THE AGE OF STATUTES AND JUDICIAL REVIEW

Alvin Padilla-Babilonia

Abstract

The counter-majoritarian difficulty describes the problem of unelected judges using the power of judicial review to undermine the majority will. But often it is hard to tell whether the law invalidated still enjoyed majority support. This is the case, for example, of laws that were enacted many years before the judicial decision. This article explores the role the age of statutes—that is, how old the law is—has for judicial review. The article explores how different constitutional theories have considered the age of statutes. It also compares the Warren, Burger, Rehnquist and Roberts Courts by looking at how old were the statutes they declared unconstitutional. To provide a fuller account of the role of temporality for judicial review, the article does an in-depth analysis of the Roberts Court. Finally, it concludes that, while the counter-majoritarian problem is often overstated, we must find other ways to assess the democratic legitimacy of invalidating older statutes.

Resumen

Este artículo analiza la dificultad de los jueces no electos que usan el poder de la revisión judicial para socavar la voluntad de la mayoría. A menudo es dificil saber si una ley invalidada continúa disfrutando del apoyo mayoritario. Este es el caso, por ejemplo, de leyes promulgadas muchos años antes de las decisions judiciales. A partir de esa premisa, ese artículo explora el papel que juega la edad de los estatutos. Es decir, la antigüedad de la ley para la revisión judicial. Asimismo, se analiza cómo las diferentes teorías

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* Fox International Fellow at Yale Graduate School and Visiting Affiliated Research Student at University of San Andrés. B.A., University of Puerto Rico, 2013; J.D., University of Puerto Rico School of Law, 2016; LL.M., Yale Law School, 2019.

constitucionales han considerado la antigüedad de los estatutos. A su vez, se hace una comparación entre las cortes de Warren, burger, Rehnquist y Roberts al observer la antigüedad de los estatutos que declararon inconstitucionales. Con el fin de proporcionar una descripción más complete del papel de la temporalidad para la revisión judicial, el artículo hace un análisis profundo sobre la corte Roberts. Finalmente, se concluye que, debemos encontrar otras formas de evaluar la legitimidad democrática de invalidad los estatutos más antiguos.

I. Introduction

The judicial review of legislation is perceived as counter-majoritarian. When the Supreme Court declares a law unconstitutional it subverts the will of a majority. But what if the Supreme Court mostly invalidates federal laws that were enacted many years ago when they seemingly no longer attract majority support? An empirical analysis shows us that federal laws declared unconstitutional by the Roberts Court were on average 25 years, 8 months and 24 days old. They represented the democratic will of members of Congress and a President who were elected approximately six general elections ago. In this sense, categorizing judicial review at the federal level as counter-majoritarian misses the point. We need to move away from the counter-majoritarian difficulty and focus on this practice by which the Court may reason that old statutes do not respond to current needs. Is this democratically legitimate?

The second part of this article summarizes the counter-majoritarian difficulty and reexamines the role the age of the statute—understood as the period between the date of enactment of a statute and the declaration of unconstitutionality—should play in reappraising this dilemma. It analyses what different constitutional theorists have proposed about how courts should consider how new or old the statute is when reviewing their constitutionality.

The third part of this article examines the cases in which the Supreme Court has held federal laws unconstitutional from 1954 to June, 2019, specifically

when they were decided and when the law was enacted. This 65-year span will be divided in four groups according its Chief Justice—Warren, Burger, Rehnquist and Roberts—to assess how temporality played a factor in these four cohorts.

The fourth part focuses on the Roberts Court. It has declared twenty-three federal laws unconstitutional and, on average, those laws were twenty-five years old. These laws will be divided in two groups: major legislation and minor legislation. I will also consider the ideological composition in each case and the political party from which the invalidated statutes came from. Finally, I will consider how the counter-majoritarian difficulty and the different roles of temporality were conceptualized in this period. In a case like *Shelby County v. Holder*, for example, the Supreme Court invalidated two provisions of the Voting Rights Act of 1965 because they were based on "decades-old data relevant to decades-old problems, rather than current data reflecting current needs."[1]

The fifth part addresses the democratic legitimacy of judicial review once we see pass the counter-majoritarian difficulty. We might perceive judicial review against recent laws as more undemocratic. However, when the Supreme Courts declares older laws unconstitutional there is also a problem of democratic self-government. If temporality influences the Court, we need to reappraise the issue of judicial review through both statistical and substantive analysis to evaluate its democratic legitimacy.

II. The Counter-majoritarian Difficulty and Temporality

The undemocratic character of judicial review has always been singled out by proponents of judicial restraint. In 1893, legal theorist James B. Thayer published an essay titled *The Origin and Scope of the American Doctrine of Constitutional Law*, which gave rise to the concept of rational basis review.[2] Since reasonable people might disagree over the constitutionality of a statute, courts should only invalidate a law when its unconstitutionality is "so clear that it is not open to rational question."[3] A legislator can vote against a law he perceives as unconstitutional, but if he later becomes a judge he must uphold its constitutionality, even if he has not changed his opinion. This rational basis standard, later adopted by the Supreme Court, allocates the primary burden of constitutional interpretation to the legislative bodies, whose interpretation can only be disregarded if there has been a clear mistake.

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1 Shelby Cty. v. Holder, 570 U.S. 529, 553 (2013).

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

3 *Id.* at 144.

3 *Id.* at 144.

More than one hundred years later, these arguments are still relevant. Richard Fallon, the leading authority on the legitimacy of the Supreme Court, argues that the Justices should "defer most often to the constitutional judgments of institutions with generally greater democratic legitimacy than the federal courts possess."[4] For Fallon, as in much of the literature, the legitimacy of the Court is most affected when it declares federal statutes unconstitutional.

Alexander Bickel famously coined the phrase the counter-majoritarian difficulty, also known as the counter-majoritarian problem, to describe the legitimacy problem of judicial review.[5] The idea, in its classical form, supposes that there is a democratic or majority will that is disregarded by the court when it invalidates laws on constitutional grounds. If declaring laws unconstitutional is counter-majoritarian, does that mean the Supreme Court should never declare any statute unconstitutional? When is the Court legitimized to do more than presume the constitutionality of the statute and defer to the legislative body? The doctrinal answer is that the Supreme Court should use a higher level of scrutiny to examine laws that directly violate specific constitutional prohibitions or laws that discriminate against "discrete and insular" minorities.[6] The first part of this statement presupposes that there is a "right answer" that the Supreme Court can reach about the meaning and scope of the constitutional text.[7] Different constitutional theories, from originalism to living constitutionalism, aim to provide the definitive account about how to come up with the right answer in order to justify the exercise of judicial review.[8]

But what if there is something fundamentally wrong with the underlying premise of the counter-majoritarian difficulty? What if, for example, the laws that are declared unconstitutional cannot be regarded as "majoritarian"? This was one of the central arguments of Robert Dahl in his seminal essay *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*.[9] Citizens typically manifest their choices by electing candidates. However, "on the basis of an election it is almost never possible to adduce whether a majority does or does not support one of two or more policy alternatives about which members of the political elite are divided."[10] As such, it is impossible to determine whether any law

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4 RICHARD FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 161 (2018).

5 *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

6 U.S. v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

7 Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 536 (2012).

