Empirically Evaluating the Counter-Majoritarian Difficulty: Public Opinion, State Policy, and Judicial Review Before *Roe v. Wade*

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Abstract

I conduct a quantitative evaluation of the “counter-majoritarian difficulty” by examining the relationship between public opinion, state policy, and judicial review in constitutional challenges to state abortion statutes in the period before *Roe v. Wade*. I find that state and lower federal court judges tended to invalidate statutes in states with high levels of public support for moving policy away from the status quo, and judges did not strike down statutes in states where majorities firmly supported the status quo. These results suggest the importance of creating a role for state and lower federal courts in evaluating the counter-majoritarian difficulty.

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1 Introduction

— “[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.” — Alexander Bickel (1962, 16-17).

— “Judicial Review does not serve to thwart or legitimate popular majorities; rather that practice alters the balance of power between the numerous political movements that struggle for power in a pluralist democracy.” — Mark Graber (2005, 428)

These two quotations nicely encapsulate what one might respectively call the traditional and revisionist views of judicial review. Alexander Bickel’s (1962) formulation of the “counter-majoritarian difficulty” launched what is “perhaps the central debate in the legal literature on judicial review” (Berry, Bueno de Mesquita and Gersen 2013, 1). In the traditional view set forth by Bickel, the exercise of judicial review—even if normatively necessary and desirable at times—is inherently problematic due to the fact that judges are seen as “overruling” the representative branches of government (Waldron 2006).

In recent years, a variety of scholars have pushed back against the traditional view with a revisionist account that sees judicial review as a “normal” institution in a democratic society marked by competing interests and power. As such, there are instances when judicial review can either be “non-majoritarian” (Graber 1993) or even “pro-majoritarian” (Berry, Bueno de Mesquita and Gersen 2013, Lain 2012). Scholars have presented a wealth of evidence showing that judicial review can actually help legislators advance their political agendas, rather than hindering the exercise of legislative power (Keck 2007, Lemieux and Watkins 2009, Whittington 2007).

While this literature—which falls under the umbrella of the “regime politics” approach to judicial review (Graber 2005)—focuses on the interests of political coalitions (i.e. political elites), a corollary of the approach is that judicial review can actually be pro-majoritarian with respect to public opinion—given the linkage between the public and legislators in a
representative democracy. Determining whether this is the case, however, requires a careful analysis of policy, public opinion, and judicial decisions on particular issues in which courts exercise judicial review. Specifically, it also requires comparing status quo policies against contemporaneous public opinion to evaluate judicial review in the context of whether opinion does or does not match current policy. This is important because even when either legislative or opinion majorities may prefer policy change, the status quo biases inherent in a separation-of-powers system may produce a disconnect between public opinion and policy. Yet, despite the wealth of case studies cited above, there have been few quantitative studies that attempt to examine the extent to which judicial review is pro-majoritarian, by directly comparing the results of judicial evaluations to public opinion on current policy.¹

In this paper, I examine the relationship between public opinion, policy, and judicial review with the goal of adjudicating between the traditional and revisionist view of the counter-majoritarian difficulty. To do so, I focus on the role of courts in the debate surrounding abortion policy in the American states prior to the Supreme Court’s 1973 decision in Roe v. Wade to legalize abortion. That decision is often placed at the center of the debate over the counter-majoritarian difficulty, given the Court’s decision to craft a national rule for state abortion statutes. As Solum (2014) argues, “the counter-majoritarian difficulty seems particularly acute when it comes to so-called ‘implied fundamental rights,’ like the right to privacy at issue in cases like ... Roe v. Wade.” While the degree to which the Court’s decision in Roe matched national public opinion has been well studied, less well known is that both state and federal courts were quite active in evaluating the constitutionality of state abortion statutes in the decade leading up to Roe. Rather than emerging out of the blue, the justices’ decision in 1973 followed a number of state and lower federal court decisions that both upheld and struck down existing state statutes as unconstitutional.

¹I discuss below the related literature on studies of the counter-majoritarian difficulty with respect to the U.S. Supreme Court.
I use these decisions to broaden the lens of the counter-majoritarian difficulty on the role of courts in this important period of social reform. In doing so, this paper makes a number of empirical contributions. First, I use multilevel regression and poststratification (MRP) to develop the first ever state-level estimates of opinion on abortion policy in the pre-\textit{Roe} period. These estimates allow for a direct comparison of the opinion of state majorities to existing state policies on abortion regulation. Second, I collect an original dataset of every state and federal case that evaluated the constitutionality of a state statute before \textit{Roe} (from 1969 to 1972). Such challenges were brought in 29 states, with courts striking down statutes in 13 states.

Connecting policy with public opinion, I find that there was a substantial correlation between state-level public opinion and whether a state liberalized its abortion statutes away from the status quo policy, which effectively only allowed abortions to save the life of the woman. At the same time, the data reveal considerable heterogeneity in the relationship between opinion and policy—in many states where sizable majorities favored reform, the status quo remained in place, creating a mismatch between state policy and majority opinion. Next, I analyze the correlation between public opinion and the likelihood of judicial invalidation of state abortion statutes in the pre-\textit{Roe} period. I find a strong connection between the two—the probability of the exercise of judicial review was increasing in state-level support for policy change. Importantly, judicial decisions striking down state statutes tended to occur in states where support for policy reform was high, and courts did not strike down statutes in states where majority opinion was firmly in favor of the status quo.

Finally, I return to the evaluation of the counter-majoritarian difficulty with respect to \textit{Roe v. Wade} itself. National-level opinion shows that Americans were closely divided over effectively allowing all abortions in the early months of pregnancy—which was the rule announced by the Court in \textit{Roe}. Moreover, a majority of state majorities did not favor such a policy. Thus, the policy announced in \textit{Roe} was counter-majoritarian, to some degree.
However, the state-level analysis shows that in the absence of some exercise of judicial review, the mismatch between policy and opinion was likely to remain in some states for some time. Finally, while the approach in the paper is descriptive, I conclude with some thoughts on the theoretical implications of these findings for placing state and lower federal courts in the debate over the counter-majoritarian difficulty, and for judicial federalism more broadly.

## 2 Representation and Judicial Review

While the counter-majoritarian difficulty is fundamentally about representation, the concept can be viewed on multiple dimensions. Friedman (1993) usefully draws a distinction between process and substance majoritarianism. The former is concerned with the “extent to which the judiciary is accountable to majority will” (Friedman 1993, 588). Judicial review gives judges the power to invalidate laws passed by popularly elected legislative majorities, which naturally creates a normative tension in a representative democracy. This tension is particularly acute with respect to federal judges, given that they are unelected and life tenured.\(^2\) When judges invalidate a law, they potentially disrupt the relationship between elected officials and their constituents.

However, just because a court invalidates a statute does not necessarily mean that the court is acting in a counter-majoritarian manner. This requires the application of substance majoritarianism, which asks whether “judicial decisions interfere with or actually comport with majority rule” (Friedman 1993, 589). Substance majoritarianism has two components: source majoritarianism asks whether courts have “relied upon evidence of popular will in deciding cases,” while result majoritarianism examines whether “actual results of judicial decisions ... correspond with majority preferences” (Friedman 1993, 589).\(^3\) Moreover, while

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\(^2\) Assessing the counter-majoritarian difficulty with respect to state courts is complicated by the fact of the majority of state judges are also elected officials (see e.g. Croley 1995, Pozen 2008, Frost and Lindquist 2010). I return to this issue below.

\(^3\) Bassok and Dotan (2013) make a similar distinction between the fact that courts may rule in a majoritarian fashion when then make actual decisions, but may still be procedurally counter-majoritarian given their lack of accountability relative to legislators.
this distinction is not always made explicit, there is an asymmetry to result majoritarianism. The judicial invalidation of statutes inherently implicates the counter-majoritarian difficulty (broadly conceived), even if the outcome of a decision matches current public sentiment. On the other hand, upholding a statute does *not* implicate the counter-majoritarian difficulty, since this means that courts are deferring to legislatures (even if a law is out of step with current public opinion).

