientists have started to provide related empirical support for pro-Court perceived competencies. John Hibbing and Elizabeth Theiss-Morse introduced the notion of "process space" to compete with the existing concept of "policy space," indicating that "many people have vague policy preferences and crystal-clear process preferences, so their actions can be understood only if we investigate these process preferences."<sup>24</sup> The Court fell right in the middle of the public's preferred "process space," meaning that the public liked the way the Court did things. A massive empirical literature supported the notion that the Court was seen as more legitimate than other institutions,<sup>25</sup> and many even took that to mean there was a pro-Court institutional preference.<sup>26</sup>

On the other side, there have been many who have argued that there was a public perception of perceived competencies leaning against the Court deciding contentious constitutional issues. Alexander Bickel and his successors remained concerned about this distinctive backlash, to the point that their concern seemed to suggest that public backlash against the Court could be viewed as undermining the entire liberal constitutional agenda.<sup>27</sup> Michael Klarman, perhaps the foremost contemporary scholar in this tradition, argued that the Court engendered greater backlash because of its ability to quickly and dramatically raise the salience

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23. See Steven G. Calabresi, *The Congressional Roots of Judicial Activism*, 20 J.L. & Pol. 577, 577 (2004) ("Far from being counter-majoritarian, therefore, judicial activism is in fact the device Congress relies on to make social policy for the nation, which Congress either approves of or is at least unwilling to stop.").

24. John R. Hibbing & Elizabeth Theiss-Morse, *Stealth Democracy: Americans' Beliefs About How Government Should Work* 6, 15, 42 (2002).

25. See generally James L. Gibson & Gregory A. Caldeira, *Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People* (2009) [hereinafter Gibson & Caldeira, *Citizens*].

26. See James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 Law & Soc'y Rev. 631, 631 (1991) (discussing argument that "those who viewed the Supreme Court as a more legitimate institution were more likely to accede to an unpopular decision"); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 Law & Soc'y Rev. 621, 621 (1991) ("A central tenet about U.S. legal culture is that Americans are more willing to accept unpopular decisions if those decisions are legitimized by the courts, in particular the U.S. Supreme Court.").

27. Post & Siegel, *supra* note 16, at 407.

(and hence accentuate cleavages) over controversial issues.<sup>28</sup> An even more common perceived-competencies argument is that the Court engenders a distinctive form of backlash with its decisions because it “incite[s] anger over ‘outside interference’ or ‘judicial activism.’”<sup>29</sup> William Eskridge made a similar argument about *Roe*:

*Roe* essentially declared a winner in one of the most difficult and divisive public law debates of American history. Don’t bother going to state legislatures to reverse that decision. Don’t bother trying to persuade your neighbors (unless your neighbor is Justice Powell). . . . Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists.<sup>30</sup>

The modern conservative movement adopted this rhetorical move, arguing that the people did not support entrusting the Court to decide major constitutional issues. When Richard Nixon first popularized the phrase “judicial activism” while running for President in 1968, he presumably used the phrase often because the notion that it was not for the Court to be deciding major constitutional issues appealed to people—otherwise a successful presidential campaign like his would have been less inclined to make the argument.<sup>31</sup> This argument about the undemocratic nature of judicial review—the fact that it represents “outside interference”<sup>32</sup>—is met with a dramatic reaction according to these perspectives: greater anger on the part of those who lost in Court than if they had lost elsewhere,

28. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 Mich. L. Rev. 431, 473 (2005) (stating Court can “raise the salience of an issue” in way harmful to both cause and to Court). Others have noted this phenomenon but argued that it leads to a pro-Court institutional sentiment. See Gibson & Caldeira, *Citizens*, supra note 25, at 3 (“[A]nything that causes people to pay attention to courts—even controversies—winds up reinforcing institutional legitimacy through exposure to the legitimizing symbols associated with law and courts.”). Robert Post and Reva Siegel have recognized that Klarman uses this competencies approach, rather than the cultural-political result approach. Post & Siegel, supra note 16, at 392 n.91 (noting Klarman “impl[ies] that judicial decisions are inherently more likely to create backlash than legislative decisions”). They have criticized this position as having “conceptual difficulties.” *Id.* We do not read the competencies approach as having conceptual difficulties, but rather as a conceptually coherent argument capable of being empirically falsified.

29. Klarman, supra note 28, at 473. See also Katharine Q. Seelye, *Conservatives Mobilize Against Ruling on Gay Marriage*, N.Y. Times, Nov. 20, 2003, at A29 (quoting former D.C. Circuit Judge Kenneth Starr as stating that courts should not interfere with “the power of the people through their elected representatives to fashion social policy”).

30. William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 Yale L.J. 1279, 1312 (2005). Eskridge makes similar arguments to Klarman. *Id.* at 1310 (noting courts “can raise the stakes of politics by taking issues away from the political system prematurely; by frustrating a group’s ability to organize, bond, and express the values of its members; or by demonizing an out-group”).

31. See Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DePaul L. Rev. 555, 558 (2010) (“Nixon reached out to southern delegates by stressing the limited role that he thought the federal courts should play in desegregating public schools.”).

32. Klarman, supra note 28, at 473.

and greater anger by those who lost than joy by those who won in Court.<sup>33</sup>

Behind these competing institutional preferences (either pro- or anti-Court) are a series of disputes, highlighted briefly already, about the distinctive decisionmaking qualities of the courts and legislatures: Is the nondemocratic nature of litigation something that will prevent a Court of societal elites from understanding and responding sufficiently to the concerns of ordinary citizens,<sup>34</sup> or is it precisely because the Court is more removed from the political process that it is a more trustworthy arbiter of principle when it comes to fundamental rights?<sup>35</sup> Do the detailed factual and social inquiries that legislatures are capable of making mean they are better at managing fractious problems,<sup>36</sup> or does the openness of the political process simply make legislatures more available to capture by well-heeled and influential minorities?<sup>37</sup> To those involved in this debate, the question is one of special knowledge about institutional competence: The choice of an institution on a particular issue will flow naturally from the relative capabilities of that institution in comparison to other institutions. The more one knows and cares about the structure of our democratic state, the greater the influence one's knowledge about institutional competence will have on institutional choice.

We differentiate concerns about perceived competencies from another form of institutional preferences in constitutional law: those with preferences for *outcomes or forms of outcomes* that a given branch is more or less likely to produce, and the distinctive politics each institution creates as a result of the kinds of outcomes it tends to produce.

Klarman has made perceived-competencies arguments of the form discussed earlier, but also argues that the Court tends to "out-pac[e] public opinion on issues of social reform"<sup>38</sup> and that there are distinctive reactions because the Court "command[s] that social reform take place

33. *Id.* at 475 (noting one "reason that rulings . . . produce political backlashes is that judicially mandated social reform may mobilize greater resistance" because "critics were able to deride it as the handiwork of arrogant 'activist judges' defying the will of the people").

34. Justice Scalia is perhaps the foremost advocate of this position:

The virtue of a democratic system . . . is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.

*United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

35. See Fiss, *supra* note 4, at 2 (noting importance of Court's role in "[s]tructural reform" which "involves an encounter between the judiciary and the state bureaucracies").

36. See 151 Cong. Rec. 21,279 (2005) (statement of Sen. Jeff Sessions) (admonishing judges to "leave politics to the politicians").

37. See Susan Rose-Ackerman, *The Economic Analysis of Public Law*, 1 *Eur. J.L. & Econ.* 53, 66 (1994) (describing fears that "Congress has been captured by special-interest groups and passes laws supporting these groups that harm the general public").

38. Klarman, *supra* note 28, at 482.

in a different order than might otherwise have occurred.”<sup>39</sup> If Congress arrived at these extreme outcomes, the response would be the same, so the response is against the outcome and not the institution per se. These arguments also feature in political debates. David Brooks of *The New York Times* has made similar arguments about *Roe*.<sup>40</sup> The decisions generate negative preferences not only because of the politics they create, but also because of the different implementation structure for a decision of the Court as compared to one of Congress.<sup>41</sup>

The argument about the Court’s influence on opinion has also been made in support of an institutional preference *for* the Court; some have argued that the Court tends to produce certain outcomes that the public appreciates. Linda Greenhouse and Reva Siegel have written recently to say that the politics preceding *Roe* were responsible for much of what followed *Roe*, suggesting that the Court had a powerful political influence on the debate.<sup>42</sup> The important point for now is how this differs from arguments over perceived competencies: The claim is about a distinctive form of influence generated by an institution because of the outcomes that it generates.

Beyond its centrality to the debate in the legal academy, we study perceived competencies for several practical reasons. First, it is *possible* to measure public perceptions of perceived competencies. The same cannot be said about counterfactual historical questions.<sup>43</sup> We cannot measure as precisely what would have happened if Congress had passed a statute like the decision the Court issued in *Brown*. We cannot easily predict whether

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39. *Id.* at 477.

40. David Brooks, Op-Ed., *Roe’s Birth, and Death*, *N.Y. Times*, Apr. 21, 2005, at A23 (“When Blackmun wrote the *Roe* decision, it took the abortion issue out of the legislatures and put it into the courts. If it had remained in the legislatures, we would have seen a series of state-by-state compromises reflecting the views of the centrist majority that’s always existed on this issue.”).

41. See Klarman, *supra* note 28, at 477–82 (providing examples of how implementation structures for court decisions differ from those for congressional decisions).

42. See Greenhouse & Siegel, *supra* note 1, at 2034 (“Attuned to these alternative institutional bases for conflict over abortion, we can pick out features of the post-*Roe* landscape that raise deep questions about the sufficiency of Court-centered accounts of backlash . . .”).

43. What role did *Roe v. Wade*, 410 U.S. 113 (1973), play in securing the public’s perception that women have a right to an abortion? Or in hardening and mobilizing opposition? Would a world in which the Supreme Court left the regulation of abortion to the states be one with greater or less support for reproductive rights? Did *Plessy v. Ferguson*, 163 U.S. 537 (1898), or *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), entrench or transform the public’s conception of the legitimacy of racial equality? Were the many legislative efforts that preceded and followed it more influential? Has *Lawrence v. Texas*, 539 U.S. 558 (2003), and its progeny increased the public’s respect for gay rights or provoked them into passing a spree of state constitutional amendments barring courts and legislatures from allowing same-sex marriage? Would a decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that rejected an individual right to bear arms have reduced or incited greater public support for gun control?

going forward Congress or the Court is more likely to produce a *Brown* or a *Roe*, or what those decisions would look like.

Second, the perceived-competencies approach has enormously broad implications—if the public reacts to an institution every time it decides something, regardless of what it decides, that will affect everything Congress and the Court do. Our discussion of the perceived-results approach shall reappear throughout the Article, because Part III in particular will focus on how the differential politics created by the Court and Congress can provide differential constraints and empowerments in a world in which the public has no other ways of differentiating between the institutions. But throughout the Article our references to institutional preferences are references to perceived competencies—to reactions to an institution simply because it is that institution.

### B. *Measuring Institutional Preferences*

With the explosion of research into public opinion and law—particularly in relation to constitutional law—there is no shortage of research measuring preferences about the law. Despite the important conceptual and other scholarly work relating to the two main types of institutional preferences, discussed above, there has been no scholarship directly measuring institutional preferences in the way our study attempts to do. This is for two separate reasons. First, much of the research does not directly measure institutional preferences, but instead measures other variables that may or may not have any relationship to institutional preferences. Our experimental design is meant to measure a much more transactional dependent variable, namely which institution (if any) the public wants to decide constitutional issues. Second, the research in this area does not question underlying premises about institutional preferences because it uses independent or dependent variables measuring such preferences in low-stakes situations.

First, while there is extensive research on public opinion, constitutional law, and the Supreme Court, that research does not directly measure institutional preferences in constitutional law. Central to this research is the dependent variable of “sociological legitimacy” attributed to decisions of a legal institution or actor, what Richard Fallon defined as the concept that these decisions are “accepted (as a matter of fact) as deserving of respect or obedience—or, in a weaker usage . . . insofar as it is otherwise acquiesced in.”<sup>44</sup> The procedural justice literature measures the relative legitimacy of decisions by legal authorities, and that literature has argued that the more procedurally fair the process leading to a decision by a legal authority, the more legitimacy the public sees in those

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44. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *Harv. L. Rev.* 1787, 1790–91 (2005).

decisions.<sup>45</sup> There are also threads of related literature measuring the approval for or popularity of the Court.<sup>46</sup>

Measuring legitimacy or approval, though, is not the same as measuring institutional preferences. Just because an institution is seen as more or less legitimate or popular in general does not tell us anything about what it is seen as appropriate for the institution to do in relative terms.<sup>47</sup> It might be that greater legitimacy means that there is an institutional preference for the institution to do more because it is legitimate or popular. It might be that greater legitimacy means that there is an institutional preference for the institution to do less because its legitimacy is limited to a (perceived) narrow and specialized docket. Or it might be that legitimacy does not track institutional preference at all because there are no institutional preferences. One version or another of four different propositions is often used to assess the legitimacy of the Court, for instance, but these propositions concern whether changes to the Court would be supported, rather than what the Court should be doing in the first place.<sup>48</sup>

It is important, in measuring potentially controversial issues, to utilize a research design simulating that controversy. However, in the literature about legitimacy and the Court, the independent variable that is manipulated often involves general perceptions of procedural justice or institutional legitimacy, such as “[y]ou can usually count on the Supreme Court to make decisions in a fair way,”<sup>49</sup> or general measures of “process preferences.”<sup>50</sup> Subjects are never stimulated with something more tangible and more motivating. Because these studies do not feature immediate, significant stakes, the findings of this research often do not reflect the kinds of heated divisions we would expect to find in the real world.<sup>51</sup>

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45. The literature is far too vast to be summarized, but for a helpful overview see generally Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *Ann. Rev. Psychol.* 375 (2006).

46. For some helpful examples, see Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 *Pol. Psychol.* 675, 683-84 (2008) (asking subjects their sentiments about how Court is “handling their job”).

47. For instance, some studies ask whether the Court has the “legal authority” or “the final word” in deciding certain issues. See Jeffrey J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 *Pol. Res. Q.* 675, 680 (1994).

48. The four propositions used to assess the Court’s legitimacy are (1) “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”; (2) “The right of the Supreme Court to decide certain types of controversial issues should be reduced”; (3) “The Supreme Court can usually be trusted to make decisions that are right for the country as a whole”; and (4) “The U.S. Supreme Court gets too mixed up in politics.” Gibson & Caldeira, *Citizens*, *supra* note 25, at 46 tbl.3.1.

49. Tyler & Rasinski, *supra* note 26, at 625.

50. Hibbing & Theiss-Morse, *supra* note 24, at 69.

51. See, e.g., James Gibson, *Public Reverence for the United States Supreme Court: Is the Court Invincible?* 9 (July 29, 2011) (unpublished manuscript) (on file with the *Columbia Law Review*) (“In general, the American people are reasonably satisfied with how



Our survey design aims to remedy that by asking about preferences in the face of a salient experimental treatment. The design of our study, then, is meant to be more psychologically realistic. People do not respond to defining national constitutional issues in the face of flat stimuli. They decide them based on salient, stimulating, real-world situations. That is how we want to assess institutional preferences, and it is to that we now turn.

## II. HOW THE PEOPLE PERCEIVE THE CONGRESS AND THE COURT

In this Part we outline our study and our results. We hypothesize an alternative version of institutional preferences suggesting that these preferences track sensibilities about which institution is most supportive of one's worldview, particularly one's cultural worldview. To measure this hypothesis, we employed an experimental design directly measuring institutional preferences as a dependent variable and measuring it in light of experimental conditions exposing subjects to a story about Congress or the Supreme Court affirming the constitutional right to gay marriage or the constitutional right to carry a concealed weapon. The conditions we used were meant to increase external validity by replicating real-world institutional actions and doctrinal structures, and were administered in the weeks before the congressional midterm elections of 2010.

Our findings are simple but striking: Institutional preferences track priors, particularly cultural priors. To begin with, as in other studies, we find in our study that cultural priors are much stronger predictors of behavior than other attitudinal priors.<sup>52</sup> Also consistent with prior research, we find two cultural orientations explaining dramatic variance in public views on gay rights and gun rights: one that we describe as "hierarchical-

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well the Court does its job . . ."); see also *id.* at 4 ("Democrats and Republicans love the Supreme Court at roughly equal levels, as do liberals and conservatives. Partisan and ideological differences do indeed characterize policy positions on many issues, but faith in and loyalty to the Supreme Court seems to be distributed across the ideological and partisan boards." (emphasis omitted)).

52. Earlier research has demonstrated that cultural variables are stronger predictors of behavior than other attitudinal priors:

[A] simple partisan inversion of impressions is necessarily less nuanced than the cross-cutting shifts observed when members of the sample were classified simultaneously along the two cultural dimensions. . . . We are eager to add, however, that we regard the question "what has the biggest impact—culture, gender, political ideology, race, etc.?"—as ill-posed. Cultural worldviews tend to cohere with other characteristics—including political affiliation, gender, race, and class—in patterns that indicate the same latent predispositions the cultural worldviews by themselves measure. . . . When forced to choose—as one often is, by sample size—cultural worldviews can be expected to be more discerning indicators of these predispositions, and hence stronger predictors of cultural variance in cognition, than these other characteristics.

Dan M. Kahan et al., "They Saw A Protest": Cognitive Illiberalism and the Speech-Conduct Distinction, 64 *Stan. L. Rev.* (forthcoming 2012) [hereinafter Kahan et al., *They Saw a Protest*] (manuscript at 30 n.93) (citation omitted) (on file with the *Columbia Law Review*).

individualist” (sometimes referred to as “HI”) prizing self-reliance and favoring traditional forms of social hierarchy, and one that we describe as “egalitarian-communitarian” (sometimes referred to as “EC”), favoring less regimented forms of social organization and greater collective attention to securing individual needs.<sup>53</sup> In the four conditions, institutional preferences track subjects’ sentiments about which institution is affirming their cultural worldview. Political knowledge is a significant moderating measure. The more a subject knows or cares about an issue, the greater an influence their worldview has on their institutional preferences.

Further, and just as striking, we found that rather than changing the balance of underlying beliefs about gay marriage or carrying a concealed weapon, action by Congress and the Court tended to make existing beliefs more extreme, thereby increasing cultural polarization. While this effect (relative to the control condition) existed in conditions where either institution acted, it was stronger in conditions where the Court acted.