8 *Id.* at 535.

9 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

10 *Id.* at 284.

actually has majoritarian support and whether declarations of unconstitutionality are truly majoritarian or counter-majoritarian.

Because it's a fool's errand to try to establish whether a statute has the support of a "national majority" we must content with a "lawmaking majority."[11] In the case of federal laws, this normally means bills that were approved by majorities in the House and the Senate, and signed by the President. But what happens when the lawmaking majority changes after a presidential and congressional election? What if the federal statutes that the Court invalidates were enacted many years before its decisions? According to Dahl, because Presidents appoint justices who share their policy views it is unlikely that Courts will invalidate major policies supported by a "persistent lawmaking majority."[12] Instead, Courts will be most willing to block policies enacted by a "weak majority" which he describes as "a dead one, a transient one, a fragile one, or one weakly united upon a policy of subordinate importance."[13] Accordingly, Dahl classified laws declared unconstitutional on two different grounds. In temporal terms, statutes could have either been enacted within the previous four years (*strong majority*) or beyond the past four years (*weak majority*). In policy terms, they can be regarded as either important by the lawmaking authority (*major legislation*) or not (*minor legislation*).

Dahl tested the validity of his claim by examining all the federal legislation the Supreme Court had declared unconstitutional throughout its history.[14] As such, he measured *the length* of the time interval between the date these laws were enacted and the date they were declared unconstitutional. He found that more than half the federal laws declared unconstitutional were older than four years, when they only enjoyed the support of a weaker or previous lawmaking majority. Surprisingly, this number includes the New Deal legislation declared unconstitutional during the *Lochner* era. Because this period was marked by the invalidation of recent laws, Dahl also distinguished between the New Deal legislation and other legislation. In the non-New Deal legislation, the distinction between major or minor policy becomes more important. According to Dahl, in almost all cases involving major policy Congress ultimately reversed the policy results from the Court's decision, even if the specific constitutional interpretation stood still.

For Dahl these findings illustrated three things. First, the Supreme Court does not uphold the wishes of minorities against the wishes of majorities. Today, using Bickel's terms, Dahl would say that the Court is not, in fact, a counter-majoritarian institution. Second, because of this, the democratic defenses and criticisms of the

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11 *Id.*

12 *Id.* at 286.

13 *Id.*

14 *Id.*

Court "are largely irrelevant, for lawmaking majorities generally have had their way."[15] Finally, when striking down major policy the Court can slow down the intended policy, but never stop it indefinitely.

Under this reading, the Supreme Court is usually part of the "dominant national alliance."[16] But it is not only a mere agent of the alliance. Instead, the Supreme Court also confers legitimacy to the policies of the coalition.[17] Because the Court will lose its power to confer legitimacy if it goes against the major policies of the dominant alliance, it will not usually engage in this course of action.[18] Therefore, according to Dahl, the Supreme Court will rarely act against a strong and persistent lawmaking majority.

Dahl gave us a tool to reappraise the counter-majoritarian problem in the twenty-first century. For Mark Tushnet "the central thrust of Dahl's analysis is clear and remains compelling."[19] We can study when the laws were enacted and when they were declared unconstitutional to assert whether the Court is, in fact, counter-majoritarian, which could lead to an erosion of its own legitimacy. Since the publication of Dahl's essay in 1957 constitutional theorists have alluded to the role time can play for judicial review, but it mostly has gone unnoticed. Alexander Bickel, for example, believed in using the case or controversy requirement, or other passive virtues, to create a "time lag between legislation and adjudication."[20] By timing the decision the Court can "cushion[ ] the clash between the Court and any given legislative majority and strengthen[ ] the Court's hand in gaining acceptance for its principle."[21] Instead of deciding the matter immediately, Courts should wait to avoid a direct conflict with a lawmaking majority.

While Bickel proposed that the Court waits until the lawmaking majority is weakened, John Hart Ely suggested a more radical theory: to consider when the statute was enacted. In *Democracy and Distrust*, Ely conceptualizes *Carolone Products* footnote four as illustrating the constitutional importance of participation.[22] When assessing the constitutionality of laws, courts should examine "whether the opportunity to participate either in the political process by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."[23] Applying this

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15 *Id.* at 291.

16 *Id.* at 293.

17 *Id.* at 294.

18 *Id.*

19 MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 197 (2015).

20 BICKEL, *supra* note 5, at 116.

21 *Id.*

22 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77 (1980).

23 *Id.*

claim to equal protection cases involving women, Ely noticed that laws with sex classifications were, on most occasions, older than the New Deal. Because women could not vote until 1920, Ely argues that they should be invalidated on these grounds, since "the case of women seems one where the date of enactment should be important."[24] In the case of statutes affecting women, who were denied access to political participation but later gained it, the Supreme Court should invalidate these laws and "'remand[]' the question to the political process for a 'second look.'"[25] Accordingly, if the legislature reenacts the same or a similar law, despite women participating in the political process, "the new law should be upheld as constitutional."[26] Rather than requiring women to mobilize to repeal these laws, they will automatically be invalidated and only come back to life if reenacted. Along similar lines, Akhil Amar has suggested that statutes enacted before women got the right to vote could be struck down and only held valid if reenacted.[27]

In *A Common Law for the Age of Statutes*, Guido Calabresi took this "second look" approach one step further. While Ely and Amar mostly worried about antiquated laws that imposed burdens or stereotypes against women, for Calabresi because of the proliferation of statutes and lawmaking inertia, some laws govern us without enjoying current majoritarian support.[28] To address this issue, which he calls the problem of legal obsolescence, he suggests that courts could find that a law is obsolete and encourage or induce "legislative reconsideration of the statute."[29] This will allow judges to update statutes, as if they were part of the common law. Once courts determine that a law is out of sync with the legal system as a whole, they can strike down the old rule and substitute it with a rule of their own, a rule existing in other regulations, a rule that will be created later on, or simply leave no rule in effect. They can also threaten to do all of this and induce the legislature or administrative agency to act quickly. Throughout all these alternatives, courts are not required to justify its decisions in constitutional terms. Similar to Dahl, Calabresi challenges the common assumption that laws deserve a special deference because they were once enacted by a lawmaking majority. According to him, "[i]f enough time or other circumstances have intervened, undercutting a presumption

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[24] *Id.* at 167.

[25] *Id.* at 169.

[26] *Id.* This approach is similar but different to the "second look" form of judicial review of systems with legislative override, like Israel and Canada, where statutes declared unconstitutional can be resuscitated through new majority votes.

[27] AKHIL R, AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 291-92 (2015).

[28] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982).