These distinctions allow for the placement of the traditional view of the counter-majoritarian difficulty in a more concrete analytical framework—particularly with respect to the relationship between public opinion and lawmaking. According to the (implicit) notion of the traditional view, public opinion and policy tend to track each other closely. If this were the case, then judicial invalidations of legislation would mean that judges were superseding the preferences of both elected representatives and the public. Along these lines, Waldron (2006, 1346) argues that “allowing decisions by courts to override legislative decisions ... fails to satisfy important criteria of political legitimacy.” In addition, recall Bickel’s contention: “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.”

However, two strands of the revisionist account—both of which are based implicitly on the notion of result majoritarianism—challenge how broadly actual instances of judicial review meet the conditions of the traditional view. First, as proponents of the regime politics approach have argued, under many circumstances legislative majorities will *want* courts to exercise judicial review, for a variety of political reasons. This includes settings where legislators would actually prefer to defer to courts, rather than face the political costs of changing policy directly (Graber 1993, Lovell 2003, Lemieux and Lovell 2010). Whittington (2005), for example, shows how the Supreme Court’s apportionment decisions in the 1960s helped the Democratic regime overcome entrenched interests that sought to maintain the status quo.
of malapportioned and gerrymandered legislative districts. It also includes settings where national electoral majorities rely on courts to “rein in” outlying local electoral minorities (Whittington 2005).

Second, and more relevant for this paper, even when either legislative or opinion majorities may prefer policy change, the status quo biases built into a separation-of-powers system may actually lead to slippages in the matching between public opinion and policy, when the former moves and the latter does not (Lax and Phillips 2012). As a result, the status quo set forth by statutes can lag behind changes in public opinion, perhaps due to blocking by entrenched interests (Whittington 2005, Klarman 1997, Lain 2012). Because courts can set constitutional policy without having to navigate the various veto points in an American legislature (state or federal), judicial review may actually help restore a more one-to-one matching between opinion and policy. To be sure, judges may act strategically and decide not to engage in judicial review for fear of reprisal (Clark 2011). But if the median member of a multimember court wants to implement a new legal policy, it is much easier for her to do so than the median member of a legislative body.

Thus, when evaluating judicial review with respect to the counter-majoritarian difficulty, it is crucial to compare not just the correspondence between public opinion and judicial decisions, but also how those decisions relate to the location of the legislative status quo. For a judicial decision to be counter-majoritarian, it must replace the status quo with a new policy even farther away from the public’s ideal point (however defined). For a judicial decision to be pro-majoritarian, it must replace the status quo with a policy closer to what the public prefers. For example, while the formal model presented in Berry, Bueno de Mesquita and Gersen (2013) does not directly model public opinion, the location of the status quo relative to the ideal point of the median member of a legislature determines whether an act of judicial review will be pro- or counter-majoritarian.

To be sure, there exists a voluminous literature on whether the decisions of the U.S.
Supreme Court align with majority opinion (Dahl 1957, Mishler and Sheehan 1993, Epstein and Martin 2010, *inter alia*). However, these studies tend to examine whether shifts in public opinion, on average, tend to produce concomitant shifts in Supreme Court decision making. Importantly, most of these studies use highly aggregated measures of public opinion (such as measures of overall public mood) to predict the Court’s aggregate voting behavior, meaning that a one-to-one comparison of policy and opinion is not impossible (see e.g. McGuire and Stimson 2004, Giles, Blackstone and Vining 2008, Casillas, Enns and Wohlfarth 2011). Thus, these studies do not squarely analyze whether the Court’s exercise of judicial review is pro-majoritarian with respect to the status quo policy. One important exception is Marshall (1989), who systematically compares issue-level public opinion with Supreme Court decisions. His analysis, however, only briefly considers whether judicial review tends to be counter- or pro-majoritarian (see pp. 95-97).

Finally, none of these studies examine any decision making by state or lower federal courts.

**Whose opinion?** Assessing the counter-majoritarian difficulty also requires assessing whose opinion is relevant? Given the dominant focus in the literature on the U.S. Supreme Court, the assumed relevant measure of opinion is usually *national-level opinion* on a given issue. This makes sense when evaluating the justices’ review of federal legislation. When the Supreme Court invalidates *state legislation*, the metric is less clear, as it involves balancing of national opinion versus state majorities (see e.g. Casper (1976) and Friedman (1993, p. 634, fn. 279)). In addition, and less recognized, as new legal issues emerge, state and lower federal courts make decisions in the the absence of a national policy by the Supreme Court. When this occurs, judicial policy is localized in the sense that state and lower federal courts’ opinions only have force in a particular state (or circuit). Under these circumstances, *state opinion* is the proper metric for evaluating the counter-majoritarian difficulty, as there is no

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4Separately, but somewhat relatedly, Hall (2012) and Hall and Black (2013) empirically question the predictions of the regime politics approach. Their approach, however, focuses on whether the exercise of judicial review helps or hurts the dominant governing coalition, not whether it is pro-majoritarian.
national policy to weigh against national opinion.

Consider, for example, the legal debate surrounding gay marriage that unfolded between 2013 and 2015. In the period following the Supreme Court’s invalidation of the “Defense of Marriage Act” in *U.S. v. Windsor* (133 S. Ct. 2675) in June 2013, the Court essentially “delegated” the question of the constitutionality of same-sex marriage bans to lower federal courts. As a result, between that time and January 2015, when the Court granted cert on the question (before ultimately finding ruling bans on same-sex marriage unconstitutional in June 2015), a succession of lower courts invalidated state bans on gay marriage in the absence of a clear statement of doctrine from the justices (Liptak 2014). In such contexts, state and lower federal courts are the proper venue to evaluate the counter-majoritarian difficulty.

**State courts** Discussion of the counter-majoritarian difficulty has traditionally focused on federal courts, where the normative tension is greatest due to the fact that federal judges are unelected and have life tenure. Less attention has been paid to state courts, where most judges are elected and face more direct accountability from voters. Indeed, many argue that there exists a *majoritarian difficulty* with elected state court judges, since their incentives for re-election may make them too responsive to particular opinion (Croley 1995, Pozen 2008). The differences between state and federal judges are certainly important, but we still might usefully apply the counter-majoritarian difficulty to state courts. First, many state judges are appointed, meaning they do not face direct elections. Second, even among elected judges, judicial elections have historically been of low salience, creating higher hurdles for the prospect of electoral accountability—though certainly the salience of these elections has increased in recent years (Langer, Leonard and Polk 2010). In addition, different electoral selection systems create different incentives for responding to public opinion (Canes-Wrone, Clark and Kelly 2014). Developing theoretical predictions based on such issues is beyond the scope of this paper; moreover, any such predictions would be impossible to test, given
the small number of judicial decisions in the sample analyzed below. However, it is still useful to ask whether state courts were invalidating abortion statutes before *Roe v. Wade* in a pro- or counter-majoritarian fashion. To foreshadow the results (discussed in Section 4.4 below), federal judges were in fact responsible for the majority of judicial invalidations of state abortion statutes in the pre-*Roe* period. At the same time, state court judges did not “reach out” and invalidate statutes in states where opinion was squarely on the side of maintaining the policy status quo.

3 The Abortion Context

Given the prominence of *Roe v. Wade* in debates surrounding the counter-majoritarian difficulty, the issue of abortion has received significant attention in both traditional and revisionist accounts. Before turning to these accounts, it is useful to provide a brief history of abortion policy in the United States in order to place judicial review of *pre-Roe* abortion statutes in its proper context.\(^5\) Under English common law, abortion was not considered a crime if performed before “quickening”—that is, before the woman could feel the fetus move, which usually occurred at about 16 to 18 weeks. No statute concerning abortion was enacted by a state until the 1820s. Through the middle of the 19th century, most legislatures that enacted laws did so to clarify that abortion after quickening was illegal. The broader aim, however, was to regulate abortion as a medical procedure, and early statutes usually contained therapeutic exceptions in cases where abortion was necessary to save the life of the woman.