We also measured electoral preferences in terms of voting preference and turnout for the midterm elections for Congress in 2010. We had a null finding on the former, but found that in several of our conditions hierarchical-individualists turned out to vote in greater numbers in response to Congress or the Court acting, while egalitarian-communitarians turned out in lower numbers. This effect existed much more in conditions where the Court acted.

#### A. *The Hypothesis: Contingent Institutional Preferences*

Arguments over perceived competencies tend, as Part I discussed, to resolve into competing sets of pro-Congress-anti-Court and pro-Court-anti-Congress factual claims. Our focus is not on the *veracity* of these competing claims about institutional choice, but rather on the *structure* of the debate itself: Who believes what, and why? We propose an alternative account to that of perceived competencies: People conform their factual beliefs about institutional competence to their intuition about which institution will provide a preferred outcome.

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53. The hierarchical-individualist worldview tends to be associated with the Republican Party and with those self-identifying as “conservative”; the egalitarian-communitarian worldview with the Democratic Party and with those self-identifying as “liberal.” See Dan M. Kahan, Culture, Cognition, and Consent: Who Perceives What, and Why, in *Acquaintance-Rape Cases*, 158 U. Pa. L. Rev. 729, 784–85 & fig.7 (2010) [hereinafter Kahan, Culture, Cognition, and Consent] (finding correlation among these categories). Prior research, however, indicates that value measures of cultural orientation are far more predictive of factual perceptions and policy preferences than are political affiliation and ideological self-identification. See John Gastil et al., The ‘Wildavsky Heuristic’: The Cultural Orientation of Mass Political Opinion 15 (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 107, 2005) [hereinafter Gastil et al., Wildavsky Heuristic], available at <http://ssrn.com/sol3/abstract=834264> (on file with the *Columbia Law Review*) (“[C]ultural orientation would explain more variance in policy attitudes than does liberal-conservative self-identification or partisanship . . .”).

The battle over institutional choice, on this account, is part of a broader contest in which the institutions are embroiled. Citizens' preferences are contingent on historically grounded conceptions of which institution will deliver preeminence to the worldview of those citizens. Arguments that courts or legislatures are (or are not) distinctively competent to decide an issue are not just factual claims; they are also salvos in motivated battles over facts in the world. Preferences regarding institutional choice are thus contingent on the values a citizen prioritizes and the social meaning a law or policy holds in relation to those worldviews. And, again, cultural worldviews are at the middle of this dynamic.

In arguing for this alternative account, we are suggesting that the institutional debate is like many other debates involving contentious factual claims, debates deeply shaped by the phenomenon of motivated cognition. Motivated cognition refers to the tendency of individuals to conform their processing of new information to their own prior views in a variety of ways. Perhaps the most dramatic findings with respect to motivated cognition regarding gay marriage and gun control—the two issues we tested—have come from the subspecies of motivated cognition known as *cultural* cognition. Across a diverse array of issues including global warming,<sup>54</sup> gun control,<sup>55</sup> date rape,<sup>56</sup> HPV vaccination,<sup>57</sup> and a host of other matters,<sup>58</sup> empirical research shows that individuals develop distinctive factual beliefs consistent with their core value orientations. We hypothesize that this view of how people process underlying policy issues and facts can be extended to understanding questions about institutions.

To measure culture, these studies utilize two cultural-value measures with significant explanatory power: hierarchy-individualism and egalitarianism-communitarianism.<sup>59</sup> Consistent with prior research, we hypothesize that hierarchy and individualism will strongly predict support

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54. See generally Dan M. Kahan, Hank Jenkins-Smith & Donald Braman, Cultural Cognition of Scientific Consensus, 14 *J. Risk Res.* 147 (2011) (finding cultural cognition informs individuals' views on climate change research).

55. See generally Dan M. Kahan & Donald Braman, More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions, 151 *U. Pa. L. Rev.* 1291 (2003) [hereinafter Kahan & Braman, *Gun-Risk Perceptions*] (presenting evidence that cultural orientations affect positions on gun control).

56. See generally Kahan, Culture, Cognition, and Consent, *supra* note 53 (using cultural cognition to examine debate over acquaintance-rape cases).

57. See generally Dan M. Kahan, Donald Braman, Geoffrey L. Cohen, John Gastil & Paul Slovic, Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition, 34 *Law & Hum. Behav.* 501 (2010) (using cultural cognition theory to explain attitudes towards HPV vaccine).

58. See generally Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey Cohen, The Second National Risk and Culture Study: Making Sense of—and Progress in—the American Culture War of Fact (GWU Legal Studies, Research Paper No. 370, 2007), available at <http://ssrn.com/abstract=1017189> (on file with the *Columbia Law Review*) (addressing nanotechnology, terrorism, national security, and mass political opinion).

59. See Gastil et al., *Wildavsky Heuristic*, *supra* note 53, at 13–16 (proposing and describing cultural measures).

for gun rights and opposition to gay rights, and that egalitarianism and communitarianism will strongly predict opposition to gun rights and support for gay rights.<sup>60</sup> Normative views about the underlying legal question will shift, but the valence of the shift will depend on the alignment of the legal outcome with or against a citizen's cultural orientation.

A few predictions follow. Institutional preferences will move in the direction of the institution affirming one's cultural worldview. Thus, arguments in favor of one institution over another are not formed on outcome-independent grounds such as design or process. Rather, those grounds are employed as a justification for institutional choice consistent with achieving a citizen's preferred social ordering. When the Court affirms a contested cultural position on a major issue, citizens whose worldviews are so affirmed perceive the Court as more competent; and when Congress offers affirmation, perceptions of competency shift in a similar fashion.

Because citizens with relatively egalitarian and communitarian values are generally supportive of gay rights, and those with relatively hierarchical and individualistic views are generally opposed, we hypothesize that legislative and judicial decisions affirming gay rights will drive egalitarian and communitarian citizens to further support the underlying position that marriage equality is protected by the Constitution. Conversely, relatively hierarchic and individualistic citizens will become even more adamant in their belief that there is no constitutional protection against marriage discrimination. The reverse, consistent with the largely inverted belief structures regarding gun rights, will be true about beliefs regarding whether the Constitution protects the right to carry a concealed weapon. In both cases, citizens will assess the impact of a new law on their worldview, and update their own outlook if the law does not threaten core beliefs that they prize.

Consistent with prior research,<sup>61</sup> we also hypothesize that greater political knowledge and sophistication will generate *greater dissensus*, rather

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60. On the issue of gun control, see Kahan & Braman, Gun-Risk Perceptions, *supra* note 55, at 1307 (“[I]ndividuals who were relatively hierarchical in their outlooks were nearly twice as likely to oppose gun control as those who were relatively egalitarian, and individuals who were relatively individualistic were over four times as likely to oppose gun control as individuals who were relatively solidaristic.”). On the issue of gay rights, see Dan M. Kahan, The Cognitively Illiberal State, 60 *Stan. L. Rev.* 115, 131–33 (2007) (describing debate in terms of cultural outlooks); The Cultural Cognition Project at Yale Law Sch., The Cultural Cognition of Gay and Lesbian Parenting: Summary of First Round Data Collection 4–16, available at <http://www.culturalcognition.net/storage/Stage%201%20Report.pdf> (on file with the *Columbia Law Review*) (last visited Jan. 28, 2012) (presenting findings).

61. See Gastil et al., Wildavsky Heuristic, *supra* note 53, at 23 (showing stronger relationships between cultural orientations and most policy preferences as political knowledge increases); Dan M. Kahan et al., The Tragedy of the Risk-Perception Commons: Culture Conflict, Rationality Conflict, and Climate Change 8 (Cultural Cognition Project, Working Paper No. 89, 2011), available at <http://ssrn.com/abstract=1871503> (on file with the *Columbia Law Review*) (finding increased numeracy is associated with increased cultural

than agreement, because the social meaning of institutional choice is more salient and cognitively detailed to those with more knowledge about the body politic. The more politically sophisticated a citizen, the more partisan cultural affiliations will shape her institutional preference and the factual justifications she develops for that preference.

We also suspect that what Congress has done to affirm or reject a particular cultural worldview will contribute to citizens' desires to express their views about the institution's role in the cultural conflict at the ballot box. The theories of cultural status anxiety that describe much of voting behavior suggest that a variety of factors will be at play here, with controversial legislative and judicial actions motivating and demotivating different portions of the population. But the theories do not suggest—at least not to us—which effect will predominate with whom. Will citizens be rallied to voting-booth action when they view a new law as disparaging their way of life, or will they simply be demoralized into abstention?<sup>62</sup> Will cultural triumph result in political complacency or inspiration? Having no compelling reason to take one position or the other, we were curious to find out which outcome would prevail. Without a hypothesis, then, we asked a third, exploratory question: How does hearing about a controversial court decision or legislative action affect voting intentions and turnout?

Although we focus below mostly on two measures known to be exceptionally strong predictors of attitudes toward gay rights and gun rights, we do not think they capture all of the motivated cognition that may be occurring. Beliefs about these issues may be motivated by a host of other possible identifications and belief sets, such as political party affiliation, ideological self-identification, gender, race, rural/urban residence, and geographical location. Existing research suggests, however, that these identifications may be less influential than the two on which this Article focuses. The hypothesis that follows can be generalized to other less-powerful predictors of attitudes toward and beliefs about gay rights and gun rights such as political party affiliation and ideological self-identification, gender, race, rural-urban residence, and region. As part of our results we will highlight how these priors also motivate reactions to institutions. For the sake of simplicity, though, we focus on the two cultural measures. Additional results are reported in even greater detail in the Appendices.

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polarization on climate change beliefs, not greater agreement). See generally Jonathan J. Koehler, *The Influence of Prior Beliefs on Scientific Judgments of Evidence Quality*, 56 *Organizational Behav. & Hum. Decision Processes* 28, 47 (1993) (“Research reports that confirmed scientists’ prior beliefs were judged to be of higher quality than those that did not.”); Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 *Ann. Rev. Psychol.* 259, 262 (1998) (describing theoretical approach to bias in research interpretation).

62. For a significant example of these arguments, see Klarman, *supra* note 28, at 473–82 (explaining political backlash to controversial judicial decisions).

B. *The Research Design: Structure and Explanation*

1. *Design Structure.* —

a. *Sample.* — The subjects for the study consisted of 2,000 American adults. They were selected randomly from a stratified national sample by Polimetrix, Inc.<sup>63</sup> and participated in the study through Polimetrix's on-line testing facilities. Fifty-one percent of the sample was female. Seventy-six percent were white, and eleven percent African-American. The median level of education was "some college" but no college degree. The median annual income was between \$40,000 and \$49,999. The average age was 48.

b. *Cultural Worldviews and Demographics.* — The subjects' cultural worldviews were measured (in advance of the study) using two scales used in previous research on cultural cognition. The scales were composed of twelve statements such as "We have gone too far in pushing equal rights in this country" (with increasing agreement indicating lower egalitarianism) and "Society works best when it lets individuals take responsibility for their own lives without telling them what to do" (with increasing agreement indicating higher individualism). The participants were asked to agree or disagree with each statement along a six-point Likert scale.<sup>64</sup> The scales are psychometrically reliable ( $\alpha = 0.86$  for Hierarchy-Egalitarianism;  $\alpha = 0.81$  for Individualism-Communitarianism) and loaded appropriately on two orthogonal factors used as continuous predictors of cultural orientation used in multivariate testing of the study hypotheses.<sup>65</sup>

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63. Polimetrix (now YouGov) is a public opinion research firm that conducts online surveys and experiments on behalf of academic and governmental researchers and commercial customers (including political campaigns). See generally Scientific Research: Survey Research with Social Impact, YouGov, <http://corp.yougov.com/scientific-research/> (on file with the *Columbia Law Review*) (last visited Feb. 22, 2012). YouGov maintains a panel of over one million Americans that it uses to construct representative study samples. For more information on the "sample matching" approach, see generally Douglas Rivers, Sampling for Web Surveys (2007), available at [http://s3.amazonaws.com/yg-public/Scientific/Sample+Matching\\_JSM.pdf](http://s3.amazonaws.com/yg-public/Scientific/Sample+Matching_JSM.pdf) (on file with the *Columbia Law Review*).

64. See Gastil et al., Wildavsky Heuristic, *supra* note 53, at 17 (describing use of survey to determine cultural orientation).

65. Cronbach's alpha ( $\alpha$ ) is a statistic for measuring the internal validity of attitudinal scales. By computing the degree of intercorrelation among various items within a scale, it can be used to assess whether the items can properly be treated as common indicators of a latent attitude or trait—i.e., one that cannot be directly observed and measured. See generally Jose M. Cortina, What Is Coefficient Alpha? An Examination of Theory and Applications, 78 *J. Applied Psychol.* 98, 103–04 (1993) (analyzing coefficient's meaning and usefulness). Composite scales like those used in this study are desirable because they not only facilitate measurement of unobservable dispositions, but also enable measurements that are necessarily more precise than those based on any of the individual indicators alone, each of which can be seen as an imperfect or "noisy" approximation of the phenomenon being studied. See generally J. Philippe Rushton, Charles J. Brainerd & Michael Pressley, Behavioral Development and Construct Validity: The Principle of Aggregation, 94 *Psychol. Bull.* 18 (1983) (presenting usefulness of aggregation). Generally,  $\alpha = .70$  suggests scale validity—i.e., that the aggregated measures furnish a reliable measure

The subjects' demographic information (gender, age, income, etc.), and other measures of worldview, including partisan and ideological self-identity, and positions on gay rights and gun rights, were also taken before the study.

c. *Stimulus*. — The subjects were assigned to read one of four short articles describing a fictitious and controversial Supreme Court ruling or congressional act (or to a control condition with no article). We used these articles to stimulate and challenge underlying sentiment about institutional preferences in order to examine if the stated preferences persisted. In our experimental design to measure perceived competencies, we did not just mention the “Court” or “Congress”; we also included some basic information about how these institutions resolve issues. For the Court conditions on gun rights, for instance, the subjects read:

The Supreme Court held oral arguments on gun rights, which were presented by the lawyers for gun rights and by the lawyers for those opposing gun rights. After these arguments were presented to the Court, the members of the Court engaged in private discussions about the case for several months.<sup>66</sup>

For the Congress conditions, for instance, the subjects read:

Members of Congress met with representatives from affected communities about this issue, and several committees of Congress held public hearings on gun rights. Members of Congress traveling home to their congressional districts to campaign for the next election have also scheduled town hall meetings to discuss these issues with their constituents.<sup>67</sup>

The entire text of the articles provided to the subjects in each condition is provided in Appendix A. In the Gun Rights Conditions, the article reported either: (1) that the Supreme Court had held that the right to carry a concealed weapon was protected by the Constitution or (2) that the Congress had passed a law requiring federal and state governments to allow citizens to carry concealed weapons. In the Gay Marriage Conditions, the article reported either: (1) that the Supreme Court had decided that gay marriage was protected by the Constitution or (2) that the Congress had passed a law requiring federal and state governments to permit gay marriage.

We now turn to our response measures in the four conditions.

d. *Response Measures*. — We measured three dependent variables: institutional preferences, policy preferences, and electoral preferences. Each of these measures was part of a series of questions asked of the control group as well as each of the four groups exposed to one of the conditions.

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of the latent trait or attitude. Cortina, *supra*, at 101 (arguing  $\alpha = .70$  is commonly used, but occasionally incorrect).

66. See *infra* Appendix A.

67. See *infra* Appendix A.

In the four conditions, after the subjects had read one of the articles, we asked each to indicate (on a six-point scale) their agreement or disagreement with six statements bearing on perceived institutional competencies.<sup>68</sup> The perceived institutional competency items form a reliable scale, which we call “institutional competence” ( $\alpha = 0.77$ ), indicating each subject’s relative inclination to believe the Supreme Court is more competent than Congress to act on this issue. The subjects were also asked to respond to two statements addressing their preference for one institution over another in this case: “The Supreme Court, not Congress, should be deciding issues like these,” and “Congress, and not the Supreme Court, should be deciding issues like these.” These items were combined into a scale that we call “institutional preference” ( $\alpha = 0.66$ ).<sup>69</sup>

We used shorter response measures to address policy and electoral preferences. For policy preferences, we used two statements regarding either gay rights (in the Gay Marriage Conditions) or gun rights (in the Gun Rights Conditions)<sup>70</sup> and two statements regarding consequential beliefs.<sup>71</sup> Our response measures for electoral preferences involved two questions regarding voting in the upcoming midterm congressional election in 2010.<sup>72</sup>

*e. Moderating Measures.* — We also asked the subjects two questions regarding the salience of gun rights<sup>73</sup> and nine questions commonly em-

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68. Example statements included: “With politically controversial issues like this, the legislature will better understand the subtleties of how rights apply in a given setting,” and “When courts decide important issues like these, there is more legitimacy to the decision because judges are not beholden to political wheeling and dealing in the way that legislators are.” For a complete list, see *infra* Appendix B.

69. Although below 0.70, 0.66 represents respectable intercorrelation for a two-item scale. Cf. *supra* note 65 (claiming scale validity at  $\alpha = 0.70$ ). On the relationship between the number of items in a scale and Cronbach’s alpha, see Neal Schmitt, *Uses and Abuses of Coefficient Alpha*, 8 *Psychol. Assessment* 350, 351–52 (1996).

70. For example, “The Constitution prohibits the government from treating gay marriage differently than heterosexual marriage,” and “The government is prohibited from regulating or banning concealed weapons by the Constitution.” For a complete list, see *infra* Appendix B.

71. For example, “Allowing gays and lesbians to marry will undermine traditional marriage and undermine American families,” and “Prohibiting the use of concealed weapons makes it hard for ordinary citizens to defend themselves.” For a complete list, see *infra* Appendix B.

72. The questions were: “If the elections for Congress were being held today, which party’s candidate would you be likely to vote for in your congressional district?” and “How likely are you to vote in the upcoming federal congressional elections in November?”