[29] *Id*.

that the same majority persists, I do not understand why any great significance should attach to a majoritarian origin."[30]

The question remains, however, who has the democratic legitimacy to determine whether majoritarian support has faded and that, therefore, certain statutes are obsolete? There are four alternatives. The first is that only legislatures can change the rules through positive action. This would presume "a *continuation of majoritarian support in all cases*, until proven otherwise by an overcoming of inertia."[31] The second approach is that rules automatically fade away unless legislatures express their continuing support. The presumption here is the opposite: "*the absence of such support after a set period*, unless proven otherwise."[32] The third approach relies on a semi-representative body, an agency or legislative committee, to decide which laws are obsolete. Finally, in the last approach that responsibility lies in the court, who would "look at statutes, as they did common law rules, and decide which are ripe for reconsideration."[33] For Calabresi, this last approach is "a legitimate allocation of power" because courts are suited to judge whether a rule fits within the legal landscape, it is a duty functionally equivalent to that of common law judges, and because they can "exercise that judgement in ways that have traditionally been viewed as democratic."[34]

When determining which statutes are obsoletes courts should consider, among other things, "the obvious question of how old the statute is."[35] However, in mainstream constitutional theory a law can be old and still be regarded as conserving majority support. For Jack Balkin, for example, "in the American system laws continue in force over time until they are repealed or amended."[36] After all, laws enacted generations ago still bind us today. Despite important proposals by Ely and Calabresi to consider when the statute was adopted, they have not taken root in traditional constitutional discourse. But has the age of statutes been an important factor, at least indirectly, when the Supreme Court declares federal laws unconstitutional?

III. Comparative Analysis: Warren, Burger, Rehnquist and Roberts

Dahl's influential article was published in 1957. Much has changed for judicial review in the past sixty-odd years. Part II updates his article by identifying the age

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30 *Id.* at 102.
31 *Id.* at 118.
32 *Id.*
33 *Id.*
34 *Id.* 118-19.
35 *Id.* at 101.
36 JACK BALKIN, LIVING ORIGINALISM 55 (2014).

of those federal statutes declared unconstitutional by the Supreme Court from 1953 to 2019. As such, this article ignores those instances where the Supreme Court held a law to be constitutional, while modifying its content through interpretation. It also leaves out those cases were states' laws were declared unconstitutional. While exploring those cases would provide a better account of how the passage of time interlinks with majority support, my aim here is more modest: to measure the age of those laws declared unconstitutional and to assess how the element of temporality played a role in the Warren, Burger, Rehnquist, and Roberts Courts. Because we have a concrete system of judicial review, where legislation is reviewed posteriori and after someone suffers an injury, there will always be a significant time interval compared to systems with abstract judicial review. Comparing different Supreme Courts within the United States, however, allows us to explore how the age of statutes matters for judicial review and to reevaluate the counter- majoritarian difficulty.

I use different measures to compare how temporality influenced these four Courts and whether they were counter-majoritarian in the sense described by Dahl. First, because these Courts had different durations, I first determined the life of each Court and then divided this number with the number of federal laws it declared unconstitutional. I will call this the *frequency of declarations of unconstitutionality*. Second, we need a single unit to compare how old the laws declared unconstitutional by each Court were. Accordingly, I calculated the time interval between the date of enactment and date of decision of each federal law declared unconstitutional by the Supreme Court. Afterwards, I added up the amount of days of each time interval and divided it by the number of laws declared unconstitutional in each term. I call the resulting average the *average age of the statutes declared unconstitutional*.

Finally, I indicate when each law was declared unconstitutional. I use four-year intervals following Dahl's notion that a lawmaking majority only lasts four years, since that is the amount of time each presidency lasts. But in contrast to Dahl, I will also place emphasis on the second interval, more than 4 years and less than 8, since if a president wins reelection his whole presidency can last eight years. Accordingly, laws younger than eight years were enacted by *strong majorities*, while laws declared unconstitutional after 8 years were enacted by *weak majorities*. This is, of course, a matter of degree. The Supreme Court could review the constitutionality of a law that is younger than four years, but with an intervening election that suggests that the law does not enjoy majority support. However, these tools provide a first step to understand how time plays a role in judicial review and in reappraising the counter-majoritarian difficulty.

A. The Warren Court: 1953 to 1969

The Warren Court, which lasted from October 5, 1953 to June 23, 1969, describes more than a specific moment in the Supreme Court. It embodies a way of thinking about judicial review in modern constitutional law. The Warren Court is linked with, among other things, judicial activism. However, there are only twenty-three cases where the Warren Court declared federal laws unconstitutional. Since Warren's time as Chief Justice lasted for 5,470 days, this means that the frequency of declarations of unconstitutionality was once every 250 days.

On the other hand, the average age of statutes declared unconstitutional was 13 years, 3 months and 18 days old (4,856 days). If we rely on presidential terms of 4 years to measure majoritarian support, this will mean that these statutes were enacted by lawmaking majorities elected three or four presidential elections prior to the declaration of unconstitutionality. This is the first indication that the Warren Court was not as active and counter-majoritarian, at least at the federal level, as some people think. The counter-majoritarian criticism to the Warren Court falls apart when we look at the time intervals of the laws held unconstitutional.

TABLE 1. WARREN COURT

Number of Years	Acts Declared Unconstitutional	Percentage
Less than 4 years	1	4.5%
4 - 7	4	17%
8 - 11	5	22%
12 - 15	9	39%
16 - 19	3	13%
20 or more	1	4.5%
Total	23	100

As the preceding table illustrates, the Warren Court only declared one federal law unconstitutional when the lawmaking majority was at its strongest. As such, only 4.5% of its cases involved a direct clash with a lawmaking majority, and only 17% involved the second strongest majority i.e. laws enacted less than eight years before the decision. Moreover, the only case where the Supreme Court declared a law unconstitutional within four years of its enactment, *Lamont v. Postmaster General*,[37] was a unanimous decision concerning what can be regarded as a minor policy of the Postal Service and Federal Employees Salary Act of 1962. Thus, the

[37] 381 U.S. 301 (1965).

Warren Court rarely confronted a direct lawmaking majority at the federal level and when it did it was in a case of relative minor importance.

B. The Burger Court: 1969 to 1986

The Burger Court lasted from 1969, when Chief Justice Warren Burger assumed office, to 1986. The Burger Court is often considered a transitional court, between the liberal approach of the Warren Court and the more conservative judicial ideology of the Rehnquist Court. There are twenty-six cases where the Burger Court declared a federal law unconstitutional. Since Burger's presidency lasted for 6,304 days this means that the frequency of declarations of unconstitutionality was once every 242 days. As such, its pace was consistent with the Warren Court, which declared laws unconstitutional every 250 days.

These laws were repealed when they had an average age of 17 years, 3 months and 23 days old (6,322 days). This number would suggest that the Burger Court was less counter-majoritarian than the Warren Court, since the laws that were declared unconstitutional were on average older. However, as the following table illustrates, the Burger Court declared ten laws unconstitutional that were not even four years old.

TABLE 2. BURGER COURT

Number of Years	Acts Declared Unconstitutional	Percentage
Less than 4 years	10	38%
4 - 7	2	8%
8 - 11	3	11%
12 - 15	2	8%
16 - 19	1	4%
20 - 23	1	4%
24 - 27	2	8%
28 - 31	1	4%
32 or more	4	15%
Total	26	100

In the first four-year interval, the Burger Court declared more laws unconstitutional than in any other (38%). In contrast, the Warren Court only declared one law of this kind unconstitutional (4.5%) and the most common age of the statutes invalidated was from 12 to 15 years (39%). As such, the Burger Court clashed with a lawmaking majority at a much higher rate than the Warren Court. One of the most significant and controversial of these cases was *Buckley*

v. Valeo,[38] where the Supreme Court declared unconstitutional a major policy; the 1974 amendments to the Federal Election Campaign Act of 1971. While the statutes declared unconstitutional by the Burger Court were older than the laws declared invalid by the Warren Court, this can be explained by the fact that the Warren Court only declared unconstitutional one law over 20 years old, whereas the Burger Court invalidated eight laws 20 years or older.