Beginning in the middle of the 19th century, two forces combined to make abortion policy more restrictive. First, for medical, professional, and moralistic reasons, physicians (under the umbrella of the American Medical Association) advocated for statutory reforms stipulating that only doctors could decide when an abortion was necessary. Second, an

\(^{5}\)For extensive reviews see Garrow (1994) and Mohr (1978). This account is drawn primarily from Tatalovich and Daynes (1981, Ch.1) and Rubin (1987, Ch. 1).
anti-abortion social movement arose during this time (joining such movements as the anti-obscenity campaign). These efforts were extremely successful. “Between 1860 and 1880, 40 antiabortion statutes were passed. Thirteen states or territories outlawed abortion for the first time, and twenty-one strengthened and broadened their older statutes” (Rubin 1987, 15). By 1880, abortion was illegal in every state.\(^6\)

This status quo would persist until the middle of the 20th century, when a reform movement arose, driven by several factors. Despite their illegality following the passage of the 19th-century statutes, thousands of abortions were performed each year—many by poorly trained practitioners or in unsafe conditions, leading to a high risk of severe injury or death. The medical profession gradually shifted toward the view that the abortion decision should be in the hands of a doctor, and not the state. This view was echoed by parts of the legal profession, who were disturbed by the fact that criminal prosecutions were rare relative to the incidence of the procedure and that the primary effect of the existing laws was to prevent abortions by competent doctors. Finally, a combination of social forces (like the introduction of new contraceptive devices) and high-profile events like the Sherri Finkbine case and an outbreak of German measles helped to place the issue on the public agenda.\(^7\)

In 1959, the American Law Institute (ALI) drafted a model law that called for reforming abortion statutes. Under the proposal, which the ALI adopted three years later, abortion would be permitted if necessary to sustain the physical or mental health of the woman, if the child would be born with severe physical or mental defects, or in cases of rape or incest (Greenhouse and Siegel 2010, 24-5). Compared to the legal status quo, in which

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\(^6\)State policy did vary in the extent of the penalties faced by both the doctor and the woman. Also, some states would eventually allow abortions to be performed to save the life of the woman.

\(^7\)Finkbine was a television actor living in Arizona who during her pregnancy in 1962 took the drug Thalidomide, which had been shown to cause severe birth defects. After a failed attempt to obtain a court order to obtain an abortion in Arizona, Finkbine eventually travelled to Sweden to obtain an abortion. Soon after, an epidemic of German measles—which can cause severe fetal damage if contracted early in a pregnancy—arose in the United States. Many women who contracted the disease sought abortions but could not obtain them.
most states banned abortions except in the case where the woman’s life was in danger, the implementation of the proposal would mark a substantial liberalization of abortion policy (Epstein and Kobylka 1992, 142-3).

While the proposal drew little immediate attention, beginning in 1966 a number of states implemented ALI-style reforms. In addition, four states (Alaska, Hawaii, New York, and Washington) essentially repealed their laws, making abortion legal if performed early in a pregnancy by a licensed physician. A majority of states, however, did not reform their laws. Pro-reform advocates, such as Planned Parenthood and the American Civil Liberties Union, brought a number of legal challenges (in state and federal courts) in both the states that had passed the ALI-style reforms and those that had made no changes. A number of these suits were successful. Most notably, in the 1969 case of People v. Belous (71 Cal.2d 954), the California Supreme Court struck down the state’s 1850 abortion statute, ruling that women had a fundamental right to an abortion. In other states, however, these challenges were unsuccessful, and the 19th-century restrictions remained the law. This was the state of affairs when the Supreme Court decided Roe v. Wade in January 1973.

3.1 Legislative change in the Pre-Roe period

Given this historical development, central to evaluating the subsequent actions by courts is the likelihood of legislative action in the absence of judicial intervention. Indeed, a central criticism of Roe v. Wade—which falls squarely in the traditional view of the counter-majoritarian difficulty—is that it cut off an active debate at the state level, thereby preventing many states from liberalizing their laws on their own account. Even some supporters of abortion rights have endorsed a version of this critique—most prominently, Justice Ruth Bader Ginsburg (1984).

Revisionist accounts have challenged this critique in two ways. First, in a regime politics account, Graber (1993) argues that judicial intervention on the question of the constitutionality of abortion statutes was actually desired by many legislators (particularly Democrats)
who faced cross-pressures among their socially liberal and conservative constituents (see also Lemieux and Lovell 2010). Second, and more relevantly for this paper, several scholars argue that the reform movement had run its course by 1972 (Nossiff 1994; 2001, Burns 2005, Lemieux 2009, Lain 2012). They argue, more specifically, that reform was blocked by a well-organized minority, led by the Catholic Church, and the stalling of reform did not reflect majority opinion. Lemieux (2009, 34), for example, writes: “Far from reflecting the legislative enactment of a newly formed consensus of the public, abortion law in the states before Roe was instead rather strikingly illustrative of one of the definitive features of Madisonian institutions: a determined, well-organized minority prevailing over a more diffuse majority.” Similarly, Lain (2012, 25) argues: “In short, the state legislative stance on abortion in the early 1970s was more a testament to the power of an intensely committed right-to-life lobby than a reflection of majority will.” Thus, under these accounts, the state of abortion policy at the time of Roe exhibited a significant status quo bias. However, while the influence of interest groups was undeniable, claims of “majority will” cannot be evaluated without accurate measures of state-level opinion in this period, to which policy can be compared. I turn now to this task.

4 Data and Methods

4.1 State policy

I begin my analysis by describing state policy in the pre-Roe period. As noted above, states varied in both the extent to which they reformd their 19th-century statutes and, among those states that did enact reforms, the extent to which policy was liberalized. Following Craig and O’Brien (1993) and Mooney and Lee (1995), I use an index to measure state policy. For now, I focus solely on legislative changes to state policy—that is, policy change that was made by legislatures (or through referendum), not through judicial invalidations of existing state law. Moving from low to high in terms of liberalization, state policy
is coded according to when abortions were permitted:

- 0: All abortions prohibited;
- 1: Only to preserve the life of the woman;
- 2: In cases of rape or incest;
- 3: If the woman’s physical health was at risk or there was a fetal defect;
- 4: If the woman’s mental health was at risk;
- 5: For any reason.

As Mooney and Lee (1995) note, the policy index was monotonic in practice—no state allowed abortions under a condition at a certain threshold but banned them under a lower threshold.⁸

Figure 1 depicts the distribution of state policy in state law, at the time of the Supreme Court’s decision in *Roe v. Wade*. The graph shows that a majority of states (33) maintained the 19th century status quo, with 30 of those states only allowing abortions to preserve the life of the woman. Among the minority of states that did enact policy change, there was significant variation in the extent of reform. Mississippi changed its law to allow for abortion in cases of rape or incest, while, as noted above, Alaska, Hawaii, New York and Washington state passed what amounted to full repeals. Thus, there was significant heterogeneity in state policy during this period.

4.2 Public Opinion

**National opinion** Before moving to state-level public opinion, I first examine national opinion in the decade leading up to *Roe v. Wade*. According to the *iPoll* archives, the first public opinion question related to abortion was asked in 1962 (this poll was spurred by the Finkbine episode). I begin by looking at national opinion in the decade preceding *Roe*. In 1962, 1965, and 1969, Gallup asked respondents whether or not “abortion operations should or should not be legal in the following cases: where the health of the mother is

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⁸For example, no state allowed abortions in cases of fetal defects but allowed them to save the life of the woman. In addition, no state changed policy in the direction of greater restrictions. In 1972, legislative efforts in New York to undo the state’s repeal were blocked by a gubernatorial veto, as was passage of an even more restrictive abortion statute in Pennsylvania.
in danger; where the child may be deformed; and where the family does not have enough money to support another child.” In 1969, the following condition was added: “where the parents simply have all the children they want although there are no major health or financial problems involved in having another child.” Finally, in 1972, the General Social Survey asked similar questions, thus creating a comparable time series spanning 1962 to 1972.9

Figure 2 depicts the percentage of Americans saying abortion should be legal under each of the four conditions, over time.10 The graph makes clear that, as early as 1962, a sizable majority (77%) favored the legalization of abortion in cases where the health of the mother would be in danger. This proportion remained fairly constant through 1972. In 1962, a small majority (55%) said that abortion should be legal in the case of possible deformities. This proportion rose steadily to 75% in 1972. Thus, a sizable majority favored moving away from the 19th century status quo of either prohibiting abortion outright or only allowing abortion when the life of the woman was in danger.

On the other hand, in 1962 a large majority was against abortion being legal “on demand”—that is, in cases where the family lacked funds to support another child. However, the percentage of respondents indicating support for legalization in this condition rose steadily—to nearly 50% in 1972. In addition, by 1972, 38% of Americans favored legalization “where the parents simply have all the children they want.”11 Thus, in the decade leading up to Roe, a majority of Americans did not favor strict bans on abortion, but also did not favor allowing abortions for simply financial reasons or if the parents had enough children.