73. The questions were: “How important is the issue of gun rights or gun control to you personally?” and “How closely do you follow the debate over gun rights and gun control?”



ployed to assess political knowledge.<sup>74</sup> These political knowledge items are widely used to measure variation in expertise and sophistication.<sup>75</sup>

f. *Analytic Measures.* — We employed various regression and simulation techniques to test our hypotheses and explore voting preferences.<sup>76</sup> Cultural measures and demographics served as independent variables, as did measures of party affiliation and ideological self-identification as liberal or conservative. Measures of perceived institutional competency and preference, measures of policy preferences, and measures of electoral preference served as dependent variables. Where instructive, we employed measures of political sophistication and knowledge as mediating variables.<sup>77</sup>

2. *Design Explanations.* — The experimental design was meant to replicate actual and potential real-world constitutional conflicts. Subjects in our control group were provided with measures of institutional preferences only for Congress and the Supreme Court, and subjects in the four conditions were provided with narratives involving either Congress or the Supreme Court. We did not have additional conditions (the President?

74. For example, “How much of a majority is required for the U.S. Senate and House to override a presidential veto? A bare majority (50% plus one), a two-thirds majority, or a three-fourths majority?” For a complete list, see *infra* Appendix B.

75. See generally Michael X. Delli Carpini & Scott Keeter, *Measuring Political Knowledge: Putting First Things First*, 37 *Am. J. Pol. Sci.* 1179 (1993) (developing and testing measures of political knowledge). We removed one of the traditional ten measures (“Whose responsibility is it to determine if a law is constitutional or not? [The President, the Congress, or the Supreme Court]”) because, as professors of constitutional law everywhere like to tell their students, there is arguably more than one correct answer, and that is what our study is analyzing in the first place.

76. See generally Andrew Gelman & Jennifer Hill, *Data Analysis Using Regression and Multilevel/Hierarchical Models* 137–66 (2007) (describing process and usefulness of statistical simulation); Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 *Am. J. Pol. Sci.* 347 (2000) (same). Statistical simulations add substantial value to nonlinear multivariate regression. One of the benefits is clarity. The practical upshot of the conventional elements of a regression output—including regression coefficients (whether or not standardized), one or another measure of error (such as standard deviations or t-statistics), and notations of the presence of specified levels of statistical significance—defy straightforward interpretation, even by those who know what they signify. Through the use of simulations, in contrast, a researcher can derive practically meaningful estimates of how particular explanatory variables (e.g., our cultural worldview measures) influence a quantity of interest (say, the likelihood that a person will take one position or another on a contested issue of fact at trial). Such estimates, moreover, often admit of graphic presentation that conveys relevant information much more readily than do regression output tables. See Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies*, Part I, 59 *Vand. L. Rev.* 1811, 1817 (2006) (noting graphical displays are more effective than tables); Lee Epstein, Andrew D. Martin & Christina L. Boyd, *On the Effective Communication of the Results of Empirical Studies*, Part II, 60 *Vand. L. Rev.* 799, 831 (2007) (objecting to use of tables to display information); Andrew Gelman, Cristian Pasarica & Rahul Dodhia, *Let’s Practice What We Preach: Turning Tables into Graphs*, 56 *Am. Stat.* 121, 121 (2002) (arguing graphs are superior for making comparisons and predictions).

77. See *infra* Appendix B for some of the questions we used.

administrative agencies? lower courts?) simply because of limited financial resources. As a result, there are some limitations in our capacity to extrapolate findings to other institutional actors, but also some findings we can more comfortably begin to extrapolate, as will be detailed. But our findings have fewer internal validity issues because each condition was provided a story that was only about the actions of one institution anyway<sup>78</sup>—so there was no need to manage the complications of only having two institutions instead of three or more.

We used descriptions of the Court and Congress, and descriptions of the constitutional arguments, that were relatively straightforward. We also structured the conditions to be doctrinally plausible. For the Gay Marriage Conditions, the constitutional argument that was presented to the Congress and the Court by pro-gay groups—and ruled in favor of in those two conditions—is that “the Constitution prohibits governments from treating gay marriage differently than traditional marriage between spouses of the opposite sex,”<sup>79</sup> an Equal Protection argument made by plaintiffs in gay marriage cases<sup>80</sup> and one that the Court could clearly hear on appeal and that Congress could at least plausibly remedy pursuant to Section Five of the Fourteenth Amendment.<sup>81</sup>

For the Gun Rights Conditions, the constitutional argument that was presented to the Congress and the Court pro-gun groups—and ruled in favor of in those two conditions—is that “federal and state governments [must] protect the ability of gun owners to carry a concealed weapon.”<sup>82</sup> This argument derives from the Second Amendment<sup>83</sup> and is an extension of *Heller* and *McDonald* that is already being raised in lower courts.<sup>84</sup> An infringement on individuals’ right to bear arms would be a rights violation that Congress could theoretically remedy. *McDonald* incorporated the Second Amendment against the states<sup>85</sup> and therefore Congress at least plausibly has the power to address any violations of that amendment pursuant to Section Five of the Fourteenth Amendment.

78. Two condition groups were provided narratives only involving Congress, and two groups were provided narratives only involving the Court. See *infra* Appendix B.

79. See *infra* Appendix A (describing hypothetical constitutional arguments brought by pro-gay groups to Supreme Court).

80. See Klarman, *supra* note 28, at 450 (noting equal protection arguments made in gay marriage cases).

81. See U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); *id.* § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

82. See *infra* Appendix A.

83. See U.S. Const. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

84. See Brandon P. Denning, *Five Takes on McDonald v. City of Chicago*, 26 J.L. & Pol. 273, 294–301 (2011) (describing current gun rights litigation since *Heller*).

85. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (“We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

In the control and in all of the conditions, we asked about institutional preferences by asking about a modified version of judicial supremacy *not* involving judicial finality. Subjects were asked about which institution “should decide the issue,” rather than asking whether that institution should decide the issue finally. We wanted to know which institution should be seen as predominant because it is rare that, outside of law schools, constitutional decisions are ever really final in a practical or political sense.

Our four conditions each involve a decision affirming a constitutional right—two conditions in favor of gay marriage, two conditions in favor of the right to carry a concealed weapon. Most constitutional issues the Court or Congress resolve do not involve pro-rights outcomes like this.<sup>86</sup> There is the possibility, then, that anti-rights actions by Congress and the Court might be different, an issue that further studies should examine. For the purposes of our experiment, though, it is worth stating that, historically, pro-rights cases are the types of cases that have featured most prominently in major cultural conflicts, and the frames thus reflect our desire to employ paradigmatic cases for complicating institutional preferences in constitutional law (arguments about backlash typically feature *Brown*, *Roe*, and other such rights-asserting cases rather than rights-denying cases). But clearly legal actions *rejecting* rights deserve further study.

Every study has its limitations, and experimental studies in particular face external validity limitations.<sup>87</sup> By their very nature experimental designs struggle to measure cumulative effects, or at least it is harder for them to do so.<sup>88</sup> This is because experimental designs tend to measure singular events, and a singular event has its own distinctive features (in this instance, our conditions feature very prominent cases) creating what we might call an “N problem.”

We examined singular, high profile constitutional disputes of two varieties (gay marriage and gun rights). This complicates the lessons to be drawn for multiple disputes (“too few N”), the lessons to be drawn for different kinds of disputes (“wrong kind of N”), and the lessons to be drawn for disputes not plausibly of a constitutional nature in the first place (“no N”). There is evidence that the more times the Court decides

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86. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 *Harv. L. Rev.* 4, 11 (2006).

87. See Jason Barabas & Jennifer Jerit, *Are Survey Experiments Externally Valid?*, 104 *Am. Pol. Sci. Rev.* 226, 227 (2010) (noting “unrealistically powerful manipulation” may yield results that do not “generalize beyond the particular study at hand”).

88. See Patrick J. Egan & Jack Citrin, *The Limits of Judicial Persuasion and the Fragility of Judicial Legitimacy* 5 (July 2011) (unpublished manuscript) (on file with the *Columbia Law Review*) (“One limitation of the experimental approach is that the treatment is a one-time injection of information, whereas in reality a Supreme Court ruling is just the opening salvo of a debate among the nation’s elites that can quickly overwhelm . . . a case.”).

cases, the more of an effect it creates for or against it (“too few N”).<sup>89</sup> Also, it might be that for less salient cases (“wrong kind of N”) or cases clearly not of a constitutional nature at all (“no N”), our conditions could present issues. Further research about the range of constitutional or close-to-constitutional-like issues that might come before the Court or Congress is necessary before making confident predictions on many fronts.

We focus on the relationship between cultural value measures and institutional choice rather than party affiliation or ideological self-identification for several reasons. First, in the data we gathered, as in several other prior studies, the value measures were better predictors of attitudes toward gay rights and gun rights, the subject matter on which our manipulations were based. Once measures for egalitarianism and individualism were entered into a regression with our measure of attitudes toward gun rights, for example, adding measures of party and ideology, for example, increased the variance explained by only 2%, increasing the  $r^2$  from 0.36 to 0.38. Just as importantly, though, we have a theoretical conception of how values drive opinions about gay rights and gun rights that is more robust than one that focuses on party affiliation and whether one labels oneself liberal or conservative. Indeed, to the lament of political scientists everywhere, the standard measures of party and ideological self-labeling are notoriously unstable over time and, perhaps more importantly, notoriously inconsistent predictors of policy attitudes.<sup>90</sup> We do not mean to say that party and ideological labels are irrelevant; in developing an experiment with a limited sample, however, we opted for the best predictors we could find.

### C. *The Results*

1. *Institutional Preferences.* — The results generally support the hypothesis laid out above—priors determine institutional preferences, cultural priors particularly so, and sophistication and salience are major moderating measures.

Consider, first, Figure 1 below illustrating the relationship between factual beliefs about the relative competencies of the Supreme Court and Congress and preferences for one institution relative to the other. Unsurprisingly, citizens who agree with statements such as “Courts should decide issues like these because they are less likely to be corrupted by political groups that want to distort the facts and the law” and disagree with

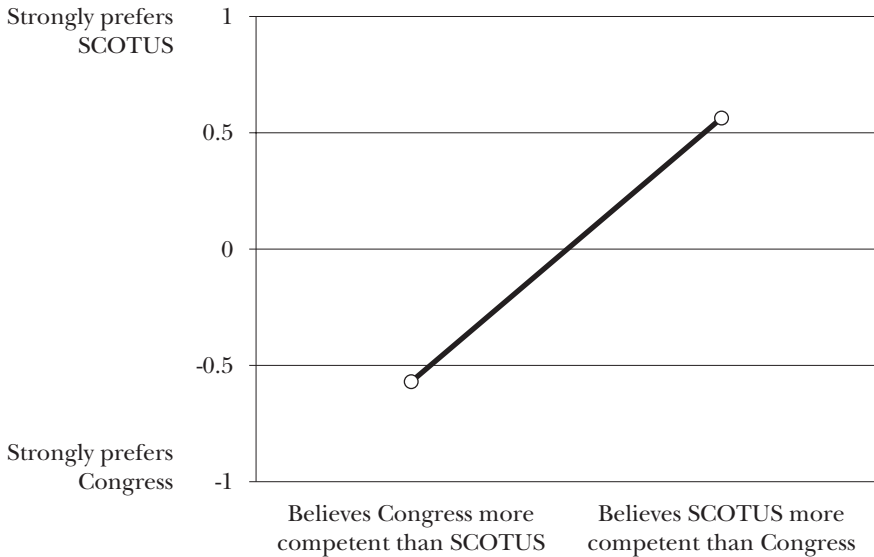
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89. See Gibson & Caldeira, *Citizens*, supra note 25, at 5 (“[T]he views of African Americans towards the United States Supreme Court evolved over time from strong support to considerable suspicion.”).

90. There is an extensive literature on this topic following the seminal work of Philip Converse. See generally Philip Converse, *The Nature of Belief Systems in Mass Publics*, in *Ideology and Discontent* 206 (David E. Apter ed., 1964). For further discussion on the relationship between value measures and ideology, see generally Gastil et al., *Wildavsky Heuristic*, supra note 53.

statements such as “The legislature should decide issues like these because they are less likely to be influenced by high-powered lawyers who don’t have the public’s best interest at heart” are more likely to prefer that the Supreme Court decide a matter than Congress. Subject’s beliefs about the relative competence of institutions and their preference for those institutions are tightly bound up with each other.

PREFERENCE FOR CONGRESS OR THE COURT CLOSELY CORRELATED WITH BELIEFS ABOUT RELATIVE INSTITUTIONAL COMPETENCE



*Figure 1.* Derived from univariate regression; detailed results are reported in Table 1, Model 1 in Appendix C. The values on the left are standard deviations in variance for the dependent variable institutional-preference. The values were obtained through regression based simulations with institutional-competence scale set to one standard deviation below the mean on the left (indicating belief in the competence of Congress relative to the Supreme Court) and one standard deviation above the mean on the right (indicating belief in the competence of the Supreme Court relative to Congress).

At first glance, this finding might seem like a reason for those arguing that citizens have real institutional preferences to rejoice: Institutional preference appears to correlate (and correlate very strongly) with their ostensibly outcome-independent justifications.

But this relationship is illusory; further inspection reveals that beliefs about the competence of the institutions themselves are contingent, in significant part, on whether the institution delivers an outcome that a subject favors. As illustrated in Figure 2, subjects with relatively egalitarian and communitarian values were significantly more likely to agree with pro-Court items in our institutional competence scale in the condition in

which they read that the Supreme Court had just made law favoring gay rights.

Difference between HI Pro Gay Congress & HI Pro Gay SCOTUS: -0.09 SD ( $\pm 0.17$ )

Difference between EC Pro Gay Congress & EC Pro Gay SCOTUS: 0.42 SD ( $\pm 0.19$ )

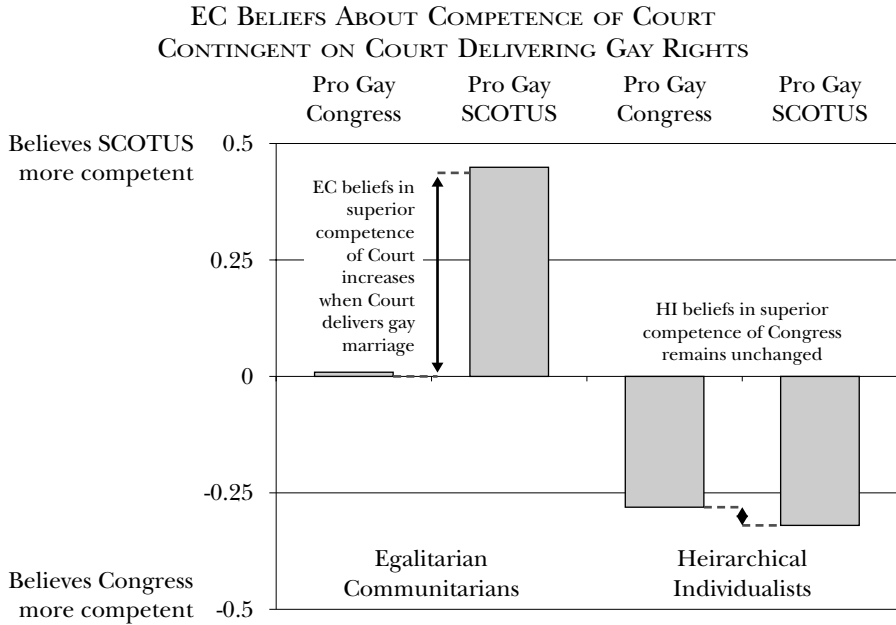


Figure 2. Derived from multivariate regression; detailed results are reported in Table 2, Model 1 in Appendix C. “Hierarchical-Individualist” and “Egalitarian-Communitarian” reflect values set, respectively, at +1 SD and -1 SD on both the hierarchy and individualism predictor scales. Responses on institutional competence scale were converted to z-scores to promote ease of interpretation.

But subjects with relatively hierarchic and individualist values, in contrast, viewed the Supreme Court as relatively unsuited to decide an issue like gay marriage—something they strongly believed should be left to Congress to determine. And this was so whether it was Congress or the Court delivering a favorable decision. Does that not indicate that they, perhaps, are principled in their evaluations of institutional competency, even if egalitarian communitarians are not?

In a word, no. Those with relatively hierarchic and individualist values, although skeptical of the Court’s competence to decide an issue like same-sex marriage equality, were not staunchly anti-Court. As can be seen below in Figure 3, their beliefs about the Court’s relative qualifications were labile across the pro-gun-rights conditions.

Difference between EC Pro Gun Congress & EC Pro Gun SCOTUS:  
0.06 SD ( $\pm 0.17$ )

Difference between HI Pro Gun Congress & EC Pro Gun SCOTUS:  
0.49 SD ( $\pm 0.16$ )

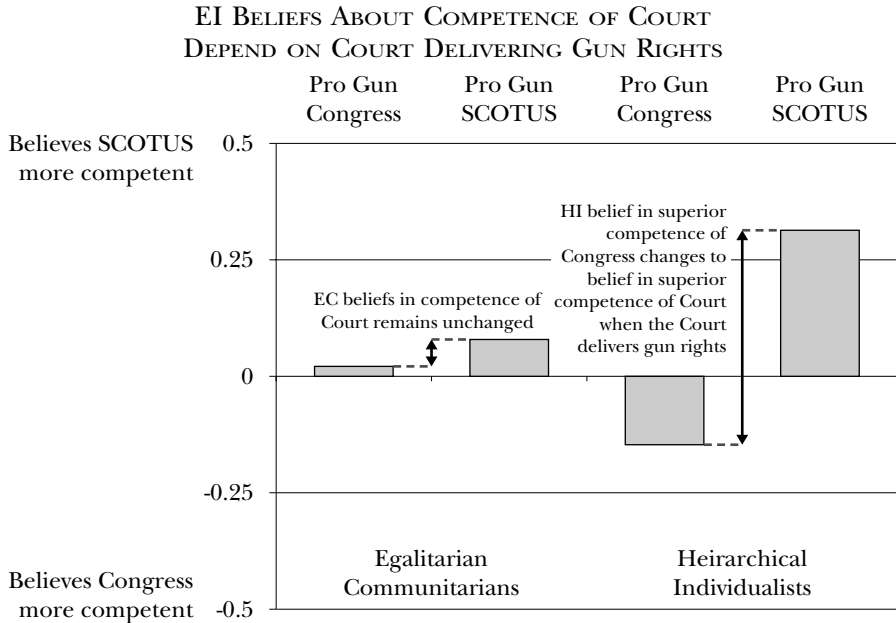


Figure 3. Derived from multivariate regression; detailed results are reported in Table 3, Model 1 in Appendix C. “Hierarchical-Individualist” and “Egalitarian-Communitarian” reflect values set, respectively, at +1 SD and -1 SD on both the hierarchy and individualism predictor scales. Responses on institutional competence scale were converted to z-scores to promote ease of interpretation.