C. The Rehnquist Court: 1986 to 2005

The Rehnquist Court lasted from September 26, 1986 to September 3, 2005 (6,916 days). As such, it is the longest Court analyzed in this article. During this time, the Court declared forty federal statutes unconstitutional and at a faster frequency than the Burger and the Warren Court. While those Courts declared unconstitutional laws unconstitutional at a similar rate—the Warren Court every 250 days and the Burger Court every 242—the Rehnquist Court declared a federal law unconstitutional every 173 days. While the Rehnquist Court is perceived as less counter-majoritarian, the faster frequency and magnitude of declarations of unconstitutionality suggests that it was actually *more* counter-majoritarian, at least in contrast with the Warren and Burger Courts.

During the Rehnquist Court, the interval of years between the date of enactment and the declaration of unconstitutionality was, on average, 13 years and 2 months (4,807 days). This follows more closely the Warren Court than the Burger Court. However, as the following table demonstrates, the Rehnquist Court is more similar to the Burger in how many laws it declared unconstitutional even when they had the support of a lawmaking majority.

TABLE 3. REHNQUIST COURT

Number of Years	Acts Declared Unconstitutional	Percentage
Less than 4 years	10	25%
4 - 7	14	35%
8 - 11	5	12%
12 - 15	1	2.5%
16 - 19	1	2.5%
20 - 23	2	5%
24 - 27	2	5%
28 - 31	0	0%
32 or more	5	13%
Total	40	100

[38] 424 U.S. 1 (1976).

The Rehnquist Court declared ten laws that were less than 4 years old (25%) unconstitutional and fourteen that were between 4 and 7 years old (35%). As such, the Rehnquist Court not only declared more laws unconstitutional than previous Courts, it was also "far more likely than the two preceding Courts to strike down laws recently enacted by Congress."[39] Accordingly, contrary to conventional wisdom, the Rehnquist Court was more counter-majoritarian than the Warren Court. After all, 60% of the laws it declared unconstitutional represented a direct clash with the lawmaking majority at its strongest.

One of the key examples of the Rehnquist Court declaring federal statutes unconstitutional is *United States v. Eichman*.[40] There the Supreme Court declared unconstitutional a federal law against flag desecration that was enacted seven months before the decision. This remind us that even if the Court is perceived as counter-majoritarian, that does not mean it is liberal or conservative, a counter-majoritarian decision may be regarded as conservative (*Buckley v. Valeo*) or liberal (*United States v. Eichman*).

D. The Roberts Court: 2005 to present

The Roberts Courts started on September 29, 2005. Since John Roberts is only 65 years old, he has the potential to become the longest serving Chief Justice in history. Therefore, we might need to wait twenty more years before completing a full assessment of the Roberts Courts. Up to now it has declared 23 federal laws unconstitutional — a frequency of once every 218 days.[41] This means that during Roberts' tenure the Court has returned to the slower pace of the Warren and the Burger Court, instead of continuing the faster rate of the Rehnquist Court.

The average age of the statutes declared unconstitutional during the Roberts Courts is 25 years, 8 months and 24 days old. Therefore, in the sense described by Dahl, the Roberts Court could be considered as the least counter-majoritarian. The following table, however, allows a better comparison between the Roberts and the Warren Court, which I consider to be the least counter-majoritarian at the federal level.

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[39] Ryan E. Emenaker, *Constituional Interpration and Congressional Overrides*, 3 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 197, 212 (2013).

[40] 496 U.S. 310 (1990).

[41] For the purposes of the analysis in this section, I examined the Roberts Court until June 30, 2019.

TABLE 4. ROBERTS COURT

Number of Years	Acts Declared Unconstitutional	Percentage
Less than 4 years	1	4%
4 - 7	5	22%
8 - 11	2	9%
12 - 15	2	9%
16 - 19	2	9%
20 - 23	1	4%
24 - 27	3	13%
28 - 31	1	4%
32 or more	6	26%
Total	23	100

First, notice that only one law which was less than four years old—when the lawmaking majority is at its strongest—was declared unconstitutional (4%). By contrast, six laws older than 32—when the lawmaking majority is weaker—have been invalidated by the Roberts Court (26%). However, if we expand the concept of recent laws to include laws younger than 8 years, or within two presidential terms, we find that the Roberts Courts is still more counter-majoritarian than the Warren Court. While the Robert Court declared six federal statutes younger than 8 years unconstitutional (26%), the Warren Court only invalidated five laws of that age (21.5%). What explains the fact that the Roberts Courts has the longest interval between date of enactment and date of decision? It has invalidated eleven laws older than 20 years (47%), while the Warren Court only invalidated one (4.5%). Part III expands upon this analysis and provides a fuller account of how temporality has been influential for the Roberts Court.

E. Summary

Taken as whole, this analysis confirms some of Dahl's conclusions from 1957: the Supreme Court is still part of the dominant national alliance and usually does not directly clash with persistent lawmaking majorities. Instead, the overwhelming majority of the laws declared unconstitutional are older, when is more difficult to discern whether they still enjoy majority support. There is no way of knowing whether the justices consciously factored the age of the statute in their decisions. However, it could be argued that it is easier for the Court to invalidate older statutes, when the counter-majoritarian difficulty is not as pressing. The following table brings a final summary of the three most significant measures: (1) frequency

of declarations of unconstitutionality, (2) average age of the statutes, and (3) percentage of laws under eight years old invalidated.

TABLE 5. SUMMARY OF THE COURTS FROM 1953 TO 2018

Courts	Warren	Burger	Rehnquist	Roberts
Frequency (days)	250	242	173	218
Average Age	13 years, 3 months and 18 days old	17 years, 3 months and 23 days old	13 years and 2 months	25 years, 8 months and 24 days old
Percentage of recent laws	21.5%	46%	60%	28.5%

IV. An In-depth Look at the Roberts Court

By comparing the different courts, we begin to understand the temporality dimension of judicial review. However, many questions are left unanswered: did the statutes declared unconstitutional involve major or minor policies? Which justices were declaring federal laws unconstitutional, the conservatives or the liberals? Did it matter whether the law was enacted by the Republican or the Democratic Party? How is the counter-majoritarian difficulty and the passage of time articulated by the Court? Part III purports to answer these questions through an in-depth examination of the Roberts Court.

As mentioned in Part II, the Roberts Court is, in some ways, the least counter-majoritarian court since the Warren Court. However, the Court is still ongoing. We might have just experienced "an initial period of restraint intended to bolster claims that the old majority was recklessly activist," that will be "followed by a period of activism intended to erase and then replace the activist jurisprudence of the old majority."[42] As such, soon we may see a renewed activism by the Roberts Court, especially after it consolidated its conservative majority with Gorsuch and Kavanaugh.