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9The comparable question wording in the 1972 GSS was as follows. “Please tell me whether or not you think it should be possible for a pregnant woman to obtain a legal abortion if: the woman’s own health is seriously endangered by the pregnancy?; there is a strong chance of serious defect in the baby?; the family has a very low income and cannot afford any more children?; she is married and does not want any more children?”

10I include “don’t know” responses in the denominator. No single question ever resulted in more than 15% of such responses. Looking only at respondents with an opinion does not affect the substance of the trends depicted in Figure 2.

11It is possible that differences in question wording across the Gallup surveys and the GSS contributed to some of the increases between 1969 and 1972.
As a handful of states implemented full repeal in the late 1960s and early 1970s, public opinion about such proposals became relevant. In 1970, Harris asked respondents: “Hawaii, Maryland, and New York now have or are about to have new state abortion laws that permit a woman to have her pregnancy aborted, for any reason, up to a certain month of pregnancy. In general, do you favor such laws permitting abortion for almost any reason or do you oppose them?”^{12} Forty percent responded they favored such laws, with 50% opposed. In 1969 and 1972, Gallup asked: “Would you favor or oppose a law which would permit a woman to go to a doctor to end pregnancy at any time during the first three months?” Forty percent and 46%, respectively, favored such laws, while 50% and 45% opposed. Thus, national opinion was split on whether to legalize abortion fully in the early months of a pregnancy.

Based on the dynamics of legislative and judicial politics in this period, my goal is to estimate two measures of opinion. The first is opinion on changing the policy status quo; in particular, the general distribution of support for liberalizing existing abortion laws, in the relevant period of 1965 to early 1973. Recall that in 1962, 1965, and 1969, Gallup asked respondents whether they favored legalization of abortion under a variety of conditions. I use responses from the 1965 and 1969 polls, in order to use polls as close as possible to the relevant period under which legislatures and courts were active.^{13} Responding no to all conditions, or yes only to if “the health of the mother is in danger,” effectively evinces support for the status quo that emerged in the 19th century. Accordingly, I code any respondent as being “pro-liberalization” if they answer yes to any of the other conditions—deformity, not enough money, or simply all the children they want.^{14}

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^{12}In actuality, Maryland did not liberalize its laws to the extent that Hawaii and New York did.
^{13}Including the 1962 poll does not substantively change any of the results that follow.
^{14}This procedure would be problematic if a sufficient number of responses were non-transitive—e.g. a respondent stating that abortion should be legal if the family does not have enough money to support another child while also stating that abortion should not be allowed to save the health of the mother. Assuming the ordering seen in Figure 2, I examined the transitivity of preferences among all respondents in the 1965 and 1969 Gallup polls. More than 90% of responses exhibited transitive preferences. One could pursue a more complicated item-response style model in which these deviations are modeled more explicitly, but the state-level estimates of opinion on changing the status quo that I estimate below are highly robust.
To these polls, I add the 1972 American National Election Study (ANES), which asked respondents the following question: “Which one of the opinions on this page best agrees with your view? 1. Abortion should never be permitted. 2. Abortion should be permitted only if the life and health of the woman is in danger. 3. Abortion should be permitted if, due to personal reasons, the woman would have difficulty in caring for the child. 4. Abortion should never be forbidden, since one should not require a woman to have a child she doesn’t want.” I code any respondent who answered (3) or (4) as “pro-liberalization.”\(^{15}\) Combining these polls results in a status quo “megapoll” of 7,522 responses (after dropping observations with missing data).\(^{16}\)

The second measure of interest is opinion on full repeal, which would effectively legalize abortion in the first few months of pregnancy. To generate these estimates, I use the 1969 and 1972 Gallup polls referenced above, in which respondents were asked whether they would “favor or oppose a law which would permit a woman to go to a doctor to end pregnancy at any time during the first three months?” Combining these polls results in a full-repeal megapoll of 2,734 observations (the 1970 Harris poll referenced above does not contain state codes).

**Individual-level opinion** Before turning to the creation of state-level opinion estimates, it is useful to examine the correlates of individual-level opinion. Table A-1 in the Appendix presents separate logistic regressions (for opinion on changing the status quo and full repeal) to dropping these non-transitive opinions (the state estimates with and without these responses correlate at .99), so I opt to proceed with the straightforward coding of responses as being “pro-liberalization” if they answer yes to any of the other conditions besides the health of the mother.

\(^{15}\)The question wording of the ANES is not ideal, as option (2) pools together restrictions on both the life and health of the mother. In addition, it does not include an option for birth defects, as in the Gallup polls. Not surprisingly, the distribution of opinion is less in favor of liberalization in the ANES, compared to the Gallup poll. Despite these shortcomings, the ANES has the advantages of both measuring opinion in the year before *Roe* was decided and having a large sample size (about 2,600). As a result, it provides valuable information about difference in opinion across states. (As noted above, the 1972 version of the GSS asked questions similar to Gallup. Unfortunately, the 1972 GSS does not include state codes.)

\(^{16}\)For computational ease, I drop all respondents who give “don’t know” responses to the relevant opinion questions (as well as respondents who are missing any demographic or geographic information). This occurs in fewer than 5% of observations.
examining the predictive effect of the following demographic and political variables: age, education, race, Catholicism, and party identification. For both types of opinion, respondents with more education were more likely to favor liberalization, as were men, *ceteris paribus*. Older Americans were less likely to favor liberalization, though this relationship was only significant in the status quo models. Black and white respondents did not significantly differ, while Catholic respondents were much less likely to favor liberalization. In terms of partisan identification, there were no significant differences between Republican and Democratic respondents in opinion on changing the status quo, while Republicans were actually slightly *more* likely to favor full repeal than Democrats; the size of this difference, however, was much smaller than the differences based on religion and education. These results are consistent with research showing that attitudes on abortion did not polarize along party lines until after *Roe* was decided (Carmines, Gerrity and Wagner 2005, Noel 2013, 158).

**Measuring state-level opinion** For both opinion on changing the status quo and full repeal, my goal is to estimate the distribution of support among state majorities. Accordingly, I use each megapoll to generate a set of “static” estimates for states that pools responses across the different dates at which opinion was measured.\(^{17}\)

How best to use these megapolls to estimate state-level opinion? One option would be to use simple disaggregation to generate estimates of state-level support—that is, take the mean level of opinion in each state. There are two issues with this approach. First, the respective megapolls don’t include observations from every state, including Alaska and Hawaii. Including these two states is particularly important in this analysis, as they were two of the four states to fully repeal their existing laws. Second, even among the states with representation in the megapolls, the number of respondents in the smaller states is too

\(^{17}\)Ideally, one could model changes in opinion over time in this period to reflect the fact that overall opinion was moving at a slow pace toward greater liberalization. Unfortunately, as seen below, the significant degree of uncertainty in the individual state estimates precludes me from making any meaningful comparisons across time.
small to generate estimates of any reasonable precision (this is particularly true in the full repeal megapoll, in which there were fewer than 10 respondents in 11 states).\footnote{However, in Appendix B, I show that all the substantive results that follow are robust to using disaggregation estimates of state-level opinion instead of the MRP estimates.}

Accordingly, I use multilevel regression and poststratification (MRP), which has been shown to generate accurate estimates of opinion on a range of policies, including gay rights (Lax and Phillips 2009\textit{b}) and abortion (Warshaw and Rodden 2012). The full details of the estimation procedure can be found in the appendix, but I give a brief overview here. MRP proceeds in two steps. First, individual-level responses are modeled as a function of both demographic predictors and the respondent’s state of residence. This information on states, which is combined with state-level predictors, is used to estimate state-level effects, controlling for demographics. Second, the estimates for each “demographic-state” type (e.g college-educated white male Californians age 18 to 29) are weighted, or post-stratified, according to the distribution of each type in the actual population.

One complication arises in this application of MRP. As noted above, Catholics were significantly less likely to support abortion legalization than non-Catholics. However, the 1970 census—which I use to capture the actual distribution of types in the population—does not contain information on religion. Fortunately, Leemann and Wasserfallen (2014) have devised a solution to this particular problem. Applying their advance (see the appendix for details), I use estimates of the proportion of Catholics in each state to calculate the proportion of Catholics in each demographic-state type (e.g., the proportion of college-educated white male Californians age 18-to-29 who are Catholics). This allows me to proceed as if the Census included information on the proportion of Catholics.