Although those with relatively egalitarian and communitarian values voiced only an average belief in the Court’s competence to decide gun rights issues across conditions (as indicated by a score close to zero), those with relatively hierarchic and individualist values went from skepticism in the condition in which they read about Congress delivering them gun rights to strong belief in the Supreme Court’s competence in the condition in which the Court delivered those rights.

Our point is not that these changing beliefs are irrational—far from it. If an institution delivers a result that is congenial to a citizen’s cultural outlook, that citizen has plenty of reasons to believe that the institution in question is likely to protect their interest in other ways as well. Rather, our point is that, in light of this evidence that beliefs about relative institutional competence shift in this way, it will be very hard to disentangle debates over the structural differences between the institutions from the

outcomes they are delivering. In short, the competency debate is outcome-related in a way that institutional purists disavow.

Those involved in the debate over institutional choice might seek refuge in the logic of expertise. Relatively few citizens follow politics closely or know much about the structure of our political system. Perhaps lack of sophistication is what drives these kinds of effects: Those without knowledge of how our democracy is structured, one might surmise, will be more results-oriented precisely because they lack the kind of expertise that will allow them to make more principled results-independent distinctions between institutions.

Our data provide this theory scant shelter. When we enter political knowledge as a moderating variable, we see just the reverse: The more knowledgeable the subjects in our sample, the more labile their reactions across conditions. Consider Figures 4 and 5, illustrating the increased effect among relatively egalitarian-communitarian subjects across the Gay Rights Conditions and a similar effect among relatively hierarchical-individualist subjects across the Gun Rights Conditions.

CHANGE IN EC BELIEFS ABOUT COMPETENCE IN GAY RIGHTS  
CONDITIONS MODERATED BY POLITICAL KNOWLEDGE

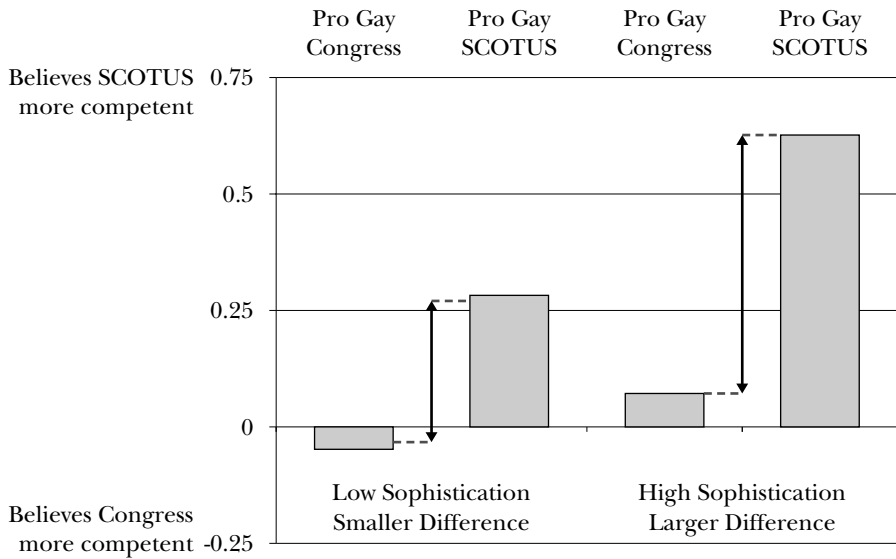


Figure 4. Derived from multivariate regression; detailed results are reported in Table 1, Model 2 in Appendix C. Values estimated for “Egalitarian-Communitarians,” with values set at +1 SD on both the hierarchy and individualism predictor scales. Values estimated for “Low Sophistication” and “High Sophistication” reflect values set, respectively, at +1 SD and -1 SD on the sophistication moderator scale. Responses on institutional competence scales shown on the y-axis were converted to z-scores to promote ease of interpretation.



CHANGE IN HI BELIEFS ABOUT COMPETENCE IN GUN RIGHTS  
CONDITIONS MODERATED BY POLITICAL KNOWLEDGE

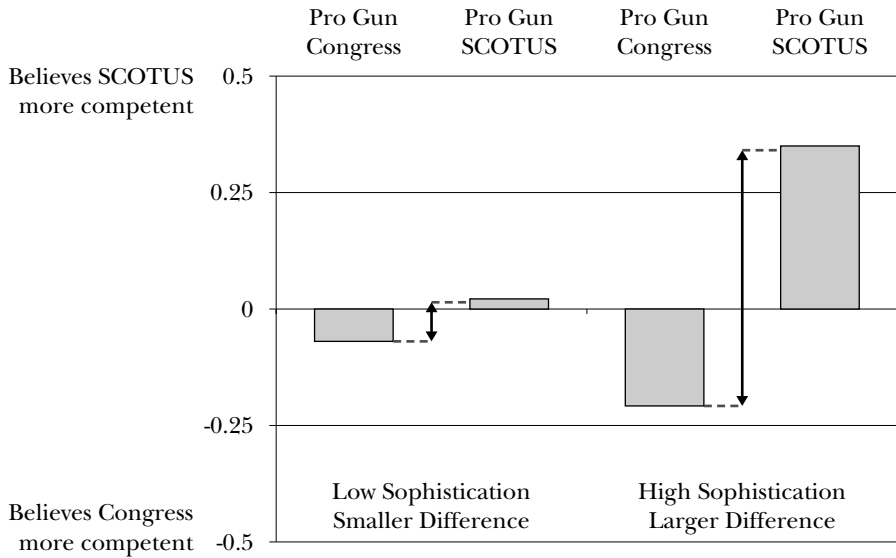
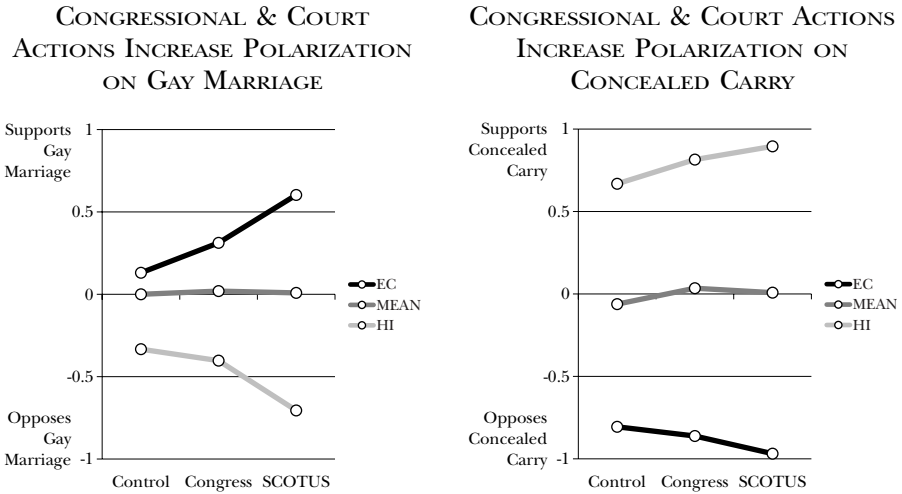


Figure 5. Derived from multivariate regression; detailed results are reported in Table 3, Model 2 in Appendix C. Values estimated for “Hierarchical-Individualists,” with values set at +1 SD on both the hierarchy and individualism predictor scales. Values estimated for “Low Sophistication” and “High Sophistication” reflect values set, respectively, at +1 SD and -1 SD on the sophistication moderator scale. Responses on institutional competence scales shown on the y-axis were converted to z-scores to promote ease of interpretation.

2. *Shifting Norms.* — The effects of Court- and Congress-made law on beliefs about underlying issues are illustrated in figures 6 and 7 below.



Figures 6 & 7. Derived from multivariate regression; detailed results are reported in Table 4, Models 1 & 2 in Appendix C. Values estimated for “Hierarchical-Individualist,” “Mean,” and “Egalitarian-Communitarian” reflect values set, respectively, at +1 SD, the mean, and -1 SD on both the hierarchy and individualism predictor scales. Scales measuring support for gay marriage and concealed carry shown on the y-axes were converted to z-scores to promote ease of interpretation.

With respect to the sample as a whole, there is almost no change in the average position on gay rights or gun rights across conditions. The change in average support for gay marriage and concealed carry, indicated by the medium-grey lines, is indistinguishable from zero in every condition, indicating no statistically significant change in support for a right to gay marriage or a right to carry a concealed weapon.<sup>91</sup>

But the lack of a change in the *average* conceals a great deal of variation among those most invested in debates over these issues: those with relatively hierarchic and individualistic values and those with relatively egalitarian and communitarian values. These citizens were moved to greater polarization in both the congressional and Supreme Court conditions. Note, however, that although the increased distance between the two is significant in both Congress and Supreme Court conditions, views about the constitutionality of the right in question are significantly *more* polarized in conditions in which the Court acted than conditions in which Congress acted. Controversial actions by the Supreme Court, at

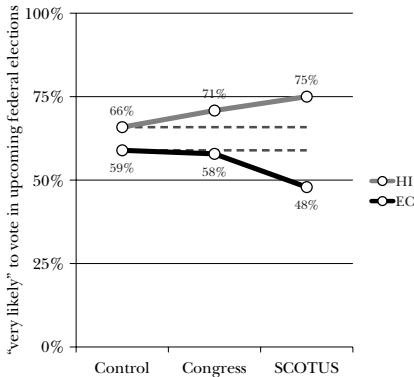
91. This, of course, does not mean there was no effect, just that it was undetectable in our sample. The null hypothesis cannot be proven.

least in the experimental conditions we have explored, are significantly more polarizing than similar actions by Congress when it comes to the underlying policy issue.

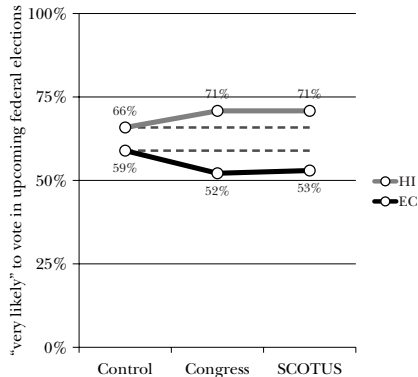
3. *Ballot-Box.* — Our exploratory analysis of the effects of voting intentions can be broken down into two distinct questions. First: *Did the manipulations have an effect on which party subjects said they were most likely to vote for in the upcoming election?* Our data provide no definitive answer to this question. Our data were unable to detect a statistically significant shift in party-voting intentions among hierarchical-individualists, or egalitarian-communitarians. However, the justifiably infamous Type II error—mistaking the failure to prove an effect as proof of the null hypothesis—is a cautionary concern here. We cannot state that there is no relationship, just that we have not found one. Perhaps with greater sample size or a different sample, a significant effect would appear.

The second question was not about partisan preference, but motivation: *Does action by the Court or Congress make individuals more or less likely to vote in an upcoming election?* Our findings are illustrated in figures 8 and 9 below:

SUPREME COURT ACTION ON GAY MARRIAGE SIGNIFICANTLY INCREASES GAP IN LIKELIHOOD OF VOTING



CONGRESSIONAL & SUPREME COURT ACTION ON CONCEALED CARRY INCREASE GAP IN LIKELIHOOD OF VOTING



Figures 8 & 9. Derived from ordered logistic regression; detailed results are reported in Table 5, Models 1 & 2 in Appendix C. Values estimated for “Hierarchical-Individualist,” “Mean,” and “Egalitarian-Communitarian” reflect values set, respectively, at +1 SD, the mean, and -1 SD on both the hierarchy and individualism predictor scales. Scale measuring likelihood of voting indicates a response of “very likely.” The gap between hierarchical-individualist voters and egalitarian-communitarian voters *increases* substantially in the Supreme Court condition affirming a right to gay marriage. (It also increases a little in the Congress condition establishing a right to marriage equality, but the difference is not statisti-

cally significant). And the gap expands in both the Congress and Court conditions affirming a right to carry a concealed weapon. It seems that the Court and Congress polarize policy preferences *and* turnout, and in both situations the Court polarizes to a greater degree. It is also notable that in each of the three conditions with statistically significant movement, hierarchical-individualists become more likely to vote and egalitarian-communitarians become less likely to vote. It seems that any action on constitutional issues in these conditions, regardless of the direction or the institution, mobilizes hierarchical-individualists and depresses turnout among egalitarian-communitarians.

Having no strong priors, any theory we develop to explain these results would necessarily be post hoc and somewhat of a “just so story.” But one thing we can say for certain is that our data do not fit the traditional ballot-box “backlash” theory. To be sure, the Gay Marriage Conditions seems to fit the pattern of a “backlash,” with voter mobilization among opponents of gay marriage and lower motivation among supporters. But in the Gun Rights Conditions, we see just the reverse of what the backlash theory would predict: Egalitarian-communitarians, rather than being galvanized by an assertion of gun rights, instead appear dispirited and (relatively) inactive compared to their victorious hierarchical individualist adversaries. Like any study worth its salt, ours raises as many questions as it answers, and more experimental research is needed to understand the logic of voters in reaction to controversial decisions by Congress and the Court.

### III. IMPLICATIONS FOR THE COURT, THE CONGRESS, AND THE COUNTRY

Our study is just the first step in examining the multiple institutional issues at stake in constitutional law, and the results of those studies will have implications for the analysis of this study. What if we added the President to the mix? What about federalism? In addition to what the Court or Congress decides, there are several other “decision attributes” (vote margin, style of reasoning, and so on) that might affect institutional preference.<sup>92</sup> There are many questions to be answered on this thread of institutional preferences in constitutional law.

What follows, then, is a preliminary discussion of the implications of contingent institutional preferences, with the recognition that this discussion is indeed provisional. Of course, the degree to which these findings might matter depends on how much one takes a consequentialist vision of judicial review.<sup>93</sup> Even for the nonconsequentialist, though, it is rele-

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92. For the most helpful summary of various of these features, see generally James Spriggs, John T. Scott & James R. Zink, *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. Pol. 909 (2009).

93. For a discussion of these themes, see generally Cass R. Sunstein, *If People Would Be Outraged by Their Decisions, Should Judges Care?*, 60 Stan. L. Rev. 155 (2007) (arguing judges should be cognizant of public opinion, if not necessarily controlled by it). For a response to Sunstein, see generally Andrew B. Coan, *Well, Should They? A Response*

vant that “[l]acking electoral legitimacy or a police force, judges are highly dependent on public acceptance of their authority. If the public is outraged, judicial authority might well be jeopardized.”<sup>94</sup>

We examine the implications of our results for the two key categories of actors in constitutional law: those who operate with the coercive power of the law behind them (the Supreme Court and Congress), and those who operate outside of government and try to influence what those inside of government do. We examine the Court from two perspectives: one looking at public-regarding implications and one looking at the implications for a Court with a (partial) agenda. From the public-regarding perspective, our results suggest that the Court is much less constrained by preferences and much more constrained by politics than had been previously thought. We also discuss how we might construct a system in which—given contingent institutional preferences—a Court making difficult decisions can still appeal to most Americans. We discuss how the combination of the reverence for the Court and the reductive nature of the debate about the Court increases our cultural polarization, and how difficult it can be for those with differing worldviews to reach across the cultural aisle when evaluating the institutions involved in constitutional politics. Rather than expecting constitutional conflict to feature cross-cultural efforts, we propose participants in these conflicts recognize the limitations of their own perspective, which can produce similar effects.

For the partial Court, our results suggest that a partisan Court trying to pursue an aggressive constitutional agenda has more flexibility to act because of how culturally contingent institutional preferences operate. A Court deciding in favor of gay marriage or in favor of gun rights can expect a base of supporters even more supportive of the Court’s institutional role and of the underlying constitutional issue *because of* the Court’s decision. This base of support may insulate the Court from immediate backlash. On the flip side, though, an egalitarian-communitarian Court has reason to worry about electoral turnout, because our results suggest that any Court decision demobilizes voters supportive of these Court decisions in that circumstance and increases turnout among conservative voters.

For Congress, our results suggest that the public might not mind congressional constitutional interpretations as much as might be assumed. Instead, there is much room for Congress to interpret the Constitution. Judicial supremacy is not the entrenched feature of public opinion that so many have assumed, and so a Congress attuned to the realities of constitutional politics has plenty of room to act on constitutional issues. Again, though, we suggest caution, but at least for gay mar-

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to If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 *Stan. L. Rev.* 213 (2007) (elaborating on Sunstein’s basic framework of judicial cognizance).

94. Sunstein, *supra* note 93, at 171.

riage Congress risks mobilizing turnout at the ballot box against its decision.

For social movements trying to extract constitutional results from institutions, the lessons are that where one goes to look for these results matters less than what one can expect from where one goes to look for these results. The competencies approach that has garnered so much attention among social activists does not provide much strategic guidance for movements. Instead, attention might be directed to the cultural-political differences between the institutions and the politics they generate. Likewise, constitutional theorists should stop discussing constraints on the role of the Court so much, because the public does not think the way some theorists seem to assume or presume.

### A. *The Institutional Actors of Constitutional Law*

1. *The Supreme Court.* — We discuss below what our findings might mean for the Supreme Court. We do not endorse a particular view of the Court as acting either faithfully for us all or strategically for some of us, but simply highlight what our findings suggest for both potential views of the Court.

#### a. *The Public-Regarding Court.* —

i. *Separation of Powers and Institutional Preferences.* — Our federal system relies on separation of powers among the branches of government to function properly. The basic design, as Madison saw it, is one in which “ambition must be made to counteract ambition.”<sup>95</sup> This means not only that ambitious outcomes constrain ambitious outcomes, but also that ambitious self-defined institutional roles constrain ambitious self-defined institutional roles. No branch is supposed to do everything while another branch does nothing. And so part of what our separation of powers design is intended to do is to create limits on decisions but also to create limits on agendas.

Article III of the Constitution indicates a number of cases comprising the mandatory docket of the Court,<sup>96</sup> and then specifies a discretionary docket, which Congress has modified over the years.<sup>97</sup> Constitutional theorists, meanwhile, have spilled much ink trying to define the role of the Court. Dan Kahan has referenced these efforts as responses to the

95. The Federalist No. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

96. See U.S. Const. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

97. See *id.* (“In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”). For a helpful summary of these changes and the controversies surrounding them, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 Colum. L. Rev. 1643, 1657–60 (2000).