Meanwhile, the issue of unelected judges invalidating laws has not lost any of its salience. On the contrary, the polarization of the political spectrum and the Supreme Court has led to a more obvious invocation of the counter-majoritarian difficulty by the losing side — both the conservative and the liberal bloc. What distinguishes this period, however, is that the age of the statute has become a double-edged sword when discussing the constitutionality of federal laws. While

42 Posner, *supra* note 7, at 547-48.

sometimes the long-standing nature of a policy is used to defend its constitutionality, in other cases the age of the statute is used against its constitutionality because it is deemed obsolete.

A. Major or Minor Legislation

Dahl claimed that when the Supreme Court clashes with a lawmaking majority it tends to be in relation to minor legislation. In contrast, major legislation—that which the lawmaking authority would regard as important—is struck down at a lower rate and sooner or later Congress reenacts a statute with similar policy objectives. Clarifying which cases relate to minor or major legislation will illuminate the democratic tendencies of the Roberts Court and tell us whether, in the future, a dominant lawmaking majority will legislate again and reverse some of the policy consequences of the Supreme Court's decisions.

Classifying which statutes were important for a lawmaking majority can be difficult since it involves a value judgement of which issues were more important for the lawmaking authority. While *United States v. Windsor* and *Citizens United v. Federal Election Commission* clearly involved major legislation,[43] the statute invalidated in *Zivotofsky v. Kerry*,[44] which designated Jerusalem as part of Israel, is more difficult to classify. One way to classify these statutes is according to the subject matter which has traditionally been considered more important. Accordingly, the statutes involving campaign finance regulations, voting rights, immigration and foreign policy, can be categorized as major legislation. This will put the amount of cases invalidating major legislation at nine: *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[45] *Boumediene v. Bush*,[46] *Davis v. Federal Election Commission*,[47] *Citizens United v. Federal Election Commission*,[48] *Shelby County v. Holder*,[49] *McCutcheon v. Federal Election Commission*,[50] *Zivotofsky v. Kerry*,[51] *Sessions v. Morales-Santana*,[52] and *Sessions v. Dimaya*.[53] Two additional cases

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43 United States v. Windsor, 570 U.S. 744 (2013); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

44 576 U.S. 1059 (2015).

45 551 U.S. 449 (2007).

46 553 U.S. 723 (2008).

47 554 U.S. 724 (2008).

48 558 U.S. 310 (2010).

49 570 U.S. 529 (2013).

50 572 U.S. 185 (2014).

51 576 U.S. 1059 (2015).

52 137 S. Ct. 1678 (2017).

53 138 S. Ct. 1204 (2018).

should be added to this list: *United States v. Windsor*,[54] which invalidated Section 3 of the Defense of Marriage Act (DOMA), and *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,[55] which struck down the American with Disabilities Act of 1990 as applied to religious organizations' selection of religious leaders.

This classification is by no means definitive, but there is a clear difference between these statutes and the remaining federal laws, which I consider to be minor legislation: criminalization of the commercial production, sale, or possession of depictions of cruelty to animals;[56] the dual layer of protection afforded to members of the Public Company Accounting Oversight Board;[57] limitations to district court judges during re-sentencing for crimes against children;[58] sanctioning Article III judges to enter final judgements on a state law counterclaim;[59] authorizing lawsuits against states engaging in gender discrimination in the granting of self-care leave;[60] criminalizing lying about having a military medal;[61] conditioning federal funding on an anti-prostitution pledge;[62] tougher sentencing in some illegal firearms cases;[63] prohibiting the registration of trademarks that may "disparage" persons, institutions, beliefs, or national symbols;[64] restrictions on sports betting;[65] defining an offense as a crime of violence;[66] and prohibiting the registration of immoral or scandalous trademarks.[67]

Until now, the Roberts Courts has invalidated almost the same amount of major and minor legislation. This pattern repeats itself when we look at federal legislation of a current or recent lawmaking majority i.e. statutes younger than eight years. There were three cases that involved recent major legislation: *Boumediene v. Bush* (the Military Commissions Act of 2006), *Federal Election Commission v. Wisconsin Right to Life* and *Davis v. Federal Election Commission*

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54 570 U.S. 744 (2013).

55 565 U.S. 171 (2012).

56 United States v. Stevens, 559 U.S. 460 (2010).

57 Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010).

58 Pepper v. United States, 562 U.S. 476 (2011).

59 Stern v. Marshall, 564 U.S. 462 (2011).

60 Coleman v. Court of Appeals of Maryland, 566 U.S. 30 (2012).

61 United States v. Alvarez, 567 U.S. 709 (2012).

62 Agency for International Development v. Alliance for Open Society International, Inc., 570 U.S. 205 (2013).

63 Johnson v. United States, 135 S. Ct. 2551 (2017).

64 Matal v. Tam, 137 S. Ct. 1744 (2017).

65 Murphy v. National Collegiate Athletic Association, 138 S. Ct. 1461 (2018).

66 United States v. Davis, 139 S. Ct. 2319 (2019).

67 Iancu v. Brunetti, 139 S. Ct. 229 (2019).

(concerning different provisions of the Bipartisan Campaign Reform Act of 2002). Meanwhile, three cases concerned recent minor legislation: *Free Enterprise Fund v. Public Company Accounting Oversight Bd.* (the dual layer protection of the Public Company Accounting Reform and Investor Protection Act)*, Pepper v. United States* (limitations on re-sentencing of the PROTECT Act of 2003), and *United States v. Alvarez* (the Stolen Valor Act). It would be naive to draw strong conclusions from this small sample, but it suggests that the Roberts Courts is also willing to declare unconstitutional major legislation enacted by a recent lawmaking majority. This is important because Congress will most likely try to revert some of the policy consequences of the declarations of unconstitutionality of major legislation. Campaign finance reform, for example, is a likely area where a future Congress will try to ameliorate some of the policy consequences of these judicial decisions.

B. Ideological Composition and Party Politics

The three cases in which the Supreme Court declared recently enacted major legislation unconstitutional were decided with a narrow 5-4 majority. In the two cases involving campaign finance, *Federal Election Commission v. Wisconsin Right to Life* and *Davis v. Federal Election Commission*, the conservative bloc won, and in the third one, *Boumediene v. Bush*, the liberal bloc was joined by Justice Kennedy. All three cases involved statutes that were enacted during a Republican presidency. The following table applies this ideological breakdown to the other cases where the Roberts Court declared federal statutes unconstitutional.