**Estimates of state-level opinion** Figure 3A depicts an ordered dotplot of support at the state-level for changing the status quo to make abortions easier to obtain under the law, along with 95\% confidence intervals. These intervals are calculated using simulations,
which are based on uncertainty in the first stage of the MRP procedure. There exists wide variation in the point estimates across states. An estimated 73% of people in Maryland supported liberalization, compared to about 25% of people in Mississippi. Half the states fall between 48% and 62% support; in most states, majorities supported liberalization. Next, Figure 3B presents estimates of state-level opinion on full repeal, along with 95% confidence intervals. In line with national opinion, support for full legalization is much lower than support for changing the status quo. In fewer than 20 states is a majority of the state population estimated to support full legalization in the first few months of pregnancy—and in only three of these states does the confidence interval exclude 50% support.¹⁹

Importantly, Figure 3 reveals that there is significant uncertainty in many of the state estimates. Accordingly, in the all the analyses that follow I propagate this uncertainty into all of the resulting estimates. I do this in two ways. First, for the congruence analyses that follow, I calculate congruence across every simulation (i.e. there are 51 states with 1,000 estimates each), which allows me to make probabilistic statements about legislative and judicial congruence with public opinion. Second, to generate uncertainty in the regression lines presented below in Figures 4 and 6, I follow the procedure outlined in Treier and Jackman (2008, 215-16) and implemented in Kastellec et al. (2015). First, for each set of simulations, I regress either legislative policy or judicial decisions on opinion. Each of these regressions, of course, has its own uncertainty; I incorporate this by simulating the intercept and slope coefficient one time in each draw, so as to build in the standard errors and covariances from the regression models into the estimates. The result is a distribution of 1,000 intercept and slope coefficients that fully incorporates the uncertainty from the opinion estimates.

¹⁹It is worth noting that each set of estimates are highly correlated with the estimates produced by disaggregation (comparing states that appear in the data), especially for the status quo measure—Figure A-1 in the Appendix depicts these correlations. However, as noted above, using MRP has several advantages.
4.3 Connecting opinion with state policy

With these estimates in hand, I next examine how well state policy correlated with public opinion in the pre-\textit{Roe} period. Figure 4 depicts a scatterplot of state-level opinion on changing the status quo against the 6-point policy liberalism scale discussed above. Each point shows a given state (using their postal codes); the points are slightly jittered to make it easier to distinguish among states. The solid line depicts the fit of regressing policy on opinion (accounting for uncertainty in the opinion estimates), while the shaded area depicts 95\% confidence intervals. All of the states that fall below the regression line did not change their policy at all. The plot reveals a positive relationship between public opinion and policy; states with greater public support for liberalization were more likely to have more liberal laws, as of the decision in \textit{Roe v. Wade}. The correlation between opinion and policy is positive and statistically significant—the probability that the slope on opinion is greater than zero is about .97. Substantively, moving from 30\% approval in opinion to 70\% predicts about a 1.5 unit shift in policy.

At the same time, the plot reveals considerable heterogeneity in the mapping between opinion and policy. Most notably, the bottom right quadrant of the plot contains many states with sizable majorities that supported moving away from a strong ban on abortion, yet where policy remained unchanged. For example, while more than 70\% of Vermont residents favored liberalization, as of 1972 the state legislature had not changed the 19th-century statute.

More directly, Figure 5 depicts the probability that policy was congruent with state opinion. Here I collapse policy into either change or no change (recall the latter includes states who are coded as either 0 or 1 on the policy index). The top plot depicts congruence in states that liberalized their laws, while the bottom plot looks at states where the status quo remained in place. The probabilities of congruence are based on calculating congruence across all simulations of opinion, and dividing the number of simulations in which policy change matched majority opinion by the overall number of simulations. The graph reveals
that in most states with policy change, the probability of congruence exceeded .5; in half the states the probability exceeded .9. Conversely, in a majority of states where the status quo remained in effect, there was at least a 50% chance that policy was incongruent with opinion. And in 14 states without policy change, the probability of congruence was less than 25%.

The two-by-two table under this figure examines the congruence between opinion and policy in a different way. It depicts the proportion of states in which policy matches opinion, with 95% confidence intervals in brackets. The table gives cell percentages; for instance, in an estimated 29% of states, the status quo remained in place and the state majority favored the lack of policy change. This table makes clear that when the public favored change, more often that not the status quo remained in place. Thus, it is clear that in many states policy lagged behind majority opinion. In such states judicial invalidation of statutes would be pro-majoritarian and not counter-majoritarian.

4.4 Judicial review of state statutes

To examine the relationship between public opinion and judicial review of abortion statutes, I collected an original dataset of court decisions in the pre-Roe period. Using both Westlaw and secondary sources, I sought to identify every case in state and federal court in which litigants brought a constitutional challenge to a state abortion statute and where a court made a final determination regarding the constitutionality of the statute. Details on the case collection procedures can be found in the Appendix.

This search revealed that challenges were brought in 29 states. Table A-2 in the Appendix summarizes the cases used in the analysis. Federal courts issued decisions in 13 states, while state courts issued decisions in 16 states (in a few states both state and federal courts made decisions). The courts hearing these cases were presented with many arguments on both

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20In New York, for example, the legislature repealed the existing statute as a federal court was hearing arguments in a challenge to the old law. The case was immediately dismissed as moot (Rubin 1987, 53-53), and thus does not enter the dataset.
sides, and thus had many options in disposing of these challenges. In most cases, however, the court either upheld the statute in total or struck it down as constitutionally infirm. Accordingly, I code each decision as invalidating a statute if it strikes down any part of the statute, and upholding otherwise. Out of the 29 states with final decisions, the courts upheld the statute in 16 states and invalidated them in 13 states. Using these decisions, I can compare how courts ruled with public opinion in each state—essentially this is a direct test of result majoritarianism.21

Each panel in Figure 6 plots the probability of a judicial invalidation of a state statute against state-level support for changing the status quo. In each plot, the solid line represents the estimated logistic curve from regressing judicial invalidations on state opinion (accounting for uncertainty). The shaded areas depict 95% confidence intervals. Figure 6A includes all states. Figure 6B focuses the analysis only on states where no policy change occurred—i.e. those states where judicial review was most likely to occur. Finally, Figure 6C includes only states where cases were actually heard to ensure that the correlation is not an artifact of pro-reform litigants bringing challenges in states where courts were more likely to be more receptive to their claims. In each plot, I present the initials of only those states in which laws were struck down.

Regardless of the how the data is broken down, the plot reveals a clear pattern: as public support for policy change increases, so does the likelihood of a court striking down the state statute. And while the plots reveal considerable uncertainty, the probability that the slope coefficient in each plot is greater than zero is .93, .96, and .92, respectively. Finally, the

21While the goal of this analysis is not to draw a causal connection between public opinion and judicial decision, it is worth speculating about how aware judges might have been of the prevailing public opinion in a given state. As noted above, unlike today, public opinion on abortion was not sorted on partisan lines (Adams 1997), so judges could not simply reply on the partisan distribution in a state as a proxy for public opinion. However, Table A-1 in the Appendix shows that abortion attitudes were significantly predicted by age, education, and (especially) Catholicism, meaning that public opinion was coherent in this period. Moreover, abortion was a salient issue in the five years leading up to Roe v. Wade, with intense lobbying of legislators on both sides. Accordingly, it seems reasonable to conclude that judges were likely to be generally aware of abortion sentiment in their respective jurisdictions, even if they did not directly consult polls.
substantive magnitude of the relationship is significant. Based on the estimates in Figure 6B, moving from 40% state-level approval for changing the status quo to 60% saw the likelihood of a judicial invalidation increase from 10% to 40%.

Next, I present a congruence analysis on the exercise of judicial review, just as I did in comparing policy change by legislatures to status quo. Here I focus solely on states where courts heard cases. Figure 7 depicts the probability that the outcome of a judicial decision was congruent with state opinion (with the probability based on calculating congruence across all simulations of opinion). The top plot depicts congruence in states where courts upheld the statute, while the bottom plot looks at states where courts invalidated the statute. It is clear that where courts upheld the statute, there is wide variation in congruence; in many states courts upheld statutes where clear majorities favored change. However, as noted in Section 2, this pattern is not a problem in terms of the counter-majoritarian difficulty, given that courts were deferential in these instances by upholding the relevant statute.