“neutrality crisis”<sup>98</sup> created by Herbert Wechsler and the desire to find “neutral principles” in constitutional law.<sup>99</sup> From Ackerman to Dworkin to Ely, constitutional law remains fixated on telling us not just what the Court should decide, but when the Court should decide. While the neutrality crisis has undermined outcome-independent theories about what the Court should decide, in many ways it has relied on process as the last refuge. Even as disagreement persists about *how* to decide certain cases, agreement seems to persist about *when* and *whether* to decide certain cases.

Chief among these outcome-independent constraints on the Court is the theory of “backlash” and the self-enforcing nature of that theory. Supporters of a cause, according to this theory, are less likely to support the cause because of a dislike for the court-centeredness of the change, and perhaps because the sweet smell of victory makes them less motivated to keep fighting the good fight.<sup>100</sup> Opponents of the outcome, angered by the decision taking the issue out of the democratic process—and more aware of their disagreement because the decision generates focus on the issue<sup>101</sup>—mobilize and vote in greater numbers. Because of greater opposition by initial supporters and by initial opponents, there is a net increase in disfavor for the overaggressive decision by the Court. Backlash against the Court is a form of the “political safeguards”<sup>102</sup> that reinforce the separation of powers: If the Court oversteps, supporters will desert it and opponents will mobilize against it. So, the argument goes, overstepping by the Court in *Brown* changed elections in the South,<sup>103</sup> and overstepping by the Massachusetts Supreme Judicial Court in *Goodridge* affected the 2004 presidential election.<sup>104</sup>

Our results suggest this self-enforcing feature of backlash does not transpire this way. When the Court decides an issue, the supporters of the decision believe even more (not less) that the Court was right to decide it. Backlash theorists are right to suspect that opponents of the decision

98. See Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *Harv. L. Rev.* 1, 51 (2011) [hereinafter Kahan, *Neutral Principles*] (“Relieving citizens of the anxiety that the Court is resolving cases in a partisan manner is the asserted justification for ‘constitutional theories.’”).

99. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959) (arguing for transcendent reasoning and analysis in Supreme Court opinions).

100. See Douglas NeJaime, *Winning Through Losing*, 96 *Iowa L. Rev.* 941, 951 (2011) (“[F]ocusing on courts (and litigation) . . . demobilizes a potentially vibrant movement.”).

101. See Klarman, *supra* note 28, at 473 (stating that court rulings produce backlash by “rais[ing] the salience of an issue” to opponents).

102. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 558 (1954) (“[T]he national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions . . . on the domain of the states.”).

103. See Klarman, *supra* note 28, at 453–58 (describing backlash after *Brown*).

104. See *id.* at 459–73 (describing backlash after *Goodridge*).

become even less supportive of the Court deciding issues, but those switches are effectively (more or less depending on the condition) cancelled out by opponents of the decision switching in the other direction against the Court.

There is still some evidence that backlash could be self-enforcing, depending on the condition. When hierarchical-individualists win in the Court on gun rights, or lose in the Court on gay marriage, they are more likely to vote, and egalitarian-communitarians are less likely to vote. This could be described as backlash if the Court decides a gay marriage case because of electoral results (more opponents voting and fewer supporters voting), but entrenchment if the Court rules in favor of gun rights (more supporters voting and fewer opponents voting).

Backlash could still be self-enforcing because of the activities of “polarization entrepreneurs.”<sup>105</sup> In other words, whatever alignment of individuals is outraged by the Court deciding an issue might create a movement against the Court even if the median preference is not reflected in that movement. It could be that the right people in the right positions are outraged, and this triggers a backlash even if this is not reflected in the general public opinion that we measured.

If the range of self-enforcing constraints envisioned by backlash do not all exist, or at least exist in equal numbers, how else is the Court constrained? Another way in which the separation of powers might constrain the Court is the craft or professional sanction that might keep the Court in place. The Court pays great attention to how elites perceive it, particularly legal elites.<sup>106</sup> If the Court oversteps proper limitations, then perhaps the condemnations of the professional community (think of Judge Learned Hand’s attack on *Brown*)<sup>107</sup> or other elites and interest groups will ensue.

But our results suggest that subjects with higher salience and/or sophistication scores are even less likely to evaluate institutional preferences independent of outcome preferences. A reader of Barry Friedman’s scholarship on debates within constitutional scholarship—and the oscillations of liberal theorists between support for and opposition to the Court depending on what the Court was doing—should not

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105. See Cass R. Sunstein, *Deliberative Trouble: Why Groups Go to Extremes*, 110 *Yale L.J.* 71, 97 (2000) (“‘[P]olarization entrepreneurs’ . . . creat[e] . . . spheres in which like-minded people can hear a particular point of view from one or more articulate people, and also participate . . . in a deliberative discussion in which that point of view becomes entrenched and strengthened.” (footnote omitted)).

106. See Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 *Geo. L.J.* 1515, 1516 (2010) (arguing “Supreme Court Justices care more about the views of academics, journalists, and other elites than they do about public opinion”).

107. See Learned Hand, *The Bill of Rights* 54 (1958) (asserting that in “The Segregation Cases” the Court “mean[t] to reverse the ‘legislative judgment’ by its own appraisal”).



be surprised.<sup>108</sup> The numbers in our study are not small, either: If the Court rules in favor of gun rights, for instance, those on the higher end of the sophistication scale in favor of gun rights prefer the Court by much more, and those at the higher end of the sophistication scale against gun rights by much less. The Court breaks even when it decides an issue, and so there is no self-enforcing backlash by elites either.

What, then, constrains the Supreme Court, if some of the assumptions of the backlash theory and competencies approach do not? The large majority of the cases that the Court decides are much lower salience than gay marriage or gun rights cases.<sup>109</sup> If low-salience cases feature more outcome-independent institutional preferences, then in the large majority of the cases the Court hears it might be constrained by a self-enforcing backlash.

Self-enforcing constraints also exist when the Court decides a case in a way that no worldview shared by any meaningful percentage of the population supports—a case like *Citizens United* might be an example of this (with 80% of the public disapproving elements of the decision).<sup>110</sup> These decisions do produce a net backlash that can harm the Court. Lowering decision costs and ensuring that the Court does not issue a *Citizens United* may be part of the reason why the Court has largely decided cases in a way that national majorities support<sup>111</sup>—if a Justice does not know who will support a decision, and it is difficult to ascertain, better to shoot for the median.

In the high-salience cases like those discussed in our study, even if outcome-independent preferences do not constrain the Court, part of what constrains the Court is what constrains other actors as well: the political back and forth of separation of powers. Part of this effect stems from the political back and forth not derived from specialized impressions of institutional roles, but from the result of normal ambition counteracting ambition. But part of what constrains the Court derives from the dynamics triggered by the Court, what we highlighted as the other version of backlash and institutional preferences in Part I. Because the Court has

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108. See Friedman, Birth, *supra* note 8, at 155 (suggesting “numerous . . . Supreme Court decisions striking down progressive constitutional legislation . . . [have] led to a spate of articles decrying the inconsistency of democracy with judicial review, and calling for constitutional interpretation outside the courts”).

109. See Schauer, *supra* note 86, at 9 (“For in reality neither constitutional decisionmaking nor Supreme Court adjudication occupies a substantial portion of the nation’s policy agenda or the public’s interest . . .”).

110. See Barry Friedman & Dahlia Lithwick, Speeding Locomotive: Did the Roberts Court Misjudge the Public Mood on Campaign Finance Reform?, *Slate.com* (Jan. 25, 2010, 2:09 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2010/01/speeding\\_locomotive.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/speeding_locomotive.html) (on file with the *Columbia Law Review*) (discussing public response to *Citizens United*).

111. See, e.g., Jack M. Balkin & Sanford Levinson, The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State, 75 *Fordham L. Rev.* 489, 501 (2006) (“[T]he Supreme Court tends, in the long run, to cooperate with the vector sum of forces in national politics.”).

“neither the purse nor the sword,”<sup>112</sup> it might be institutionally disadvantaged in playing this normal separation of powers game. Even if people do not perceive the Court differently, that does not mean the Court is immune from normal political constraints or even more significant political constraints (because of its relative lack of hard power).

b. *A Court for Everyone*. — There is a widely articulated and held cultural script that the Court is *the* institution to serve all of us from all cultural perspectives. Terry Maroney has termed this the “persistent cultural script of judicial dispassion.”<sup>113</sup> Even those who want empathetic Justices want them to use empathy to be able to appreciate the perspectives of others who differ from them.<sup>114</sup> The social scientists tell us that support of all sorts for the Court is much higher than any other institution, now or during modern times, across ideologies.<sup>115</sup> In the aftermath of *Bush v. Gore*,<sup>116</sup> Linda Greenhouse summarized a belief that the Court was distinctively able to “take a bullet for the country.”<sup>117</sup>

But our results suggest this is not the way people think. They are culturally motivated in how they perceive the role of the Court in the same way they are culturally motivated in how they perceive a congressional law about abortion or an executive order about stem cells or military commissions. If we perceive the role of the Court in the same culturally biased way we perceive everything else, is there any way to rise above that?

We discuss in this section the lesser need for unifying strategies because of the nature of most and even controversial constitutional decisions by the Court. But in those situations in which we do not want those from diverging perspectives to see the world in different ways, we discuss how the nature of the rhetoric about the Court makes the situation worse. Rather than helping us to recognize that our perspectives are biased, the public discussion about the Court pushes bias underground, thereby making it worse.

i. *Affirmation to Make the Court for Everyone: Affirming Constitutional Others*. — As an initial matter, in most cases finding unifying strategies is

112. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

113. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 *Calif. L. Rev.* 629, 633 (2011) (“[J]udicial dispassion has come to be regarded as a core requirement of the rule of law, a key to moving beyond the perceived irrationality and partiality of our collective past.”).

114. See, e.g., Thomas B. Colby, *In Defense of Judicial Empathy* 1–2 (2011) (unpublished manuscript) (on file with the *Columbia Law Review*) (arguing judges should use empathy, or “cognitive ability to understand a situation from the perspective of other people, combined with the emotional capacity to comprehend and feel those people’s emotions in that situation”).

115. See *supra* notes 25–26 and accompanying text (discussing empirical literature on perceptions of Court’s legitimacy).

116. 531 U.S. 98 (2000) (*per curiam*).

117. See Linda Greenhouse, *Learning to Live with Bush v. Gore*, 4 *Green Bag* 381, 382 (2001) (“[T]he Court’s intervention was an act of judicial statesmanship that saved the country from judicial and political chaos.”).

unnecessary. Low-salience cases feature cultural priors affecting preferences much less than in other cases, and so there is no need to rise above cultural bias.<sup>118</sup> In the large majority of other cases, “affirmation”<sup>119</sup> might be able to overcome cultural bias. By affirmation, we mean reinforcing and recognizing the validity of an opposing worldview—in this case, an opposing constitutional worldview.<sup>120</sup> As Dan Kahan puts it, “[w]hen information is presented under conditions that effectively *affirms* [sic] an individual’s identity, that individual is far less likely simply to dismiss evidence and arguments that challenge a belief.”<sup>121</sup> One of us has noted that these approaches can have some benefits in constitutional law.<sup>122</sup>

This psychological principle of “affirmation” has perhaps motivated the search for unifying theories of constitutional law, with the hope that a properly calibrated frame can unify otherwise fragmented constituencies. The belief has been that “[i]t takes a theory to beat a theory”<sup>123</sup> and so finding the right theory could do the trick. Jack Balkin has argued that liberal originalism might perform this role.<sup>124</sup> Noah Feldman has argued that focusing on the flaws with democratic capitalism can perform this

118. See Robert S. Baron et. al., Social Corroboration and Opinion Extremity, 32 J. Experimental Soc. Psychol. 537, 538 (1996) (“[I]ndividuals may avoid taking extreme positions unless they have a good deal of certainty regarding the issue.”).

119. See, e.g., Kevin R. Binning, David K. Sherman, Geoffrey L. Cohen & Kirsten Heitland, Seeing the Other Side: Reducing Political Partisanship via Self-Affirmation in the 2008 Presidential Election, 10 Analyses Soc. Issues & Pub. Pol’y 276, 276 (2010) (finding that “providing individuals a chance to affirm their self-integrity” relieved “pressure to adhere to their [political party’s] core beliefs and behaviors”); Geoffrey L. Cohen, Joshua Aronson & Claude M. Steele, When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self, 26 Personality & Soc. Psychol. Bull. 1151, 1151 (2000) (finding evidence consistent with theory that “defensive reactions [in the face of disconfirming evidence] would be ameliorated by an affirmation of an alternative source of self-worth”).

120. See David K. Sherman & Geoffrey L. Cohen, Accepting Threatening Information: Self-Affirmation and the Reduction of Defensive Biases, 11 Current Directions Psychol. Sci. 119, 119 (2002) (“[P]eople respond to information in a less defensive and more open-minded manner when their self-worth is buttressed by an affirmation of an alternative source of identity.”).

121. Kahan et al., They Saw a Protest, *supra* note 52 (manuscript at 41).

122. See, e.g., Dan M. Kahan & Donald Braman, Cultural Cognition and Public Policy, 24 Yale L. & Pol’y Rev. 149, 168 (2006) (“Policymakers can harness this identity-affirmation effect by designing policies that are sufficiently rich in their social meanings to affirm the values of persons of diverse cultural worldviews simultaneously.”).

123. Randy E. Barnett, An Originalism for Nonoriginalists, 45 Loy. L. Rev. 611, 617 (1999).

124. See generally Jack M. Balkin, Living Originalism (2012) (arguing that liberal originalism appeals to broad and previously unreachable constituencies).

role.<sup>125</sup> Kenji Yoshino has argued that deciding cases on liberty rather than equality grounds can attract wider support for decisions.<sup>126</sup>

Affirmation and the constitutional theories emanating from related impulses might work in the large majority of cases that the Court hears, but it still leaves us with complications for the most salient, blockbuster cases the Court hears—like the two cases we asked about in our study. In those cases, it is hard to imagine affirmation working as well. Affirmation in these instances (because cultural priors are so intense) is expensive because it requires individualized intervention, dialogue, deliberation, and debiasing—something it would be costly and difficult to do each time the Court issues a high-profile constitutional decision for the hundreds of millions of Americans affected by these decisions.<sup>127</sup>

Let us start with the Justices. It is hard to imagine Justice Scalia prefacing his opinion in *Lawrence v. Texas* by first recognizing how important equality is to the gay community, before continuing on to insist that the Court “has largely signed on to the so-called homosexual agenda . . . [and] dismantle[d] the structure of constitutional law.”<sup>128</sup> It is hard to imagine Justice Ginsburg starting her dissent in *Gonzales v. Carhart* with a paean to the religious significance of the unborn fetus before describing how the Court’s pro-life decision interferes with “a woman’s autonomy to determine her life’s course.”<sup>129</sup> Individuals are nominated to the Court because they are committed to the cultural perspective behind the agenda of the senator belonging to the nominating President’s party on salient issues.<sup>130</sup> The President must nominate individuals like this to satisfy core members of his own political party.<sup>131</sup>

Our results suggest that it is difficult in high-salience cases for the public to receive these messages as anything other than coded cultural acceptance or rejection. Affirmation and its debiasing can be drowned out by the polarizing rebiasing being performed by interested parties in these cases. In high-salience cases, by the time the case reaches the Court, lawyers (and others) have worked diligently (and effectively) to frame these cases in ways meant to appeal to partial cultural communities, so

125. See Noah Feldman, *Imagining a Liberal Court*, N.Y. Times Magazine, June 27, 2010, at 39, 41–42 (arguing that limitations on capitalism are more acceptable).

126. See Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 792–97 (2011) (arguing that liberty and dignity-based decisions are more acceptable than equality-based decisions).

127. See Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. Personality & Soc. Psychol. 1069, 1070 (1995) (describing methodology behind debiasing).

128. 539 U.S. 558, 602–05 (2003) (Scalia, J., dissenting).

129. 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

130. See Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments 110–11* (2005) (noting ideological congruity between senators belonging to nominating President’s party and their Court nominees).

131. See Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 Sup. Ct. Rev. 381, 450 (“[T]he politicization of the confirmation process has been made even more dramatic by the increasingly aggressive involvement of interest groups.”).

that by the time the case makes its way to the Court it is fraught with heavy, culturally-loaded messages. And so even the best efforts at affirmation might fall on culturally-biased ears.

Consider, for example, *Lawrence*. One could argue that the Court tried its best to appeal to both natural supporters of the decision (egalitarian-communitarians) as well as to potentially natural opponents of the decision (hierarchical-individualists). The decision in *Lawrence* expanded constitutional protections for gay Americans as well as straight Americans because it was a substantive due process decision.<sup>132</sup> The majority opinion explicitly bracketed the issue of same-sex marriage as one that the Court was not deciding.<sup>133</sup> Kenji Yoshino praised these features of the opinion as “quiet[ing] pluralism anxiety.”<sup>134</sup>

But, despite its best efforts, affirmation might have been impossible in *Lawrence* because the affirming and anxiety-quieting were drowned out by what preceded the case as well as what followed it. Gay rights were already an issue being intensely debated by various cultural communities, with liberal interest groups highlighting *Lawrence* as potentially a major step forward and conservative interest groups highlighting *Lawrence* as potentially a major step backward and the next step toward “far more controversial issues like same-sex marriage.”<sup>135</sup> It would have been hard to focus on discrete elements of the opinion by the Court and tune out the pre-decision and post-decision framing of the case.

And so one study found that *Lawrence* polarized opinion on the Court more than a series of other recent and important decisions.<sup>136</sup> Our survey design was intended to replicate the surrounding atmospherics of a high-salience Court decision, with similar results. In the Gay Marriage Conditions, before the Court or Congress acted, the positions of the opposing sides were presented. Subjects were told that “[g]ay rights groups have argued that the Constitution prohibits governments from treating gay marriage differently” and “opponents have argued that the Constitution only protects traditional marriages and families.”<sup>137</sup> In response to Court or congressional action, these perspectives were presented again, as the conditions stated that “[g]ay rights groups praised the new decision as a ‘major step forwards in the history of American civil

132. 539 U.S. at 564 (“We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”); see also Yoshino, *supra* note 126, at 793 (citing this as example of strategy that “stresses the interests we have in common as human beings rather than the demographic differences that drive us apart”).