TABLE 6. THE IDEOLOGICAL COMPOSITION OF THE SUPREME COURT

Decision of the Supreme Court		**Party when Act was enacted**		
Case	**Ideological composition (swing justice)**	**President**	**House**	**Senate**
Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449 (2007)	5-4 Conservative Bloc (Kennedy)	R	R	D
Boumediene v. Bush, 553 U.S. 723 (2008)	5-4 Liberal Bloc (Kennedy)	R	R	R
Davis v. Federal Election Commission, 554 U.S. 724 (2008).	5-4 Conservative Bloc (Kennedy)	R	R	D

Citizens United v. FEC, 558 U.S. 310 (2010)	5-4 Conservative Bloc (Kennedy)	R	R	D
United States v. Stevens, 559 U.S. 460 (2010)	8-1	D	R	R
Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010)	5-4 Conservative Bloc (Kennedy)	R	R	D
Pepper v. United States, 562 U.S. 476 (2011)	6-2	R	R	R
Stern v. Marshall, 564 U.S. 462 (2011)	5-4 Conservative Bloc (Kennedy)	R	D	R
Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012)	9-0	R	D	D
Coleman v. Court of Appeals of Maryland, 566 U.S. 30 (2012)	5-4 Conservative Bloc (Kennedy)	D	D	D
United States v. Alvarez, 567 U.S. 709 (2012)	6-3 (Kennedy and Roberts)	R	R	R
Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205 (2013).	6-2	R	R	R
Shelby Cty. V. Holder, 570 U.S. 529 (2013)	5-4 Conservative Bloc (Kennedy)	D	D	D
United States v. Windsor, 570 U.S. 744 (2013)	5-4 Liberal Bloc (Kennedy)	D	R	R

McCutcheon v. FEC, 572 U.S. 185 (2014)	5-4 Conservative Bloc (Kennedy)	R	R	D
Zivotofsky v. Kerry, 135 S.Ct. 2076 (2015)	5-4 Liberal Bloc (Kennedy)	R	R	D
Johnson v. United States, 135 S. Ct. 2551 (2015)	8-1	R	D	R
Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017)	8-0	D	D	D
Matal v. Tam, 137 S.Ct. 1744 (2017)	8-0	D	D	D
Sessions v. Dimaya, 138 S. Ct. 1204 (2018)	5-4 Liberal Bloc (Kennedy)	R	D	R
Murphy v. National Collegiate Athletic Association, 138 S. Ct. 1461 (2018)	6-3 Liberal Bloc (Kennedy and Roberts)	R	D	D
United States v. Davis, 139 S. Ct. 2319 (2019)	5-4 Liberal Bloc (Gorsuch)	R	D	R
Iancu v. Brunetti, 139 S. Ct. 229 (2019).	6-3 Conservative Bloc (Kagan and Ginsburg)	D	D	D

These cases attest to Kennedy's reputation as the swing justice, at least when it comes to declaring federal statutes unconstitutional. Yet, out of these twenty-three cases, Kennedy only joined the liberal justices to invalidate federal statutes in four of them. In contrast, in eight cases he was part of the conservative majority to declare federal laws unconstitutional. Meanwhile, Gorsuch has been the only other con ervative justice to join the liberal bloc in a 5-4 decision. Added together, in thirteen out of twenty-three cases the Supreme Court split 5-4 along ideological lines when assessing the constitutionality of a federal statute. Only five cases commanded a unanimous or near-unanimous majority. This highlights the polarized nature of the Roberts Courts, especially when it exercises its power of judicial review.

While the conservative justices tend to project themselves as proponents of judicial restraint, these cases illustrate that is the conservatives of the Roberts Court, not the liberals, who are declaring most federal laws unconstitutional. These conservative-led declarations of unconstitutionality can be divided in three groups. First, there were eight cases where the conservatives formed a five-

member majority to strike down federal statutes (35%). Six of these cases involved laws that were signed by a Republican but promulgated by a divided Congress. The other two were legislated and signed with Democratic control of all political branches. Second, there were five cases where either eight or nine justices agreed to invalidate a federal law (22%). One was signed by a Democratic president with a divided Congress, two by a Republican president with a divided Congress, and two by a Democratic president with Democratic control of the House and the Senate. Third and finally, there were three cases were three conservatives (i.e. more than half) formed a majority alongside liberals (13%). Two of these three laws were enacted with Republican control of all political branches, while the third one with Democratic control of all branches. As such, only in two out of twenty-three cases did more than half the conservatives participate to invalidate a federal law enacted by Republicans (8%). If we add these three groups together there is a total of sixteen cases were the conservative bloc declared, or was indispensable to declaring the unconstitutionality of federal statutes (70%).

On the other hand, there were seven cases were the liberals led, but with the help of one or two conservatives (30%). Three of them were enacted by a Republican President with a divided Congress, two of them were signed by a Republican President and a Republican Congress, one was signed by a Republican with a Democratic Congress, and another one was signed by a Democratic President, but with a Republican Congress. This leads to a small, but important conclusion: the liberals have never led the Court to declare unconstitutional a federal statute adopted with Democratic control of the Presidency and Congress.

Let us now consider which party controlled the Congress and the Presidency that enacted these laws. Only seven cases involved statutes signed by a Democratic President (30%), in contrast with the other sixteen signed by a Republican President (70%). However, the ideological balance shifts when we look to the Senate, since thirteen of the cases involve laws adopted by a Democratic Senate (56%) and only ten were adopted by a Republican Senate (44%). Curiously, the balance is closer in the House of Representatives: eleven cases involve laws enacted by a Democratic House (48%) and twelve were promulgated by a Republican House (52%). By just looking at these numbers, the law most likely to be invalidated will be one enacted by a Democratic Senate and a Republican House, and signed by a Republican President. Of course, this analysis only looks at which political party had control, even narrowly, and not at which individual members of Congress supported the act in controversy. However, these numbers suggest that in a traditional sense neither party's policies have been singled out by the Supreme Court. Both the Republicans and the Democrats have been equally affected by judicial review. Finally, fourteen cases involved federal laws enacted during moments of divided government (61%), which illustrates how tenuous the idea of a lawmaking majority really is.

C. Substantive Analysis

Broader trends emerge when we look at the substantive content of these cases. For instance, the conservatives share a particular view of originalism that gives more prominence to the Founding than the Reconstruction. The *lochnerization* of the First Amendment is another trend. In ten of the twenty-three cases the Supreme Court has relied on the First Amendment to invalidate federal statutes; four of those, 5-4 conservative majorities in the context of campaign finance regulations. Both conservatives and liberals love to remind each other about *Lochner* and how problematic is to have unelected justices declare laws unconstitutional. More surprising, however, is how the justices have articulated their arguments for or against judicial restraint with explicit mentions of how recent or old certain statutes or policies are.

This back-and-forth between liberals and conservatives over judicial restraint goes back to the first case where the Roberts Court invalidated a federal statute. In *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[68] the Supreme Court struck down a ban on issue ads right before a primary or general election. In his dissent, Souter defended the constitutionality of the statute since it relied on a "century-long tradition of legislation and judicial precedent."[69] His argument was that similar policies had been part of the legal system since 1907, which supported his claim that they were constitutional and that they enjoyed continuous majoritarian support. Along similar lines, in *Citizens United v. Federal Election Commission*, Stevens stated that "[i]n a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules."[70] He criticized the Court for rejecting the wishes of the American people, "who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."[71] As such, these two dissents questioned how the Court could refuse to defer to the political branches, especially when these were both long-standing regulations that had majoritarian support. For Stevens, these decisions amounted to "legislative self-dealing rather than an earnest effort to facilitate First Amendment values and safeguard the legitimacy of our political system."[72]

The conservatives have repeated these concerns in those few occasions where they have not had their way. The first occasion during the Roberts Court was

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68 551 U.S. 449 (2007).

69 *Id.* at 521.

70 Citizens United v. Federal Election Commission, 558 U.S. 310, 479 (2010).

71 *Id.*

72 *Id.* at 460-61.