Conversely, for nearly every state where courts invalidated the statute, the probability that the decision was congruent with majority state-level opinion was near or above 50%, meaning they were likely pro-majoritarian. And, in the two states where the decision to invalidate the statute was incongruent (Pennsylvania and Georgia), the estimated level of approval for changing the status quo exceeded 47%. Thus, in no state did a court “reach out” and invalidate a statute where opinion was overwhelmingly on the side of the status quo.

As in Figure 5, the table under Figure 7 presents a cross-tab of judicial invalidation versus state majority opinion, keeping only states where courts heard cases. Here the most relevant comparison is the proportion of states that fall in each column when the court invalidated the statute. The bottom row of the table shows that among states where the court struck

22Moreover, the decision in Pennsylvania was made by a judge of the Common Pleas Court of Centre County. The Pennsylvania Supreme Court was in the process of ruling on the statute when Roe v. Wade was handed down. Thus, it is not clear how widely or effectively the county court’s ruling applied in practice.
down the statute, a majority of the public was three times as likely to favor change from
the status quo policy. Moreover, comparing Figure 5 to Figure 7, judicial decisions actually
appear to be slightly more responsive to public opinion than legislatures. The comparison
is not perfectly apt, since courts did not rule on policies in many states. But, with this
caveat in mind, looking on-the-diagonal of the crosstab in Figure 7 shows that the exercise
of judicial review was congruent with state opinion 59% of the time. Returning to Figure 5,
legislative policy was consistent with state opinion only 53% of the time.

Finally, while the number of decisions is too small to make much of any differences
between state and federal courts, it is worth noting that the probability of invalidation was
higher in federal courts than in state courts. Each federal case was decided a by a three-
judge panel of the district courts: of the 11 federal cases, 8 resulted in either partial or full
invalidation of the statute. Conversely, only five of 18 states cases resulted in invalidations.
What this means is that it was not simply elected state judges striking down unpopular
statutes, a result that, if true, would have significant implications for assessing the counter-
majoritarian difficulty. Rather, life-tenured federal judges were responsible for the majority
of invalidations of state abortion statutes before Roe v. Wade, and hence were more likely
than state judges to bring policy in line with public opinion.

Evaluating Roe v. Wade

Having shown that state and lower federal courts were, in many instances, exercising
judicial review in a majoritarian fashion in the pre-Roe period, it is useful to circle back to the
Supreme Court’s decision itself in Roe. While many of the lower court decisions invalidating
statutes noted the higher burden on the state to justify regulations on abortion early in the
pregnancy, no decision attempted to overtly outline a trimester system, as fashioned by the
majority opinion in Roe. As noted earlier, as of 1972 about half of Americans favored laws
“which would permit a woman to go to a doctor to end pregnancy at any time during the
first three months.”
Two conclusions emerge from that distribution. First, given the roughly equal split, the Court’s decision in *Roe* did not impose a policy contrary to the wishes of a large majority of the American public (Friedman 2009, 297). At the same time, the split means that the decision did not reflect any sort of national consensus. In addition, returning to Figure 3B, very few *state majorities* favored such a policy, meaning the Court was mandating a federal floor of protection for abortion rights higher than the average state majority would prefer. In this sense, the decision was certainly counter-majoritarian to a degree. At the same time, the evidence on state-level policy and judicial review demonstrates that, in the absence of some exercise of judicial review, the mismatch between policy and opinion was likely to remain in some states for some time. For the Supreme Court to have not weighed in at all on the constitutionality of abortion restrictions would have had the effect of keeping many unpopular policies in place.

5 Discussion and Conclusion

The results presented here contribute to a growing body of evidence that suggests that the traditional view of the counter-majoritarian difficulty does not adequately capture the political realities in which courts operate. In particular, given the prevalence of status quo biases in a government with multiple veto players and multiple interests, there will be many occasions in which policy lags behind changes in public opinion. In ruling state statutes invalid, many judges were acting in concert, and not discord, with the preference of state majorities. Thus, this study illustrates how in many circumstances courts may serve as pro-majoritarian policymaking institutions that can move policy toward a majority’s preferences when other political actors either cannot or do not want to shift policy (Frymer 2003, Silverstein 2009).

The findings also suggest the importance of creating a role for state and lower federal courts in evaluating the counter-majoritarian difficulty. The focus on the Supreme Court is natural, given its prominence and its place at the summit of the judicial hierarchy. But
in many instances the Court will take years to weigh in on an issue, leaving lower courts to adjudicate emerging constitutional issues. The empirical approach I have taken in this paper suggests a means for more systematic evaluation of the extent to which courts are counter-majoritarian. Advance in methodologies in estimating sub-national opinion now make it feasible to measure opinion in smaller units than that of the national government, where courts often exercise political power in the absence of direct action from superior courts. For example, returning to the issue of the constitutionality of gay marriage bans, whether the judicial invalidations of such bans by state and lower federal courts (before the Supreme Court weighed in) were pro-majoritarian is an empirical question that could easily be answered, given state-level estimates of support for gay-marriage (Lax and Phillips 2009a). But a similar pattern of correspondence between state-level public opinion and judicial review would not be surprising, given the significant shift toward support for gay marriage in the past two decades (Klarman 2012).

In addition, the judicial invalidations of abortion statutes before *Roe* demonstrate that focusing solely on the Supreme Court may lead to an underestimation of the extent of judicial power. For instance, in support of his argument that *Roe* had only a limited effect on abortion rates, Rosenberg (1991, 178) notes that the increase in legal abortions began in 1970, three years before *Roe* was decided. But some of this increase could have been due to state and lower court decisions striking down state abortion laws, thereby increasing the availability of legal abortions.23

The activity of state and lower federal courts in abortion politics is also relevant to the burgeoning literature on whether prominent judicial decisions on contested issues induce a “backlash” from the public and elites (Klarman 1994, Keck 2009, Fontana and Braman 2012). The conventional account in this literature is that *Roe v. Wade* emerged suddenly

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23In addition, Hall (2011, 38-44) shows that the number of abortions in states with the 19th century status quo in place did increase significantly following *Roe v. Wade*. 
and inspired a broad counter-mobilization among anti-abortion forces that persists to this day (see e.g. Rosenberg 1991, Eskridge Jr 2005, Sunstein 1991). A number of recent studies challenge this claim, arguing that the fault lines in the abortion debate began to emerge in the decade before Roe was decided, with anti-abortion forces mobilizing well before 1973 (Greenhouse and Siegel 2010, Post and Siegel 2007, Lemieux 2009, Nossiff 2001). While my data cannot speak to interest group activity or the intensity of preferences, the fact that abortion litigation reached the doors of courts in more than half the states by the time Roe v. Wade was decided does illustrate the depth of abortion politics in the years before the decision. Moreover, as noted above, without action by the Supreme Court policy was likely to lag behind opinion in many states, and so the claim that the decision in Roe cut off a secular trend toward liberalization in the states is not supported by the data.

More generally, the linkages between courts, public opinion, and policy evaluated in this paper also illustrate the unique way in which courts can affect representation. Recall from Figure 4 the heterogeneity in the relationship between policy and public support for changing the status quo. While I focused on the states where policy was “too low,” the figure also reveals many states where policy was “too high.” In these states, the ability of courts to serve as a check on mismatched policy is constrained by the fact that courts cannot say that states provide “too much” protection for abortion rights. Thus, in many areas of the law, courts serve as a “one-way” ratchet: they can force states to increase their level of constitutional protections but cannot compel them to lower it.

After Roe, this asymmetry would interact with judicial federalism in an important way that would affect the implementation of abortion policy. The Supreme Court’s decision in

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24 The only way this could occur would be if there were a determination that the fetus itself had constitutional rights that could not be abridged via statutes providing for legal abortion. Some judges did make this argument around the time of Roe—see e.g. Judge Burke’s dissenting opinion in the New York case of Byrn v. New York Health & Hospitals Corporation (286 N.E.2d 887). But such a view has never been endorsed by a majority opinion—judges that rule against challenges to abortion statutes generally argue that the state is free to legalize abortion, but are not constitutionally compelled to do so.
Roe set a federal “floor” of policy below which no states would legally go (Mooney 2000). In the years to follow, many states would attempt to push back against this policy by setting new abortion restrictions; meanwhile, the Supreme Court became increasingly conservative, upholding more restrictions on abortions (while declining to overrule Roe). At the same time, state courts are free to interpret their state constitutions as requiring “higher” levels of protection beyond the federal floor established by the U.S. Supreme Court. This led abortion rights supporters to bring their claims to state courts in the hopes of greater victory there. In this way, the opportunity for a greater match between opinion and policy would play out in the states—with courts serving as intermediaries via the use of judicial review.