133. *Lawrence*, 539 U.S. at 578 (“The present case does not involve . . . whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”).

134. Yoshino, *supra* note 126, at 778.

135. Klarman, *supra* note 28, at 459.

136. Egan & Citrin, *supra* note 88, at 5.

137. See *infra* Appendix B.

rights and a vindication of the Constitution’” and opponents were noted as “criticiz[ing] the decision as a ‘blow to the people and traditions of the United States and to the importance of the institution of traditional marriage.’”<sup>138</sup> Our results showing the significance of priors could be because of these polarizing atmospherics.

Another reason why affirmation might be difficult is that the Court decision need not just affirm and dignify *existing* biases in preferences, but respond to *greater* biases in preferences created by the Court in these high-salience cases. Our results found that Court decisions on gay marriage and gun rights polarized sentiments on the underlying policy issues in statistically significant ways: Support for gay marriage after a Court decision on gay marriage increased among egalitarian-communitarians, and decreased among hierarchical-individualists. Support for gun rights after a Court decision on gun rights increased among hierarchical-individualists and decreased among egalitarian-communitarians.

ii. *Entitativity to Make the Court for Everyone: Breaking Down Constitutional Walls.* — If affirmation might not work as well in high-salience cases, what are we to do? One response is easy: nothing, and we should not see this as a matter of concern. There are no clear right or wrong answers in these cases, or at least no clear right or wrong factual presuppositions. The concern about cultural bias is most convincing when there is evidence that it prevents individuals from responding to accurate factual information.<sup>139</sup> But we have no reliable way to assess whether the Court, as an objective factual matter, is more or less capable than Congress in deciding these issues. These are less clearly factual issues in which bias might distract us from factual truths.

Compliance with Court decisions is also not really an issue. All of the research suggests that the Court enjoys over 80% support for its basic constitutional powers.<sup>140</sup> Having a constitutional system in which the occasional, high-salience battle leads our priors to affect how we think about what the Court should do is not necessarily problematic in the first place. It can be argued that it is precisely because of support for the Court that it can and should handle these sorts of conflicts where passions are most intense and most biased.<sup>141</sup> In diverse societies, there will be issues that divide us, even if not many. For those issues, rather than

138. See *infra* Appendix B.

139. See Dan Kahan, *Fixing the Communications Failure*, 463 *Nature* 296, 297 (2010) [hereinafter Kahan, *Communications Failure*] (“If we want democratic policy-making to be backed by the best available science, we need a theory of risk communication that takes full account of the effects of culture on our decision-making.”).

140. See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Towards the United States Supreme Court*, 47 *Am. J. Pol. Sci.* 354, 355 (2003) [hereinafter Gibson et al., *Measuring Attitudes*] (describing survey results in which 30% of those surveyed indicated “great deal” of confidence and 50% of those surveyed indicated “only some” confidence in individuals running Supreme Court).

141. See Eskridge, *supra* note 30, at 1294 (stating role of Court is to keep “the *stakes of politics . . . reasonably low*”).

trying to overcome division, better to manage them in tolerable ways. Having the more popular institution (the Court) decide these cases is an acceptable panacea.

But why tolerate polarizing disagreement when there might be something we can do about it? We propose that talking about the Court differently might mitigate some of the dynamics discussed earlier. The scholarship about finding common ground is really of two forms: findings that affirmation can help<sup>142</sup> and findings that self-awareness about bias can help.<sup>143</sup>

However, the public rhetoric that discusses the Court makes the situation worse. This is for two related and reinforcing reasons. First, our discussion of the Court assumes and reiterates the sense of two separate, distinct perspectives on the Constitution, with each side refusing to acknowledge any flaws in their positions (“entitativity” is what the literature calls this sense of separate and discrete groups with their own self-psychology). Second, this discussion proceeds in the face of a Court that is reified and revered rather than challenged, limiting the challenges posed to either group perspective. We propose, instead, self-identifying flaws in our own perspectives on the Court, and opening the Court up to genuine discussions to further this more open discussion. This strategy has the potential to open our constitutional minds.

Let us start with the notion of “naïve realism.” Naïve realism refers to our tendency to see others as hopelessly biased (“realism”), but see ourselves as objective (“naïve”).<sup>144</sup> This relies on an in-group and out-group dynamic. One’s own group (the in-group) is not biased but others (the out-group) are biased. Naïve realism is even greater among groups with a higher degree of entitativity, or the “extent to which a social aggregate is or is not perceived as a coherent, unified, and meaningful entity.”<sup>145</sup> The more we see ourselves as part of one group—and others as part of another group—the more we expect those groups to demonstrate “more

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142. See Hirt & Markman, *supra* note 127, at 1069 (“Previous research has suggested that an effective strategy for debiasing judgments is to have participants ‘consider the opposite.’”).

143. See Scott O. Lilienfeld, Rachel Ammirati & Kristin Landfield, Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?, 4 *Persp. on Psychol. Sci.* 390, 393 (2009) (summarizing research on debiasing and its efficacy).

144. Lee Ross and Andrew Ward, Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding, *in* *Values and Knowledge* 103, 110–11 (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996).

145. Vincent Yzerbyt, Olivier Corneille & Claudia Estrada, The Interplay of Subjective Essentialism and Entitativity in the Formation of Stereotypes, 5 *Personality & Soc. Psychol. Rev.* 141, 141 (2001).

similarity.”<sup>146</sup> We therefore perceive our in-group and the out-group both as having “coherence and unity.”<sup>147</sup>

The problem with this is the mental shortcut it creates: if you are in my group you are open and reasonable, whereas if you are in the other group you are “fixed and unreasonable.”<sup>148</sup> If you are an egalitarian-communitarian, you look for others who are egalitarian-communitarians, identify with them, support their decisions, and consider them fair, even while you think that hierarchical-individualists are a coherent and unfair community.

These features of group-ness plague our modern discussion about the role of the Court. Members of the public see decisions of the Court as based on considerations other than objective determinations of the law, particularly when that decision is disagreeable.<sup>149</sup> But our public discussions of the Court do not acknowledge this fact, and instead feature heuristics meant to communicate to each Justice’s community that *they* are being objective even as *others* are being biased. Chief Justice Roberts stated at his confirmation hearings that he aspires to be an “umpire” to indicate in language resonating with hierarchical-individualists that he was being fair.<sup>150</sup> Justice Scalia talks about originalism as the “law of rules”<sup>151</sup> while attacking liberal judges as stating that “[i]f it is good, it is so.”<sup>152</sup> Justice Sotomayor testified in language resonating more with egalitarian-communitarians—“as a judge, I don’t make law.”<sup>153</sup> Justice Brennan described the emergence of a conservative-leaning originalism as “little more than arrogance cloaked as humility.”<sup>154</sup>

There are therefore competing perspectives, each labeling their own approach fair and foolproof and the other approach biased and foolhardy. Our results, suggest, though, that this language is just hiding our

146. Vincent Yzerbyt, Anouk Rogier & Susan T. Fiske, Group Entitativity and Social Attribution: On Translating Situational Constraints into Stereotypes, 24 *Personality & Soc. Psychol. Bull.* 1089, 1091 (1998).

147. *Id.*

148. See *id.* at 1099 (citing studies illuminating common heuristic of interpreting in-group members as reasonable and out-group as less reasonable).

149. See John M. Scheb II & William Lyons, The Myth of Legality and Public Evaluation of the Supreme Court, 81 *Soc. Sci. Q.* 928, 937–38 (2000) [hereinafter Scheb & Lyons, *Myth of Legality*] (describing “widespread recognition of the effect of the justices’ ideologies on their decisions”).

150. Neil S. Siegel, Umpires at Bat: On Integration and Legitimation, 24 *Const. Comment.* 701, 701 (2007).

151. Antonin Scalia, The Rule of Law as a Law of Rules, 56 *U. Chi. L. Rev.* 1175, 1187 (1989) [hereinafter Scalia, *Rule of Law*].

152. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 39 (1997).

153. Naftali Bendavid, Supreme Strategy: Stick to the Script, *Wall St. J.* (July 15, 2009), <http://online.wsj.com/article/SB124762632993643211.html> (on file with the *Columbia Law Review*).

154. William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, 27 *S. Tex. L. Rev.* 433, 435 (1986).



bias rather than resolving it. Both sides decide whether the Court should decide a case based on their cultural priors. But each side discusses its own view of the Court as obvious and neutral.

At the same time, because it is the Supreme Court, full of highly qualified elites wearing robes, the Court itself is seen as beyond reproach. A substantial body of research shows that the public believes that the Court behaves differently from the political branches.<sup>155</sup> The general tendency of coherent groups not to self-criticize and thereby open minds is *worsened* because the entire field of constitutional law and the Supreme Court is seen as more off limits for critique. The result is that even though our cultural priors do affect us, the combination of our attachment to a view of the Constitution stated unconditionally by some sides and reticence to attack the Court at all, makes our bias worse rather than better.

Affirmation, as mentioned earlier, is one common strategy of dealing with these dynamics. But affirmation requires recognition of the worldviews of *others*.<sup>156</sup> This can occur, but is hard to achieve when the stakes are so high, when those having to reach across the aisle are selected because they have strong precommitments, and when the intrusive deliberative strategies that accomplish this best are hard to apply on the scale of three hundred million.

We suggest something more modest: recognition of the complications of the worldviews of *ourselves*, and the cultural openness that results. Forcing people to acknowledge the flaws in their own perspectives has a powerful mind-opening effect.<sup>157</sup> In discussing the Court, though, it is hard to recognize the flaws of a position unless the flaws with the entire group and series of positions associated with the group are recognized. The way to do this is by focusing on the complications of the worldviews of the group to which one subscribes. This might be considered a strategy of minimizing group-ness, or lowering entitativity.

We can imagine several tactics to lower entitativity when it comes to the Court. Issuing decisions at the same time with competing messages can lower entitativity (releasing opinions on the same day with different

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155. See John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 *Pol. Behav.* 181, 190 (2001) (“Americans may be realistic about the actual determinants of Supreme Court decision making, but they continue to believe in the ideal of the apolitical Court.”); Scheb & Lyons, *Myth of Legality*, *supra* note 149, at 938 (“Politicians who might be tempted to attack the Court run the risk of offending those who subscribe to the myth of legality.”).

156. See Amy McQueen & William M.P. Klein, *Experimental Manipulations of Self-Affirmation: A Systematic Review*, 5 *Self & Identity* 289, 303 (2006) (discussing relationship between social comparisons and self-affirmation).

157. This is a version of a call for judicial humility. See Kahan, *Neutral Principles*, *supra* note 98, at 62 n.347 (describing humility as “consciousness of one’s *own* limits”). Our focus here is on recognizing one’s limitations by breaking down group identities and discussing the Court differently.

outcomes and different alignments of Justices, for instance). The Court, the Justices, and the media can highlight instances where Justices vote contrary to expectations—when Justice Alito cites Justice Breyer’s concurring opinion in support of his dissenting opinion in *Snyder v. Phelps*,<sup>158</sup> or Justice Scalia votes to strike down a key Bush Administration initiative on the war on terror in *Hamdi v. Rumsfeld*.<sup>159</sup> If the Court, the Justices, and others focus on how even their philosophy could have led to a different result, it can reduce entitativity.

Once entitativity is lowered, it is easier for the public to recognize the biases inherent in the perspectives of their group, and therefore in themselves. They no longer see their group as natural and inevitable and so they no longer see their group (and their) perspective as natural and inevitable. Remedying bias can therefore become an automatic, self-enforcing psychological feature of responses to the Court. Highlighting bias through “basic education about specific cognitive biases . . . decreases participants’ tendency to fall prey to certain errors.”<sup>160</sup>

Once these biases are identified to members of the public, it then creates an implicit motivation to control prejudice.<sup>161</sup> Research has demonstrated that our biases are often “outside of conscious awareness”<sup>162</sup> and that many individuals want to control those prejudices.<sup>163</sup> Studies have discovered that highlighting this bias to individuals can have longitudinal effects; it helps create a “negative attitude toward prejudice . . . and an implicit belief that oneself is prejudiced,”<sup>164</sup> causing that person to battle that bias on their own in the future. If the Court and the public see that being an originalist or a pragmatist might bias their perspective and struggle to fight against this, it can result in “extended practice in non-stereotypic responding . . . capable of reducing the subsequent activation of stereotypes”<sup>165</sup> and creating an “automatic goal to respond in an unbiased manner.”<sup>166</sup> Just like affiliating with a group and

158. 131 S. Ct. 1207, 1226 (2011).

159. 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting).

160. Lilienfeld et al., *supra* note 143, at 393.

161. See generally Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 *J. Experimental Soc. Psychol.* 164 (2008) (discussing phenomenon).

162. *Id.* at 164.

163. See Russell H. Fazio, Joni R. Jackson, Bridget C. Dunton & Carol J. Williams, *Variability in Automatic Activation as an Unobtrusive Measure of Racial Attitudes: A Bona Fide Pipeline?*, 69 *J. Personality & Soc. Psychol.* 1013, 1022–23, 1025 (1995) (“[T]he expression of judgments and the performance of overt behavior may be carefully and deliberately monitored [by test subjects] so as to avoid the appearance of a prejudiced response.”).

164. Glaser & Knowles, *supra* note 161, at 165 (emphasis omitted).

165. Bertram Gawronski, Roland Deutsch, Sawsan Mbirkou, Beate Seibt & Fritz Strack, *When “Just Say No” Is Not Enough: Affirmation Versus Negation Training and the Reduction of Automatic Stereotype Activation*, 44 *J. Experimental Soc. Psychol.* 370, 370 (2008).

166. *Id.* at 375.

using the biased perception provided by that group were activated automatically, so too can using unbiased perspectives.<sup>167</sup>

Breaking down the bias that derives from group identities would only be furthered by highlighting the imperfections of the institution at the center of all of this: the Supreme Court of the United States. The Court need not be treated in a tabloid fashion to be treated in a more candid and honest fashion. Easing the discourse norms about the Court to permit more direct conversation about the Court would increase less-biased conversation. From recognizing our own perspective is biased, to recognizing that the institution itself is imperfect, our awareness of bias would grow and therefore so would our motivations to mitigate it.

Some might object to our debiasing through self-awareness on the grounds that it weakens both the rule-of-law and the rule-of-the-Court. Recognizing that the groups are not fixed can force Justices to recognize the ambiguities in their jurisprudential commitments, which can make the Justices even more unaccountable by opening their eyes to the discretion they have.<sup>168</sup> But if silence on these factors causes people to hide and therefore further bias, the alternative is even worse. Recognizing ambiguity causes people to confront it and confront the biases they use to resolve ambiguity. Hiding ambiguity permits people to use their biases to resolve it.

Those worried about the Court might balk that this strategy is lowering the Court to the level of every other institution, and making it into a junior varsity Congress or White House. If we recognize that originalism or pragmatism have their limitations, and we recognize that the Court itself has its limitations, what is there to stop other institutional actors or the public from ignoring powerless men and women in robes? The Court goes out of its way in “obfuscating the judicial role” in order to preserve its legitimacy because of this sense.<sup>169</sup> There is much research to suggest, though, that the Court starts from a deeper base of legitimacy in the first place.<sup>170</sup> Moreover, bringing competing jurisprudential groups and the Court down to Earth could make it subject to the same forms of accountability that other institutions endure. Our results suggest that if the Court does right by someone, that person will like the Court. And so as long as

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167. See *id.* at 370 (“[A] more effective means to change unwanted stereotyping is to combat the automatic activation of stereotypes in the first place rather than to deliberately control their influence on behavior once . . . activated.”).

168. See Gail Heriot, *Way Beyond Candor*, 89 *Mich. L. Rev.* 1945, 1948 (1991) (“The point here is simply that some constraint in the law is beneficial, and the more rigid formulation offers more constraint on the judge than the more flexible and discretionary formulation.”).

169. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 *Colum. L. Rev.* 1955, 1958 (2006).

170. See Jeffrey J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 *J. Pol.* 1114, 1115 (1997) (“[A]n active and even controversial Court can enjoy strong, stable aggregate support.”).

the Court does right by enough people, it will be fine. This seems acceptable for a democratic society.

c. *A Strategic Court.* — Most accounts of the behavior of the Supreme Court now are either explicit or implicit in seeing the Court as calibrating its actions based on the behavior of other actors.<sup>171</sup> From this perspective, our results suggest that the Court is not constrained in the way that traditional theories of backlash postulate, though there is still cause for circumspection. Because people respond to the cultural message of the case in deciding which institution should decide the case, it means that the Court will essentially always have some sizeable percentage of the population supporting its authority to decide a case. At the same time, because people respond to the cultural message of a case, for high-salience cases there will be a sizeable percentage of the population opposed to the Court deciding the case and beyond persuasion. This combination provides the Court with a plausible “run to the base” strategy in high-salience cases and a plausible strategy to secure universal support in low-salience cases. The Court can ignore opponents in high-salience cases at minimal cost, and in other cases it can use strategies to persuade potential opponents.

Our results do suggest, though, that a Court deciding in favor of gay marriage or similar issues might have more to fear than a Court deciding in favor of gun rights or similar issues because of greater voter turnout by hierarchical-individualists. A Court deciding any issue, of course, must keep in mind that measuring opinion about the Court does not perfectly capture dynamics, because more powerful and more entrepreneurial individuals might be especially angered even if median opinion is not.

For salient issues, the strategic logic is simple: A decision motivates the base and does not convince those it never could have convinced anyway. Regardless of how the Court decides the case (and assuming there are at least some cultural communities supporting the decision), there will be substantial support for the notion that it was the right institution to decide the case.

But a Court decision does more than that: For salient issues, it unifies and (usually) motivates those supportive of the cultural perspective the Court articulated. In the Gay Marriage Condition, for instance, support for the Court deciding the case among egalitarian-communitarians increases. Egalitarian-communitarians are also much more likely to support gay marriage. For the strategic Court, the reliability and even increased support of the base provides the “political support” necessary to help it withstand any controversy it engenders by issuing a particular decision. A motivated base can prevent many of the threats the Court faces

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171. See Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 *Law & Soc. Inquiry* 601, 611 (2000) (noting broad support for proposition that justices act “*strategically*, in the sense of understanding and anticipating the likely responses of others to the judge’s own actions”).

