The Short-Run Inelasticity of Constitutional Law

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Richard H. Pildes, Is the Supreme Court a 'Majoritarian' Institution?, 2010 **Sup. Ct. Rev.** 103 (2010).

In the large and ever-growing category of articles I wish I'd written, the latest entry is Rick Pildes's withering critique of a standard line about the Supreme Court. The standard line holds – roughly speaking, and its imprecision is one of the article's main points – that the Court "cannot and does not stray too far from 'majoritarian views' …. If the Court does, larger political forces bring the Court back into line; the Justices, knowing this, do not wander far." (p. 105). In the context of the Court's recent *Citizens United* decision, Pildes exposes the ambiguity and fragility of this view.

Pildes traces the thesis of a majoritarian Court back as far as a book by Dean Alfange in 1937, although the same claims were clearly articulated by James Bryce in his neglected classic The American Commonwealth, first published in 1889. Whatever its origins, the thesis is usually associated with Robert Dahl's classic 1957 article, which Pildes contrasts with the nearly contemporaneous identification of the "countermajoritarian difficulty" in Alexander Bickel's 1962 book on the Court. Pildes argues that later commentators have taken the Dahl article and run too far with it, overreacting against a romanticized image of the Court as heroic guarantor of minority and individual rights. Thus Pildes offers a partial rehabilitation of Bickel as against, not Dahl himself, but rather Dahl's successors.

The thesis of the majoritarian Court is really a complex of different theses, with different moving parts and different implications. In Pildes's words, "[t]oday's majoritarians are able to cast the Court as so powerfully constrained by 'majoritarian pressures' because they rely on constantly varying and slippery conceptions of 'the majority' that purportedly constrains the Court" (p.116). Among the possible "majoritarian" baselines are (1) current "mainstream public opinion," as identified by aggregated national opinion polls; (2) a currently dominant political coalition in the nonjudicial branches; (3) a dominant political coalition at the time relevant Justices were appointed, which – because of the increasingly long average tenure of the Justices – will often differ from the coalition described by (2) above; (4) the presidential wing of the dominant party; (5) the "lawmaking elite". (I have omitted citations to the theorists who have propounded one or another of these baselines, but Pildes's article names names).

Part of the problem with these competing baselines is their very multiplicity. One or another of them is usually available to anyone who wishes to claim that the latest apparently countermajoritarian decision is really majoritarian, if only we understood the true state of politics. The consequence is that while particular majoritarian theses may be falsifiable, a general commitment to a majoritarian view of the Court is not, because it can skip happily among various ways of specifying the argument.

Furthermore, Pildes identifies a fallacy of aggregation that sometimes underpins majoritarian arguments. It may be true that any sufficiently large set of the Court's decisions, taken as a whole, will be largely majoritarian, somehow defined. But the property that characterizes the group need not characterize its parts or members, so it does not follow that each decision within the set will be majoritarian, taken one by one; the latter claim commits what logicians call a fallacy of division. In economic terms, there is a difference between the short run elasticity and the long run elasticity of constitutional law. In the long run, political institutions – including the Court – will supply the law that a critical mass of people want, so constitutional rules will be long-run elastic. In the short run, however, constitutional law may be importantly countermajoritarian at any given time, because political adjustment of the law relies on mechanisms, like the appointments process, that take time to operate.

Indeed, as Pildes goes on to argue, it is plausible to think that the Court's scope for countermajoritarian

decisionmaking will increase in the future, given various background changes in American politics. The polarization of legislative parties and the increasing volatility in partisan control of the nonjudicial branches both tend to increase the "gridlock interval," or the range within which the Court can decide what it wants because one party or the other will block efforts to overturn its decision. The same phenomena make it difficult for either party to muster a sustained strong of appointments that would reshape the Court's behavior. The increasing tenure of the Justices creates an ever-widening gap between the preferences of the appointing coalition and the preferences of current national majorities. And there is a large gap between the Court's diffuse or ambient support in public opinion and the public's dim view of other institutions, especially Congress.

If the majoritarians have overreacted to Court romantics, Pildes offers balanced judgment and clearminded assessment of different majoritarian theses and mechanisms; he is careful to avoid overreacting in the other direction. Viewed over decades or generations, the Court will not get too far out of line with what enough people want. But that is a thin claim of dubious utility. The long run may be getting longer, as structural trends in politics clog or slow the mechanisms of political correction and thus give the Court increasing autonomy. In any event political life is a succession of short runs lived here and now; Keynes's dictum about the 100 per cent rate of long-run mortality holds for constitutional law as well as for economics. The eventual elasticity of constitutional law offers cold comfort to anyone concerned with countermajoritarian judging.

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