**References**


Berry, Chris, Ethan Bueno de Mesquita and Jacob Gersen. 2013. “Pro-Majoritarian Courts.” University of Chicago, Harris School working paper.


Figure 1: State abortion policy as established by legislatures and referenda, as of January 1973. The barplot depicts the number of states at each level of the abortion policy index, which is increasing in terms of the liberalization of policy. The shaded region depicts states in which legislatures changed policy—that is, absent court intervention. A majority of states maintained the 19th century status quo prior to Roe v. Wade.

Figure 2: National public opinion on abortion policy, from 1962 to 1972.
Figure 3: Estimated state-level opinion on A) changing the legal status quo to make abortions more accessible; B) legalizing abortions in the first three months. Horizontal lines depict 95% confidence intervals. Note that the states are ordered separately in each plot.

Figure 4: State legislative policy versus public opinion on changing status quo, in the pre-Roe period. See text for details.
Figure 5: Congruence between state opinion and state policy. The plot shows the probability that policy is congruent with opinion, for states with (top) and without (bottom) policy change. The table presents a crosstab of when opinion matches policy. The percentages are cell percentages for the number of states in which each condition is met. The brackets contain 95% confidence intervals, which are based on the simulated estimates of opinion.
Figure 6: State-level public opinion and the probability of a judicial invalidation of a state abortion statute. The top panel includes all states. The middle panel only includes states that did not change their laws at all. The bottom panel only includes states in which cases were brought. In all three, the probability of a judicial invalidation is increasing in state-level support for changing policy away from the status quo.
Figure 7: Congruence between state opinion and judicial review, in states in which court challenges to existing statutes were heard. The plot shows the probability that policy is congruent with opinion, for states with (top) and without (bottom) policy change. The table presents a crosstab of when opinion matches policy, based on states in which the legislature did not change abortion policy. The percentages are cell percentages for the number of states in which each condition is met. The brackets contain 95% confidence intervals, which are based on the simulated estimates of opinion.
Appendix A

This appendix provides information on the data and measures used in the paper.

A-1 State policy

The index of state policy comes from similar indices employed in Craig and O’Brien (1993) and Mooney and Lee (1995). The indices in those sources are nearly identical; the index in Mooney and Lee (1995) does not distinguish between the states in my 0 and 1 categories, but is slightly more fine-grained in distinguishing among the states that implemented reform. Note that Washington, D.C. is coded as a repeal “state” in Craig and O’Brien (1993). This policy change was actually accomplished via judicial decision; the district’s relevant statute was passed in 1901, and only allowed for abortion for health or life of the mother. Thus, for the purposes of legislative policy, I coded D.C. as 1.

A-2 Public Opinion

National and individual-level opinion  All the national polling results presented in Section 4.2 and in Figure 2 come directly from _iPoll’s_ summary of the relevant poll questions. Table A-1 presents individual-level logistic regression of opinion on changing the status quo and full repeal. See the subsection on state-level opinion below for a fuller description of the covariates used in the regressions. The models also include fixed effects for the separate polls used in each analysis.

State-level opinion  To estimate state-level opinion, I employ multilevel regression and poststratification (MRP). There are two stages to MRP. In the first stage, opinion is modeled a function of demographic characteristics of respondents and geography (i.e. the state they live in), using random effects. In the second stage, the estimates are poststratified according to the true proportion of each “demographic-geographic” type in each state. In the first stage, I model response as a function of gender; one of four age groups (18-29, 30-44, 45-64, and 65+); race (white and black); and one of four education groups. To reflect the fact
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Standard errors in parentheses
* indicates significance at $p < 0.05$

Table A-1: Logit models of individual-level opinion. The first model looks at opinion on changing the statue quo, the second model looks at opinion on full repeal.

that Americans generally had less education in the 1960s and early 1970s, I use the following education breakdowns: less than grade 9; grade 9-11; high school grad; some college or more. In the second stage, the first-stage estimates are post-stratified according to the distribution of each type in the actual state population. For this stage, I use the “5-Percent Public Use Microdata Sample” in the Census, from the 1970 Census.
As noted in the paper, one complication of using MRP in this context is that the census does not ask about religion; as Table A-1 shows, Catholics were much less likely to favor abortion law liberalization than non-Catholics. Fortunately, Leemann and Wasserfallen (2014) have devised a solution to the generic problem of not having data at the Census level that is correlated with individual responses. Specifically, they show that if one knows the distribution of the “missing” variable in the Census at the state level, one can weight the joint distributions from the Census types by the marginal distribution of that variable and recover estimates that are very close to what one would recover in the presence of complete Census data. Accordingly, I first obtained the proportion of Catholics in each state from Johnson, Picard and Quinn (1974). I then updated the 1970 “poststratification file”—the distribution of demographic types in each state—by weighting each type by the marginal distribution of Catholics in each state. With this updated poststratification file, I can thus weight the first-stage estimates by the population distribution of demographic-geographic types.\(^ {25}\)

Formally, let \( y_i = 1 \) denote a response in favor of liberalization, either in terms of the status quo or full repeal. For each set of estimates, I estimate the following model:

\[
\Pr(y_i = 1) = \logit^{-1}(\beta^0 + \alpha_{gender}^r[i] + \alpha_{age}^k[i] + \alpha_{edu}^l[i] + \alpha_{Catholic}^m[i] + \alpha_{state}^s[i])
\]

The terms after the intercept are modeled effects for the various groups of respondents (modeled as drawn from a normal distribution with mean zero and endogenous variance):

\[
\alpha_{gender}^r \sim N(0, \sigma^2_{gender}), \text{ for } r = 1, 2
\]

\[
\alpha_{age}^k \sim N(0, \sigma^2_{age}), \text{ for } k = 1, ..., 4
\]

\[
\alpha_{edu}^l \sim N(0, \sigma^2_{edu}), \text{ for } l = 1, ..., 4
\]

\[
\alpha_{Catholic}^m \sim N(0, \sigma^2_{Catholic}), \text{ for } m = 1, ..., 2
\]

\(^ {25}\)An alternative estimation strategy would be to allow the proportion of Catholics in a state to enter the first-stage model as a state-level variable, rather than an individual-level variable, and simply use the original Census data (without information on religion). Given the predictive power of Catholicism at the individual-level, this is a second-best option. Nevertheless, all of the results in the paper hold if this opinion estimation strategy is employed.
The state effects are modeled as a function of the proportion of people in each state that live in an urban area, which is positively correlated with support for abortion liberalization:

\[ \alpha_{s}^{state} \sim N(\alpha^{0} + \beta^{urban} \cdot urban_{s}), \text{ for } s = 1, \ldots, 51 \]

In the second stage, I use the coefficients that result from this estimation to calculate predicted probabilities of opinion for each demographic-geographic type. There are 6,528 combinations of demographic and state values (128 within each state). Let \( j \) denote a cell from the set of demographic-geographic types. For any \( j \), the results above allow us to make a prediction of support for liberalization \( \hat{\theta}_{j} \), which is simply the predicted probability given by the results from Eq. (1). I next poststratify these results according to population frequencies derived from the 1970 Census. For each state, we then can calculate the percentage who support liberalization, aggregating over each cell \( j \) in state \( s \). Let \( \hat{\gamma} \) denote an estimate of support for liberalization in a given state \( s \). Then, \( \hat{\gamma}_{s} = \sum_{j \in \mathcal{J}_{s}} \frac{N_{j} \hat{\theta}_{j}}{\sum_{j \in \mathcal{J}_{s}} N_{j}}. \)

All the estimates were calculated using the MRP package in \( R \) (Malecki et al. 2014). The package also allows for the estimation of uncertainty for each estimate.
Validation of MRP estimates  It is useful to compare the MRP estimates to that produced by disaggregation—that is, simply taking the mean level of opinion in each state. Figure A-1 depicts scatterplots of the respective MRP and disaggregation estimates for changing the status quo (A) and for full repeal (B). The estimates are highly correlated, especially for changing the status quo ($\rho = .91$). The correlation among the full repeal measures is slightly weaker (.73), but still strong.