(constitutional amendments, new and threatening Justices) simply by the use of a minority veto.<sup>172</sup>

At the same time, in high-salience cases there is little chance the Court can convince opponents. When the Court rules in favor of gay marriage, hierarchical-individualists are less likely to support the Court deciding constitutional cases. When the Court rules in favor of gun rights, egalitarian-communitarians become less likely to support the Court. Opponents become even more implacably opposed to the underlying constitutional issue.

In other words, the Court motivates its supporters and loses support among those who would not have supported it anyway. The only risk the Court faces with opponents is that it slightly increases their turnout without a compensating increase by supporters (in fact, supporters are less likely to turn out to vote in three of the conditions while opponents are more likely to vote).

But the Court can endure any slightly greater chance for body blows it might face because of slightly increasing opposition turnout. We know that, regardless of institutional preferences, many studies have shown that even in the face of unhappiness with the Court there is very little support for “fundamental structural changes” to the Court.<sup>173</sup> Around 80% of the public has “a great deal” or “only some” confidence in “the people running” the Supreme Court.<sup>174</sup> Even in an era of political polarization, these numbers persist.<sup>175</sup> A Court decision might cause electoral trends undermining the decision, but at least part of that impact will be mitigated by the support opponents of the decision have for the basic structure of the Court.

An important caveat should be mentioned here: We are measuring public opinion, and public opinion does not always translate into identical political dynamics. It could be that among the few egalitarian-communitarians opposed to the Court deciding cases, there is a particularly potent or resourceful group of individuals who could trigger a backlash cascade. This might be so, for instance, because the decision motivates a geographically concentrated group of people.<sup>176</sup> At the very least,

172. See generally Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (2007) (discussing political supports as improving or harming power of Court).

173. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 *Am. J. Pol. Sci.* 635, 649 (1992) (noting diffuse support for Supreme Court remains high among those who support institutional purpose, regardless of support for specific Court decisions).

174. James L. Gibson et. al., *Measuring Attitudes*, *supra* note 140, at 355.

175. See James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 *J. Empirical Legal Stud.* 507, 521 (2007) (showing continued support of Court over time despite increased political polarization).

176. There is research suggesting local public opinion in response to a Court decision might be different than national public opinion. See generally Valerie J. Hoekstra & Jeffrey A. Segal, *The Shepherding of Local Public Opinion: The Supreme Court and Lamb's*

this worry is minimized because of the smaller number of outcome-independent individuals who object to the Court.

The situation facing a pro-egalitarian-communitarian strategic Court is slightly less positive than the situation facing a pro-hierarchical-individualist strategic Court. After the Warren Court, liberals started to develop a real concern over backlash. Nowhere was this truer than the scholarly reaction to *Roe*, because of concern that “backlash against *Roe* might swell to engulf the entire liberal agenda.”<sup>177</sup> As a result, “[c]onstitutional scholarship that cautions judges to interpret the Constitution so as to avoid controversy [has arisen] particularly on the left.”<sup>178</sup> Even scholars favoring a liberal Court commonly express fear at the prospect of the public reaction that such a Court might face.<sup>179</sup>

Our results show that these groups (which tend to be cultural egalitarian-communitarians) have many reasons to be supportive of a Court issuing decisions they like. Across a range of issues related to institutional competence, egalitarian-communitarians trusted the competency of the Court more than Congress. This support for the Court endures more for egalitarian-communitarians than for hierarchical-individualists. There is not a perfect match between their favored issues and those of liberals, but there is a meaningful overlap. In other words, the Court has more support from its supporters initially, and that support is more likely to endure. When given the stimulus of a pro-gay-marriage Court decision, as mentioned before, egalitarian-communitarians become much more supportive of the power of the Court and of gay marriage itself.

The complication for the Court in this situation is that there is support for the concern that there would be a strong backlash by opponents. Hierarchical-individualists become even less supportive of the Court deciding cases, and less supportive of gay marriage, when the Court rules in favor of gay marriage. These effects are largely cancelled out by the increase in support by egalitarian-communitarians. The only clear negative from our results is electoral turnout: When the Court rules in favor of gay marriage, egalitarian-communitarians are less likely to vote while hierarchical-individualists are more likely to vote. An egalitarian-communitarian Court might convince natural supporters even more, and for the most part the outrage of natural and inevitable opponents could be endured, but results at the ballot box might undermine all of this with time.

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*Chapel*, 58 J. Pol. 1079 (1996) (discussing effect on constituency involved in *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)); Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 Am. Pol. Sci. Rev. 89 (2000) (comparing impact of specific cases on local communities implicated and population at large).

177. Post & Siegel, *supra* note 16, at 407.

178. *Id.* at 406.

179. See, e.g., *id.* at 374 (“Stunned by the ferocity of the conservative counterattack, progressives have concluded that the best tactic is to take no action that might provoke populist resentments.”).

For a hierarchical-individualist Court, the dynamics are somewhat different. When the Court issued decisions that they liked, hierarchical-individualists moved dramatically in favor of the Court. In fact, the only way for a Court to attract the support of these communities is to have the Court decide cases in their favor.

Hierarchical-individualists become no more supportive of the constitutional right to carry a concealed weapon, but that is because it would be nearly impossible to be more supportive—their levels of support were already incredibly high. Curiously, when the Court decides in favor of gun rights the decision motivates turnout for hierarchical-individualists more while depressing turnout for egalitarian-communitarians.

2. *Congress.* — Popular constitutionalism has emerged in part because of a response to the institutional exclusivity of judicial supremacy, and, in some of its (more departmentalist) versions, has focused on empowering other institutions,<sup>180</sup> including Congress. Congress does not usually play a substantial role either in the actual deliberation about constitutional issues or the scholarly discussion of judicial review.<sup>181</sup> Indeed, Justice Scalia has argued that the failures of Congress to consider constitutional limitations might merit revisiting the presumption in favor of the constitutionality of congressional laws.<sup>182</sup> Our results suggest that Congress might be able to act more on constitutional issues.

Before turning to new opportunities for Congress, we will first discuss general concerns similar to those highlighted about the Court earlier. If outcome-independent institutional preferences exist only in theory, what constrains Congress from overstepping its constitutional boundaries? While backlash was a self-enforcing constraint on the Court, there is less of a need for institutional preferences to constrain Congress, because members of Congress face elections.<sup>183</sup> Congress also battles with the President for control of the coercive power of the federal government.<sup>184</sup> If Congress exceeds its prerogatives, then the classic Madisonian ambition-counteracting-ambition logic will constrain Congress.

180. See David Pozen, *Judicial Elections as Popular Constitutionalism*, 110 *Colum. L. Rev.* 2047, 2063 (2010) (“Departmentalism refers to the idea that the coordinate branches of government possess independent authority to interpret the Constitution.”).

181. See Robin West, *The Aspirational Constitution*, 88 *Nw. U. L. Rev.* 241, 243 (1993) (noting small role Congress plays in constitutional law).

182. See Stuart Taylor, Jr., *The Tipping Point*, *Nat’l J.*, June 10, 2000, at 1810, 1811 (quoting Justice Scalia as stating, in regards to presumed constitutionality of congressional acts, “[I]f Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.”).

183. See U.S. Const. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”); *id.* amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .”).

184. See, e.g., Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 *Wm. & Mary L. Rev.* 679, 718 (1993) (“After all, ongoing checks

What, then, of the concern highlighted earlier about cultural priors biasing our responses to institutions, in this case, Congress? Again, partiality might be even less of a concern when Congress acts, because by its (electoral) nature we might expect partiality. If we aspire to overcome bias, many of the same debiasing techniques mentioned earlier would work.

If members of Congress want to assume a larger role in constitutional law, our results suggest the public will not object. There is no hegemonic public support for judicial supremacy as many, in the absence of evidence, have assumed.<sup>185</sup> There is a strong norm and practice against Congress pushing challenges to the Court's constitutional interpretations very hard.<sup>186</sup> When Congress pushes back, members of the Court complain.<sup>187</sup> Perhaps as a result of a shared conception of role-appropriate behavior, Congress does not often challenge the Court's role in deciding major constitutional cases, or at least stops at the water's edge.

Our results suggest that Congress can act to challenge the interpretive exclusivity of the Court. The same dynamic of a safe and even energized base applies in the Congress conditions, but perhaps with even greater force because of differences in how the Court and Congress operate. In our study, when Congress decides an issue it increases its support for deciding the issue among its supporters. For Congress, though, the support of the base is even more important because of the political dynamics of Congress. Part of the reason for the polarization of Congress is the greater accountability of its members to the base of each party.<sup>188</sup> Political primaries for House and Senate elections mean that a member of Congress must achieve support from a sufficient number of party loyal-

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and balances between the legislative and executive branches are themselves a source of political accountability.”).

185. See Anthony Lewis, *Law or Power?*, N.Y. Times, Oct. 27, 1986, at A23 (reporting “widely held public and legal view” in favor of judicial supremacy); see also *supra* notes 24–33 and accompanying text (detailing negative views of judicial activism).

186. There have been many discussions in Congress of disagreements with the decisions of the Court, and even thousands of pieces of introduced legislation to remedy this disagreement. See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895, 896 (1984) (“Jurisdiction-curbing proposals have surfaced in Congress in virtually every period of controversial federal court decisions.”).

187. See, e.g., Ruth Walker, *O'Connor Assails “Pervasive Attacks” on Judges and Judicial Independence*, *Harv. L. Sch.* (Feb. 2007), [http://www.law.harvard.edu/news/today/hlt\\_feb07\\_oconnor.php](http://www.law.harvard.edu/news/today/hlt_feb07_oconnor.php) (on file with the *Columbia Law Review*) (“In her remarks . . . O'Connor . . . decried an atmosphere of growing hostility toward the judiciary ‘in the halls of Congress’ . . . citing recent threats by some members of Congress to impeach judges whose rulings refer to decisions by courts abroad.”).

188. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2330–47 (2006) (explaining that party system creates incentive for party-alignment and therefore polarization).



ists to be nominated.<sup>189</sup> Districts for the House are drawn increasingly so that party loyalists are more likely to be clustered, in part because of re-districting changes<sup>190</sup> and in part because of increasing tendencies of like people to live by like people.<sup>191</sup> Party loyalists are more likely to contribute money to campaigns and to work on behalf of a campaign.<sup>192</sup>

In other words, there is reason to think Congress could become more involved in deciding constitutional issues if it wanted to do so. It might be that the “people have largely abdicated their collective authority to determine constitutional meaning.”<sup>193</sup> But this is not because the people wanted this to be so. If popular constitutionalism wants to mobilize around an institutional home, Congress would be a plausible place to start.

There are several caveats or limitations about this potentially more assertive role for Congress. Our survey did not measure whether this might pose some longitudinal threats to Congress (what Part II discussed as the “too much N” problem). The support for the Court is much higher than for Congress,<sup>194</sup> and the Court enjoys a “positivity bias,” meaning the more people see the Court the more they like it,<sup>195</sup> while the opposite is true of Congress.<sup>196</sup> There is not much direct research about what transpires if these two institutions engage in direct combat over authority to decide constitutional issues, but these repeatedly validated findings might cause Congress concern. This suggests hesitations about our findings, or at the least hesitations about relying on these findings to initiate frequent constitutional actions by Congress in the face of disagreement by the Court.

189. See Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 *Wm. & Mary L. Rev.* 415, 424 (2004) (describing role of primaries in increasing party polarization).

190. See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 *Harv. L. Rev.* 29, 114–15 (2004) (“Gerrymandered election districts, which pack voters with similar preferences into safe districts, produce representatives who reflect more partisan extremes.”).

191. See generally Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (2008).

192. See Stephen A. Jessee, *Voter Ideology and Candidate Positioning in the 2008 Presidential Election*, 38 *Am. Pol. Res.* 195, 206 (2010) (“[C]ampaign donations, volunteering, or other sources of assistance tend to come from more ideologically extreme voters.”).

193. Pozen, *supra* note 180, at 2054.

194. See Hibbing & Theiss-Morse, *supra* note 24, at 67–72 (explaining relative approval of Court compared to Congress).

195. See Gibson & Caldeira, *Citizens*, *supra* note 25, at 3 (“According to this theory [of positivity bias] . . . anything that causes people to pay attention to the court . . . winds up reinforcing institutional legitimacy . . .”).

196. See Hibbing & Theiss-Morse, *supra* note 24, at 67–70 (describing pattern that approval of Congress decreases as public sees more of it).

B. *Extra-Institutional Actors in Constitutional Law*

There is now significant scholarship addressing how social movements use constitutional law as a means of pushing their own agendas. But this scholarship has an increasingly singular focus: examining how the constitutional decisions of the Supreme Court derive from constitutional arguments advocated by movements outside of the courts. Social movements are the demand side, and the Court is the supply side. So while this scholarship is seen as focusing on the efforts of “the people themselves”<sup>197</sup> as opposed to the traditional “obsession”<sup>198</sup> with courts, instead it combines the two, focusing on how “the people themselves” use the courts.

But while social movements looking to influence constitutional law might have singular goals, they do not have a singular choice at their disposal. These social movements can pursue their causes in a range of institutional places. This is the question of institutional choice, and it has loomed large for many social movements over the years. President Obama has criticized the civil rights movement for focusing too much on the courts, stating that one of the problems with the civil rights movement is that it became too “court-focused.”<sup>199</sup> Mark Tushnet has made a similar point, arguing, “[I]berals today seem to have a deep-rooted fear of voting. They are more enthusiastic about judicial review than recent experience justifies, because they are afraid of what the people will do.”<sup>200</sup> The gay rights movement has engaged in exhaustive discussions of whether to push their cause in the courts or in the legislature. Now, with a Republican majority in the House of Representatives and a base eager to overturn the health care law, these issues have become front-page headlines: Was it right to turn to the Court to overturn the health care law?

Our results can shed some light on these questions. More than anything, our results suggest that it does not matter whether one goes to Congress or to the Court. Regardless of whether a movement goes to Congress or to the Court, supporters of the eventual decision by that institution will think the movement chose correctly, and opponents will think the movement chose poorly. Likewise, going to Congress or the Court will increase support for the eventual constitutional issue among those pleased with the result, and decrease support for those unhappy with the result. If an organization supports gay marriage, in other words, a win in the Court will mean that supporters will think it was right to take

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197. See generally Kramer, *supra* note 19 (discussing how “the people themselves” were responsible for creating, interpreting, and implementing United States Constitution).

198. See Friedman, *Birth*, *supra* note 8, at 155 (describing academia’s “obsession” with countermajoritarian democracy).

199. Justin Driver, *Obama’s Law*, *New Republic*, June 30, 2011, at 12.

200. Tushnet, *supra* note 5, at 177; see also Obama, *supra* note 6, at 83 (stating he “wondered if, in our reliance on the courts to vindicate not only our rights but also our values, progressives had lost too much faith in democracy”).

the case to the Court, and opponents will not. And it means that supporters will become even more supportive of gay marriage, while opponents even less supportive.

There are a few limitations on these points about institutional choice. First, the Court does polarize policy preferences more than Congress does across all conditions. If a movement aims to keep different cultural communities closer together, Congress might be a better place to advocate its cause.

Second, the Court affects electoral turnout differently than Congress does. Going to the Court (at least in three of our four conditions) can mobilize hierarchical-individualists and demobilize egalitarian-communitarians in a way that going to Congress might not. In other words, by bringing the health care law challenge to the Court, hierarchical-individualists might benefit at the polls, while egalitarian-communitarians might suffer. If the California gay marriage case makes its way to the Court, there is reason to believe gay marriage supporters will have less turnout and opponents will have greater turnout.

Other research suggests that differences more in the nature of the cultural-political dynamics generated by institutional differences should influence institutional choice. The sheer chance of success in one institution compared to another becomes relevant. Is there a reason to go to the Court because it might be “acting when elected officials won’t”?<sup>201</sup> Is it important to entice elites to join the movement cause, and is it the case—as it commonly is—that judicial success impresses elites?<sup>202</sup> Will the Court have difficulties implementing its decisions compared to Congress? Are there path-dependent benefits to having the Court go first and framing the ambition of the social movement as a constitutional one rather than as a political one?<sup>203</sup> These are important questions to be asked, but they are questions more about the politics of institutional choice than the pure preferences surrounding it.

Our results can provide insights for another group of extra-institutional actors thinking about institutional choice: constitutional theorists. Constitutional theory has been dominated by what Robert Post and Reva Siegel called “backlash theorists” who have remained “fearful [of] an assertive judiciary” and what that assertive judiciary might do to foster

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201. See Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–85*, 97 *Am. Pol. Sci. Rev.* 483, 483 (2003) (discussing ways federal courts might and do exercise more power when Congress fails to do so).

202. See Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *Cause Lawyering: Political Commitments and Professional Responsibilities* 261, 264–66 (Austin Sarat & Stuart Scheingold eds., 1998) (describing ways in which elites get involved in causes).

203. For a discussion of this dynamic, see generally Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 *Am. J. Soc.* 1201 (1991).

public rebellion against the Court.<sup>204</sup> After a more aggressive conservative jurisprudence, now some conservatives likewise fear that public reaction to cases like *Heller* mean that even with a conservative Court “[t]he largest threat to liberty still lies in handing our democratic destiny to the courts.”<sup>205</sup> This fear of the Court doing too much and of finding a theory to justify the Court acting like “the least dangerous branch”<sup>206</sup> has created a cottage industry of rebuttal scholarship, but scholarship accepting the debate on its own terms. The “democratic constitutionalism” advocated by Post and Siegel sees the public response to the Court as not threatening, but still distinctive.<sup>207</sup> So, too, do some see the Court as uniquely situated to pursue certain causes because the Court is seen as largely immune from the dynamics of public opinion.<sup>208</sup>

We are suggesting something different, but with implications for these constitutional theorists. On many fronts, our results suggest that the public responds to the Court playing a central role no differently than it responds to other institutions. The Court does polarize policy and electoral preferences more than Congress, but the larger questions of whether the Court should be deciding cases in the first place are addressed by the public using largely the same heuristics the public uses to decide whether Congress should be taking action. The Court is not more distinctively threatening to a cause, nor is it distinctively helpful. The public responds to the Court using their cultural priors in many of the same ways they respond to Congress.

This suggests a simple point for constitutional theory: It is time to reorient at least some parts of our discussion about the role of the Court.<sup>209</sup> The proper role for the Court in a democratic society is an important one, to be sure. If the goal of constitutional theory is to answer the most important questions of the day, then part of our discussion about backlash has been answering the wrong questions about the role of the Court.