Boumediene v. Bush.[73] In an opinion by Justice Kennedy, the Court held that Congress could not suspend a prisoner's right of *habeas corpus*. In his dissent, Chief Justice Roberts that Congress is the one who can "determine—through democratic means—how best to balance the security of the American people with the detainees' liberty interests," rather than "unelected, politically unaccountable judges."[74] In similar terms, Scalia berated how the Court was placing itself above the political branches, who had acted quickly to enact this federal statute. Conservatives have also emphasized how long certain regulations have existed. In *United States v. Alvarez*, one of the rare instances where the liberals invalidated a federal law under the First Amendment, Justice Alito argued that "[t]he Stolen Valor Act follows a long tradition of efforts to protect our country's system of military honors."[75] The long life of similar regulations is highlighted as evidence of majoritarian support and constitutionality of the statute, even in cases such as *Alvarez* where the law enacted was quite recent.

The discussion in two cases place front and center the dilemma of unelected judges exercising judicial review against statutes enacted by the representatives of the people: *United States v. Windsor*,[76] and *Obergefell v. Hodges*.[77] While *Obergefell* did not involve a federal statute, since the case was a follow-up to *Windsor* it is valuable to consider them in tandem. In *Windsor*, the Supreme Court declared a federal law unconstitutional that restricted marriage only to opposite-sex unions. Alito, in his dissent, stated that the plaintiff was requesting "the recognition of a very new right," instead of "the protection of a deeply rooted right," to "unelected judges" rather than seeking this innovation from the "legislative body elected by the people."[78] Scalia went even further, asserting that the decision diminishes "the power of our people to govern themselves."[79] For Scalia, the Court has "no power under the Constitution to invalidate this democratically adopted legislation."[80] Scalia continued to rail against what he perceived as "judicial supremacy" in *Obergefell*. Echoing Stevens in *Citizens United*, Scalia could not countenance how limiting marriage between a man and a woman would be unconstitutional, given that such laws had existed for 135 years without having been declared unconstitutional. A similar defense is articulated, the courts should not disregard

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73 553 U.S. 723 (2008).

74 *Id.* at 826.

75 United States v. Alvarez, 567 U.S. 709, 741 (2012).

76 570 U.S. 744 (2013).

77 135 S. Ct. 2584 (2015).

78 *Windsor,* 570 U.S. at 809-09.

79 *Id.* at 778.

80 *Id.*

the long history and age of these restrictions. Age shows continuous democratic will, rather than weakened majoritarian support and legislative inertia.

In his dissent in *Obergefell*, Chief Justice Roberts conceptualized the role of judicial review and its legitimacy in democratic terms. For him, the Court should be "sensitive to the fact that judges are unelected and unaccountable, and that the legitimacy of their power depends on confining it to the exercise of legal judgment."[81] But the inconsistency of the Roberts Court over matters of judicial restraint and the sanctity of the democratic process is clear when you contrast *Windsor* and *Obergefell* with *Shelby County v. Holder*.[82] In an Opinion penned by the Chief Justice, the Supreme Court invalidated Section 4(b) of the Voting Rights Act of 1965, which contains the coverage formula that determines which states and local governments are subject to the preclearance requirement of Section 5. Consequently, the Court rendered inoperable Section 5, which requires preclearance before certain states and local government amend their voting laws. Because Section 5 of the Voting Rights Act had a sunset clause, it has been reauthorized many times. The last time this happened, in 2006, Congress considered at length whether to reauthorize it. Congress and the President agreed to do so for an additional 25 years, since it had been so instrumental in eradicating racial and language discrimination in voting laws. But because Congress did not change Section 4(b), the same formula from 1975 would apply to determine which state and local governments needed preclearance.

By authorizing Section 5, Congress and the President, the elected representatives of the People, were also tacitly consenting to the coverage formula. This did not, however, stop the Supreme Court, in a 5-4 decision, from declaring Section 4(b) unconstitutional because it violated the equal sovereignty of the states. Because Congress had not updated the coverage formula, the statute's 40-year-old formula was "keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs."[83] Here the age of the statute had the opposite effect: the coverage formula was unconstitutional because Congress had not reviewed it in 40-plus years. Along the lines of Calabresi's second look approach, the Supreme Court emphasized that in *Northwest Austin Municipal Util. Dist. No. One v. Holder*,[84] it had cautioned against the constitutionality of the statute and asked Congress to adopt a rule of its own to replace the coverage. Since Congress did not do so, and the Court could not update it themselves, the Supreme Court declared the coverage formula of the Voting Rights Act unconstitutional.

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81 *Obergefell*, 135 S.Ct. at 2626.

82 Shelby County v. Holder, 570 U.S. 529 (2013).

83 *Id.* at 553.

84 557 U.S. 193 (2009)

Here age represents legislative inertia and not continuous majoritarian support. In her dissent, Justice Ginsburg detailed how carefully Congress had examined the issue and stressed how the Court was substituting Congress' judgement with their own. Repeating the usual rallying cry, Ginsburg concluded that "the Court should have left the matter where it belongs: in Congress' bailiwick."[85]

Shelby County should be understood as a symbol of the dangers of relying on the age of a statute to argue that it does not respond to the current social, economic and political landscape. At the same time, it can be analyzed as a direct clash with a recent lawmaking majority, since Congress and the President reauthorized the preclearance requirement less than eight years before the decision. The democratic legitimacy of the Supreme Court is affected when a law that was declared constitutional forty years ago and has the support of a current lawmaking majority is invalidated. Roberts himself has been aware of the democratic legitimacy of the Court. That was clear in *National Federation of Independent Business v. Sebelius*,[86] where he gave the decisive fifth vote to safe key provisions of Obamacare. But avoiding a direct clash with a lawmaking majority in one of the major legislations in recent times is one thing. Deciding when it is democratically legitimate to exercise judicial review, especially with a statute that is older and has a weaker lawmaking majority behind it, is another.

V. The Legitimacy of Invalidating Older Statutes

We have seen that the Supreme Court mostly invalidates older federal statutes and that the justices have used the age of the statute to argue both in favor and against its constitutionality. This final part reappraises the counter-majoritarian difficulty and the question of the democratic legitimacy of judicial review. I argue that the counter-majoritarian problem is often overstated. However, this does not end the debate about the democratic legitimacy of judicial review. Rather, we must assess how the principle of self-government is also at stake when the Supreme Court invalidates older federal statutes.

The key takeaway from this essay is that the usual complaint that the Supreme Court is counter-majoritarian is weakened when we consider two things: (1) the difficulty of ascribing majority support to a statute, unless it is a recent one, and (2) the fact that the Court tends to declare older federal statutes unconstitutional. There are only a few cases when we can truly say the Supreme Court is acting in a counter-majoritarian way. This is most evident when the challenged federal statute is a recent, major legislation. For instance, if the Supreme Court had invalidated

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85 *Shelby County*, 570 U.S. at 590.

86 567 U.S. 519 (2012).

Obamacare we could have criticized it for being counter-majoritarian. However, if the law is old and minor it is impossible to tell whether it still enjoys majoritarian support. Therefore, not every instance of judicial review of federal legislation can be labeled as counter-majoritarian. In some cases, the majoritarian support is higher than in others. The age of a statute is just one of many elements that should be taken into consideration when evaluating whether the Supreme Court is actually nullifying the will of a lawmaking majority.