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204. Post & Siegel, *supra* note 16, at 373.

205. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 *Va. L. Rev.* 253, 257 (2009).

206. See generally Bickel, *supra* note 2.

207. See Post & Siegel, *supra* note 16, at 376–77 (“We argue that each of these [backlash] theorists tends in his own way to overestimate the costs of backlash and to underestimate its benefits. Contemporary scholarly debate does not sufficiently appreciate the ways that citizen engagement in constitutional conflict may contribute to social cohesion in a normatively heterogeneous polity.”).

208. See Schauer, *supra* note 86, at 9 (“The Court . . . operates at a distance from the center of gravity of the nation’s policy portfolio . . .”).

209. For a related point, see Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 *Nw. U. L. Rev.* 933, 933 (2001) (arguing scholars should stop focusing on countermajoritarian difficulty because other political elements of judicial review are more important).

## CONCLUSION

In the last years of his life, Thurgood Marshall often reflected back on his career before joining the Supreme Court. Marshall had been at the middle of one of the most important institutional choices made in American constitutional history: pursuing racial justice through the courts and the Supreme Court as much as—if not more than—through the other branches.<sup>210</sup> This leads to the obvious question: The institutional choice he made was important, but was it also right?

For decades, this has been one of the defining questions about *Brown*, and about constitutional law more generally. It is a retrospective question of interest, and a prospective question of importance. Where do advocates of gay marriage or of gun rights go in pursuit of their vision of justice? This conversation has been simultaneously profound and incomplete. Our goal has been to shed some light on the answer to the question that Justice Marshall posed, even if just for now and not for his generation. We hope our results will be of use to scholars writing about the Court and lawyers deciding how to get justice for their clients.

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210. For a summary of these strategic decisions by Marshall and his colleagues, see Richard Kluger, *Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality* 53–79 (2004).

## APPENDIX A: ARTICLES IN CONDITIONS

*Major Victory for Gun Rights Groups: Supreme Court Issues Decision Protecting Gun Owners*

In recent weeks, gun rights groups have been arguing to a federal court that the federal and state governments must protect the ability of gun owners to carry a concealed weapon. Gun rights groups have argued that the right to carry a concealed weapon for self-defense is protected by the Constitution, and the Supreme Court should issue a decision enforcing that constitutional right. In response, opponents have argued that the spread of concealed weapons would decrease the safety of citizens and federal and state governments need to be able to regulate that, and that therefore such a right to carry a concealed weapon is not addressed by the Constitution.

The Supreme Court held oral arguments on gun rights, which were presented by the lawyers for gun rights and by the lawyers for those opposing gun rights. After these arguments were presented to the Court, the members of the Court engaged in private discussions about the case for several months.

Just a few days ago, the Supreme Court decided the case—and gun rights groups are very pleased. The new decision requires federal and state governments to protect gun owners carrying a concealed weapon. Gun rights groups praised the new decision as a “major step forwards in the history of American freedom and a vindication of the Constitution” while gun control groups criticized the decision as a “blow to the safety and security of the American people and their communities.”

*Major Victory for Gun Rights Groups: Congress Passes Law Protecting Gun Owners*

In recent weeks, gun rights groups have been pushing Congress to pass a law requiring federal and state governments to protect the ability of gun owners to carry a concealed weapon. Gun rights groups have argued that the right to carry a concealed weapon for self-defense is protected by the Constitution, and Congress should pass a law enforcing that constitutional right. In response, opponents have argued that the spread of concealed weapons would decrease the safety of citizens and federal and state governments need to be able to regulate that, and that therefore such a right to carry a concealed weapon is not addressed by the Constitution.

Members of Congress met with representatives from affected communities about this issue, and several committees of Congress held public hearings on gun rights. Members of Congress traveling home to their congressional districts to campaign for the next election have also scheduled town hall meetings to discuss these issues with their constituents.

Just a few days ago, Congress passed official legislation related to gun rights—and gun rights groups are very pleased. The new law requires federal and state governments to protect gun owners carrying a concealed weapon. Gun rights groups praised the new legislation as a “major step forwards in the history of American freedom and a vindication of the Constitution” while gun control groups criticized the legislation as a “blow to the safety and security of the American people and their communities.”

*Major Victory for Gay Rights Groups: Supreme Court Issues Decision Protecting Gay Marriage*

In recent weeks, gay rights groups have been arguing to a federal court that the federal government and state governments permit gay couples to marry, and now have taken their case to the Supreme Court. Gay rights groups have argued that the Constitution prohibits governments from treating gay marriage differently than traditional marriage between spouses of the opposite sex and the Supreme Court should issue a decision enforcing that right. In response, opponents have argued that the Constitution only protects traditional marriages and families, and that whether to protect gay marriage is not at all addressed by the Constitution, so such a Supreme Court decision protecting gay marriage would be unwise.

The Supreme Court held oral arguments on gay marriage, which were presented by the lawyers for gay rights groups and by the lawyers for those opposing gay marriage. After these arguments were presented to the Court, the members of the Court engaged in private discussions about the case for several months.

Just a few days ago, the Supreme Court decided the case—and gay rights groups are very pleased. The new decision requires federal and state governments to permit gay couples to marry. Gay rights groups praised the new decision as a “major step forwards in the history of American civil rights and a vindication of the Constitution” while opponents criticized the decision as a “blow to the people and traditions of the United States and to the importance of the institution of traditional marriage.”

*Major Victory for Gay Rights Groups: Congress Passes Law Protecting Gay Marriage*

In recent weeks, gay rights advocates have been pushing Congress to pass a law requiring that the federal government and state governments permit gay couples to marry. Gay rights groups have argued that the Constitution prohibits governments from treating gay marriage differently than traditional marriage between spouses of the opposite sex and Congress should pass a law enforcing that constitutional right. In response, opponents have argued that the Constitution only protects tradi-

tional marriages and families, so such congressional legislation protecting gay marriage would be unwise.

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APPENDIX B: QUESTION MODULES<sup>211</sup>*Independent Variables**Cultural Values Module**A. Individualism-Communitarianism*

People in our society often disagree about how far to let individuals go in making decisions for themselves. How strongly do you agree or disagree with each of these statements? [strongly disagree, moderately disagree, slightly disagree, slightly agree, moderately agree, strongly agree]

The government interferes far too much in our everyday lives.

Sometimes government needs to make laws that keep people from hurting themselves.

It's not the government's business to try to protect people from themselves.

The government should stop telling people how to live their lives.

The government should do more to advance society's goals, even if that means limiting the freedom and choices of individuals.

Government should put limits on the choices individuals can make so they don't get in the way of what's good for society.

*B. Hierarchy-Egalitarianism*

People in our society often disagree about issues of equality and discrimination. How strongly do you agree or disagree with each of these statements? [strongly disagree, moderately disagree, slightly disagree, slightly agree, moderately agree, strongly agree]

We have gone too far in pushing equal rights in this country.

Our society would be better off if the distribution of wealth was more equal.

We need to dramatically reduce inequalities between the rich and the poor, whites and people of color, and men and women.

Discrimination against minorities is still a very serious problem in our society.

It seems like blacks, women, homosexuals and other groups don't want equal rights, they want special rights just for them.

Society as a whole has become too soft and feminine.

*Political Knowledge Module*

Next we'd like you to identify various persons, groups, or events that have been in the news recently. There is a 30 second time limitation on each question.

Which party currently has the most members in the U.S. House of Representatives? [Democrats, Republicans, Neither]

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211. Question module orders were randomized.

Which party currently has the most Senators in the U.S. Senate?  
[Democrats, Republicans, Neither]

What public office is now held by Timothy Geithner? [Speaker of the House, Senate Majority Leader, Vice President, Secretary of the Treasury, Supreme Court Justice]

What public office is now held by Harry Reid? [Secretary of State, Speaker of the House, Senate Majority Leader, Vice President, Supreme Court Justice]

What public office is now held by John Roberts? [Speaker of the House, Senate Majority Leader, Vice President, Attorney General, Supreme Court Justice]

How much of a majority is required for the U.S. Senate and House to override a presidential veto? [Bare majority, Two-thirds majority, Three-fourths majority]

Whose responsibility is it to nominate judges to the federal courts?  
[The President, Congress, The Supreme Court]

How long is the term of office for a United States Senator? [Two years, Four years, Five years, Six years]

Which party would you say is more conservative than the other at the national level? [Democrats, Republicans, Neither]

### *Salience Module*

Now we'd like to get your reaction to where you think this issue fits within our current political climate.

How important is the issue of gun rights or gun control to you personally? [Very important, Moderately important, Mildly important, Not at all important]

How closely do you follow the debate over gun rights and gun control? [Very closely, Somewhat, Very little, Not at all]

### *Gay Policy Preference Module*

Now we'd like to get your reaction to some of the things that people have said on this issue. [Strongly Disagree, Moderately Disagree, Slightly Disagree, Slightly Agree, Moderately Agree, Strongly Agree]

The Constitution prohibits the government from treating gay marriage differently than heterosexual marriage.

The Constitution allows the government to prohibit gay marriage.

Permitting gays and lesbians to marry will allow more Americans to enter into and benefit from loving and committed relationships.

Allowing gays and lesbians to marry will undermine traditional marriage and undermine American families.

*Gun Policy Preference Module*

Now we'd like to get your reaction to some of the things that people have said on this issue. [Strongly Disagree, Moderately Disagree, Slightly Disagree, Slightly Agree, Moderately Agree, Strongly Agree]

The government is prohibited from regulating or banning concealed weapons by the Constitution.

The government is permitted to regulate or ban concealed weapons under the Constitution.

Prohibiting the use of concealed weapons makes it hard for ordinary citizens to defend themselves.

Prohibiting the use of concealed weapons helps increase the safety and security of ordinary citizens.

*Dependent Variables**Institutional Preference Module*

When legislatures decide controversial issues like these, there is more legitimacy to their decision because we want elected legislators rather than unelected and activist judges running the country.

When courts decide important issues like these, there is more legitimacy to the decision because judges are not beholden to the political wheeling and dealing of lobbyists in the way that legislators are.

With politically controversial issues like this, the legislature will better understand how far rights extend in a given setting.

With questions of fundamental rights like this, we should not leave the determination of rights to the vagaries of the legislative process.

The legislature should decide issues like these because they are less likely to be influenced by high-powered lawyers who don't have the public's best interest at heart.

Courts should decide issues like these because they are less likely to be corrupted by political groups that want to distort the facts and the law.

*Voting Intention Module*

Now we'd like to know how you feel about the upcoming federal congressional elections. We know it's still early, but we'd like to know which way you are leaning right now.

If the elections for Congress were being held today, which party's candidate would you be more likely to vote for in your congressional district? [Strongly/Moderately/Slightly lean towards the Democratic/Republican Party]

How likely are you to vote in the upcoming federal congressional elections in November? [Very likely, Likely, Unlikely, Very unlikely, I have already voted this election cycle with an early or absentee ballot]

## APPENDIX C: TABLES AND MEASURES

|             | Model 1  |          | Model 2  |          |
|-------------|--|----------|--|----------|
|             | <u>beta</u>  | <u>t</u> | <u>beta</u>  | <u>t</u> |
| e.factor    | -0.46  | -11.36   | -0.35  | -6.05    |
| i.factor    | 0.35   | 7.92     | 0.31   | 6.29     |
| party       |  |          | 0.02   | 0.72     |
| ideology    |  |          | 0.11   | 2.39     |
| (Intercept) | -0.03  | -0.75    | -0.47  | -3.13    |
|             | Residual standard error: 0.73 on 371 DOF Adjusted R-squared: 0.36 F-statistic: 107.3 on 2 and 371 DF, p-value: < 2.2e-16 |          | Residual standard error: 0.7176 on 332 DOF Adjusted R-squared: 0.38 F-statistic: 54.02 on 4 and 332 DF, p-value: < 2.2e-16 |          |

Table 1: Multivariate regression analysis of cultural values, party affiliation, ideological self-identification, and support for gun rights. N = 350. Predictors are un-standardized regression coefficients with t-statistic indicated parenthetically. Outcome variable is standardized (z-score) scale of items in “pro.gun.rights” scale. Missing values for individual cultural worldview items were replaced using multiple imputation.

|                       | Model 1 |         | Model 2 |         |
|-----------------------|---------|---------|---------|---------|
| institutional.beliefs | 0.57    | (37.34) | 0.57    | (36.12) |
| egalitarianism        |         |         | 0.02    | (1.04)  |
| individualism         |         |         | 0.05    | (3.13)  |
| ideo5                 |         |         | 0.02    | (1.31)  |
| pid7                  |         |         | 0.00    | (-0.40) |
| black                 |         |         | 0.01    | (0.24)  |
| male                  |         |         | -0.07   | (-2.47) |
| income                |         |         | 0.01    | (2.24)  |
| educ                  |         |         | -0.01   | (-1.20) |
| pk                    |         |         | 0.00    | (0.05)  |
| newsint               |         |         | 0.00    | (-0.09) |

Table 2: Univariate and multivariate regression analysis of institutional preference and beliefs and institutional competence. N = 2000. Predictors are un-standardized regression coefficients with t-statistic indicated parenthetically. Outcome variable is standardized (z-score) responses to “institutional.beliefs”. Missing values for individual cultural worldview items were replaced using multiple imputation. Note that the addition of additional variables generates no significant increase in variance explained in institutional preferences.

|                | Model 1   |         | Model 2  |         |
|----------------|---|---------|--|---------|
| egalitarianism | 0.25  | (5.27)  | -0.14  | (-0.90) |
| individualism  | -0.10   | (-2.03) | 0.12   | (0.91)  |
| court          | 0.15  | (2.48)  | -0.15  | (-0.89) |
| Pk             | 0.10  | (1.44)  | 0.06   | (0.34)  |
| h-e:court      | -0.03   | (-0.47) | -0.13  | (-0.55) |
| c-i:court      |   |         | -0.12  | (-0.60) |
| h-e:pk         |   |         | 0.49   | (2.48)  |
| c-i:pk         |   |         | -0.30  | (-1.58) |
| court:pk       |   |         | 0.45   | (1.92)  |
| h-e:court:pk   |   |         | 0.32   | (1.12)  |
| c-i:court:pk   |   |         | 0.14   | (0.50)  |
| constant       | -0.09   | (-2.14) | -0.11  | (-0.92) |
|                | Residual SE: 0.84 on<br>756 DF Adjusted R-<br>squared: 0.12 F-<br>statistic: 22.38 on 5<br>and 756 DF P-value: <<br>2.2e-16 |         | Residual SE 0.8259 on<br>750 DF Multiple R-<br>squared: 0.1705, F-<br>statistic: 14.02 on 11<br>and 750 DF P-value: <<br>2.2e-16 |         |

Table 3: Multivariate regression of effects of cultural values on beliefs about institutional competence across pro-gay conditions. N=800. Predictors are un-standardized regression coefficients with t-statistic indicated parenthetically. Moderator variable is standardized (z-score) “political knowledge” scale. Outcome variable is standardized (z-score) “institutional.beliefs” scale. Missing values for individual cultural worldview items were replaced using multiple imputation (Rubin 2004; Royston 2004).

|                             | Model 1   |       | Model 2   |        |
|-----------------------------|---|-------|---|--------|
| hierarchy-egalitarianism    | 0.50  | 12.22 | -0.51   | -12.84 |
| communitarian-individualist | -0.15   | -3.45 | 0.36  | 8.25   |
| court                       | -0.04   | -0.80 | 0.03  | 0.66   |
| congress                    | -0.06   | -1.06 | 0.04  | 0.70   |
| h-e:court                   | 0.14  | 2.39  | -0.05   | -0.92  |
| h-e:congress                | 0.12  | 2.10  | -0.01   | -0.23  |
| c-i:court                   | 0.00  | -0.02 | 0.05  | 0.83   |
| c-i:congress                | 0.09  | 1.48  | 0.06  | 1.00   |
| constant                    | 0.03  | 0.69  | -0.03   | -0.85  |
|                             | RSE: 0.71 on 1183<br>DF Adjusted R-<br>squared: 0.44 F-<br>statistic: 116.1 on 8<br>and 1183 DF, p-<br>value: < 2.2e-16 |       | RSE: 0.73 on 1095<br>DF Adjusted R-<br>squared: 0.37 F-<br>statistic: 81.43 on 8<br>and 1095 DF, p-<br>value: < 2.2e-16 |        |

Table 4: Multivariate regression of effects of cultural values and condition on support for gay marriage (Model 1) and support for concealed carry (Model 2). N=1200. Predictors are un-standardized regression coefficients with t-statistic indicated parenthetically. Missing values for individual cultural worldview items were replaced using multiple imputation.

|                             | Model 1   |         | Model 2   |         |
|-----------------------------|---|---------|---|---------|
| hierarchy-egalitarianism    | 0.15  | (1.32)  | 0.15  | (1.32)  |
| communitarian-individualist | 0.29  | (2.40)  | 0.29  | (2.40)  |
| Court                       | -0.02   | (-0.14) | -0.01   | (-0.06) |
| Congress                    | -0.03   | (-0.24) | 0.10  | (0.68)  |
| h-e:court                   | -0.25   | (-1.54) | -0.31   | (-1.82) |
| h-e:congress                | -0.26   | (-1.64) | -0.20   | (-1.21) |
| c-i:court                   | 0.00  | (0.03)  | 0.12  | (0.65)  |
| c-i:congress                | -0.02   | (-0.12) | -0.06   | (-0.36) |
| Constant                    | 0.52  | (4.88)  | 0.52  | (4.88)  |
|                             | ND: 1639 on 1234<br>DF RD: 1617 on<br>1226 DF (3 obs<br>deleted due to<br>missingness) AIC:<br>1635 |         | ND: 1512 on 1146<br>DF RD: 1486 on<br>1138 DF (4 obs<br>deleted due to<br>missingness) AIC:<br>1504 |         |

Table 5: Ordered logistic regression of effects of cultural values on likelihood of voting across control, pro-gay (Model 1) and pro-gun (Model 2) conditions. N=800. Predictors are un-standardized regression coefficients with t-statistic indicated parenthetically. Moderator variable is standardized (z-score) “political knowledge” scale. Outcome variable is “likely.voter”. Missing values for individual cultural worldview items were replaced using multiple imputation.