I am not suggesting, however, that the Supreme Court should declare older federal laws unconstitutional because they no longer have majoritarian support. My claim is that the focus on the counter-majoritarian difficulty misses the true democratic problem of judicial review of federal legislation: who has the democratic credentials to review and reconsider this legislation, regardless of whether they have majoritarian support. As such, the analysis of the democratic legitimacy of judicial review should not be limited to the counter-majoritarian problem.

To understand this, we must go back to Calabresi's second look approach. For Calabresi, if enough time has intervened between the date of enactment and the date the law is declared unconstitutional it undercuts the "presumption that the same majority persists."[87] Furthermore, courts can remand obsolete laws back to the legislative body for a second look. As I have shown in Part II, most federal laws that have been declared unconstitutional are old statutes. I agree that, in these cases, it is hard to tell whether they still have majoritarian support. Therefore, in cases regarding old statutes, the Supreme Court is not acting in a counter-majoritarian way. It is also true that many laws are obsolete and outdated because in the United States, as in many common law jurisdictions, there is no systematic and coherent approach to lawmaking. However, Calabresi goes one step further and believes that courts have the faculty to remand the question back to the legislature. This would entail that the lawmaking majority can give the statute a second look, but in many situations, it will be harder to reenact it.

The Supreme Court seems to have adopted Calabresi's view regarding the obsoleteness of certain statutes, but without providing Congress a second look. Instead, the Supreme Court invalidates the law and Congress cannot reenact the same statute. The Supreme Court seems to reason that older federal statutes no longer have continued majority support. In these situations, rather than deferring to Congress, the Supreme Court is more willing to look at the law's constitutionality. The Court second-guesses the legislature because it has the benefit of hindsight into how the statute fits with the entire body of law, some of which did not exist at the time the statute was enacted. Therefore, with regards to federal legislation,

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87 CALABRESI, *supra* note 28, at 102.

the Supreme Court acts in ways that are even worse than the approach proposed by Calabresi, because it precludes Congress from giving the statute a second look.

This exercise of judicial review, exemplified in cases like *Shelby County*, is not democratically legitimate. For both outcome-related reasons and process-related reasons, Congress should decide whether a law has continued majority support and, most importantly, whether they are obsolete or do not reflect current needs.[88] Legislators are democratically accountable through regularly scheduled elections. They can consider moral and constitutional arguments in their broadest sense, while justices are limited by the constitutional text and the different theories of constitutional interpretation. Moreover, Congress is in a better position to assess whether the legislation still has popular support and whether it still satisfies its policy goals. In conclusion, it should be the responsibility of our elected representatives and not unelected judges to update our legal system.

At the same time, we cannot know whether the Supreme Court actually reasons that some older federal statutes are obsolete or no longer have majoritarian support. The age of a statute is something that is rarely explicitly acknowledged. The Supreme Court might not even be aware of how old each statute is. This would suggest that the age of the statute does not usually have any significance when the Supreme Court reviews federal legislation. However, the Supreme Court probably knows when they are reviewing recent major legislation, such as Obamacare. As I mentioned before, in these circumstances we can properly categorize the decision as counter-majoritarian. While the Supreme Court might not always factor in when the statute was enacted, it is highly probable that it knows when recent major legislation is being challenged.

On the other hand, Part III provides many examples of how justices often refer to the fact that a law was enacted a long time ago as an argument to defend its constitutionality. While they might not know the precise age of a statute, they seem to be aware that the policy is not a new one and has stood the test of time without being challenged successfully. More worrisome, the age of the statute was used in *Shelby County* to argue that it was an obsolete statute enacted a long time ago. This case illustrates the dangers of the Supreme Court deciding whether a statute is antiquated and no longer responds to current needs. As such, the main issue is not whether the law no longer has continuous majority support. The essential question is who has the democratic legitimacy, between the courts and Congress, to determine that an older statute has become obsolete in light of the intervening social and political context. It is my view that the legislative process is the appropriate forum, because it gives a voice to all the citizens affected by the statute. Moreover, Congress could also adopt informal rules under which it

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[88] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

can systematically review laws that are older and modify them, if necessary, in a holistic way. As such, Congress should also assume its own responsibility and legislate in a cohesive and systematic way.

Here, I have offered a preliminary assessment about the democratic legitimacy of the judicial trend of invalidating old statutes. However, other constitutional theories can provide a different account of the role time plays. For example, for the living constitutionalist, a law might have had majority support when enacted and considered valid within the constitutional parameters. But as time moves on so does the constitutional interpretation. Conflict, mobilization and confrontation can challenge us to reassess whether a previous rule, certainly thought as valid one hundred years ago, is still valid today. In this sense, time does not have to mean weakened majority support, but we should consider the amount of time that has passed and how the socio-political context has shifted when evaluating whether a federal law complies with the Constitution. On the other hand, for the originalists the age of the statute plays the *opposite* role. They can argue, as many of them have, that the age of the statute illustrates its constitutionality, especially when the law, or a similar one, was enacted soon after the pertinent constitutional clause was adopted. For them the socio-political context should not matter, and the fact that a law has withstood the test of time is illustrative of its constitutionality.

These are some examples of how normative accounts of the legitimacy of judicial review can consider the role of temporarily. In addition to the normative accounts, we should also explore what this could entail for sociological legitimacy. Sociological legitimacy looks at whether people consider the system or institution, in this case the Supreme Court, legitimate. In a recent study by Gibson and Caldeira, 55% of respondents answered that "[j]udges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judge."[89] This implies that the sociological legitimacy of judicial review is still conceived in majoritarian terms. However, these studies do not include questions regarding temporality or conceptualize what is a majority or when did this majority made its decision. Would people respond differently if they knew that by the time the Supreme Court reached their decision, thirty years had lapsed since Congress enacted the law? The answers to this and other questions will guide us in understanding the sociological legitimacy of the Supreme Court and might even lead to different practices in judicial review. Therefore, the data shown in Part II could influence both normative and sociological accounts of the legitimacy of judicial review.

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[89] James L. Gibson and Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?* 45 L. & SOC. REV. 195 (2011).

VI. Conclusion

Evaluating the temporal element in judicial review is not only important, but often overlooked. This article aimed to fill this gap by studying how temporality influences the judicial review of federal legislation. It found that the Supreme Court rarely invalidates laws enacted by a current lawmaking majority. As such, conceiving judicial review in majoritarian or counter-majoritarian terms misses the point. The problem is not whether the Court is subverting the will of a majority, since in most cases the laws are so old we cannot tell whether there is majoritarian support. The true question is who has the democratic credentials to modify or eliminate that law, even when it has lost popular support or become obsolete. In my view, it should be Congress the one who reconsiders these statutes because it is accountable to voters and it can evaluate the full picture.

Here, I have looked at the counter-majoritarian difficulty through different lenses. This is a problem that has occupied many constitutional scholars. Yet, I hope I have contributed to its demystification. After all, the real threat to democracy is not the judicial review of federal legislation, but the many political and institutional features that stop the political process from truly reflecting the popular will. In this sense, we should look beyond the counter-majoritarian difficulty and focus on the other ways the constitutional system is not democratically legitimate.