As an additional validity check, we can compare the correlation between the status quo and full repeal measures, which should be at least moderately high, given that people who support full repeal must support liberalization (though the converse is not true). Figure A-2(A) depicts a scatterplot of the MRP estimates for the two measures; the solid line is a regression line. The two estimates correlate at .68. The only dramatic outlier is Vermont, which is estimated to be firmly in favor of supporting the status quo but also firmly against changing the status quo. (If Vermont is excluded the correlation increases to .78).

Figure A-2(B) depicts a similar scatterplot, but this time using the disaggregation mea-

![Figure A-2: State-level estimates of support for changing the status quo versus state-level estimates of support for full repeal, based on A) MRP estimates; B) Disaggregation estimates. The solid lines are regression lines.](image-url)
sures of state-level opinion. The correlation is a much weaker .35, which is due (in part) to significant measurement error in the estimates for the states with fewer number of respondents. This suggests a significant improvement from using the MRP estimates over disaggregation.

A-3 Judicial Decisions

To find all constitutional challenges to state abortion statutes, I first used Westlaw. I used the following search term: DA(aft 01-01-1965 & bef 01-22-1973) & ‘‘4 abortion" and constitution! unconstitution!. I then read each case to term whether it was a direct challenge to the statute. “Standard” cases involving abortion—such as appeals from convictions under the statute that did not raise a challenge—were discarded. For each challenge, I then coded whether the court invalidated any or all of the state statute.

I cross-checked my Westlaw results with the lists of cases in Roemer (1971), Vergata et al. (1972), and Epstein and Kobylka (1992, 164). If a case was listed in one of those sources and did not appear in the Westlaw, I relied on the source’s description of the decision to code the outcome.

Finally, note that in some states there were multiple cases involving challenges to abortion statutes. For comparative purposes, I treat states as unit of analysis and thus pool all court decisions within a single state, if there are multiple cases. If an earlier case upheld the statute and a later case struck it down, the latter case is used to code the state’s judicial outcomes (this occurred, for example, in Vermont). In other instances, a higher court in the state struck down a lower court decision. The highest court decision in the state is used to code the state’s judicial outcomes. (For example, a lower state court decision striking down the state’s statute was later reversed by the state supreme court.)

Table A-2 lists each case used in the analysis, along with a summary of the Court’s decision.
### Federal cases

<table>
<thead>
<tr>
<th>State</th>
<th>Case Name</th>
<th>Citation</th>
<th>Court</th>
<th>Summary of court’s ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>Doc v. Bolton</td>
<td>319 F.Supp. 1048</td>
<td>USDC, N.D. Georgia</td>
<td>Struck down the statute in part, ruling that it unconstitutionally limits the number of reasons for which an abortion may be sought</td>
</tr>
<tr>
<td>Kansas</td>
<td>Poe v. Menghin</td>
<td>339 F.Supp. 986</td>
<td>USDC, D. Kansas</td>
<td>Struck down physician and hospital requirements of statute</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Cross v. Attorney General of Com. of Ky</td>
<td>344 F.Supp. 587</td>
<td>USDC, E. D. Kentucky</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Louisiana State Bd. of Medical Examiners v. Doe</td>
<td>318 F.Supp. 1217</td>
<td>USDC, E.D. Louisiana</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Young Women’s Christian Ass’n of Princeton, N. J. v. Kugler</td>
<td>342 F.Supp. 1048</td>
<td>USDC, D. New Jersey</td>
<td>Ruled that the statute was unconstitutionally vague on its face and as applied</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Corkey v. Edwards</td>
<td>322 F.Supp. 1248</td>
<td>USDC, C.D. North Carolina</td>
<td>Upheld most of the statute, but struck down a a four-month residency requirement</td>
</tr>
<tr>
<td>Texas</td>
<td>Roe v. Wade</td>
<td>314 F.Supp. 1217</td>
<td>USDC, N.D. Texas</td>
<td>Statute was unconstitutionally overbroad and vague.</td>
</tr>
<tr>
<td>Utah</td>
<td>Doe v. Rampton (Unpublished)</td>
<td></td>
<td>USDC, D. Utah</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>U.S. v. Vuitch</td>
<td>305 F.Supp. 1032</td>
<td>USDC, District of Columbia</td>
<td>Struck the requirement that abortion could only be performed to preserve the life or health of the woman</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Babbitz v. McCuen</td>
<td>310 F.Supp. 293</td>
<td>USDC, E.D. Wisconsin</td>
<td>Statute was invalid to the extent it banned abortion in early months of pregnancy</td>
</tr>
</tbody>
</table>

### State cases

<table>
<thead>
<tr>
<th>State</th>
<th>Case Name</th>
<th>Citation</th>
<th>Court</th>
<th>Summary of court’s ruling</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Nelson v. Planned Parenthood of Tucson</td>
<td>19 Ariz.App. 142</td>
<td>Court of Appeals of Arizona</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>California</td>
<td>People v. Bellows</td>
<td>71 Cal.2d 954</td>
<td>California Supreme Court</td>
<td>Struck statute as unconstitutional</td>
</tr>
<tr>
<td>Florida</td>
<td>State v. Barquet</td>
<td>262 So.2d 431</td>
<td>Florida Supreme Court</td>
<td>Statute was unconstitutionally vague</td>
</tr>
<tr>
<td>Illinois</td>
<td>People v. Anast</td>
<td>Unpublished</td>
<td>Illinois circuit court, Cook County</td>
<td>Statute was unconstitutionally vague</td>
</tr>
<tr>
<td>Indiana</td>
<td>Cheaney v. Indiana</td>
<td>259 Ind. 138</td>
<td>Indiana Supreme Court</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Iowa</td>
<td>State v. Abodecky</td>
<td>179 N.W.2d 347</td>
<td>Supreme Court of Iowa</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Iowa</td>
<td>State v. Abodecky</td>
<td>179 N.W.2d 347</td>
<td>Iowa Supreme Court</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Sasse v. Com.</td>
<td>485 S.W.2d 897</td>
<td>Court of Appeals of Kentucky</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Louisiana</td>
<td>State v. Scott</td>
<td>260 La. 190</td>
<td>Louisiana Supreme Court</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Kudish v. Board of Registration in Medicine</td>
<td>356 Mass. 98</td>
<td>Massachusetts Supreme Judicial Court</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Michigan</td>
<td>People v. Nixon</td>
<td>12 Mich.App. 332</td>
<td>Court of Appeals of Michigan</td>
<td>Statute was invalid to the extent it banned abortion in early months of pregnancy</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Spears v. State</td>
<td>257 So.2d 876</td>
<td>Mississippi Supreme Court</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Missouri</td>
<td>Hodgers v. Danforth</td>
<td>486 S.W.2d 258</td>
<td>Missouri Supreme Court</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>South Dakota</td>
<td>State v. Musson</td>
<td>86 S.D. 663</td>
<td>South Dakota Supreme Court</td>
<td>Upheld the statute as constitutional</td>
</tr>
<tr>
<td>Vermont</td>
<td>Beecham v. Leachy</td>
<td>130 Vt. 164</td>
<td>Vermont Supreme Court</td>
<td>Statute unconstitutional</td>
</tr>
</tbody>
</table>

Table A-2: Summary of cases. USDC = United State District Court.
Appendix B

As discussed in Section 4.2 in the paper, an advantage of using MRP-based estimates of state-level opinion is that such estimates exist even for states without polling data. However, it is useful to check whether the substantive results are the same if I use the disaggregated estimates of state-level opinion—that is, simply taking the mean of opinion by state, for both support for changing the status quo and for full repeal. In this appendix I show that indeed the results are robust.

First, Figure B-1 replicates Figure 3 in the paper, using the disaggregation estimates. To generate the uncertainty in the estimates, I simply use the sample mean and standard

![State-level public opinion on abortion policy](image)

Figure B-1: Estimated state-level opinion, using disaggregation, on A) changing the legal status quo to make abortions more accessible; B) legalizing abortions in the first three months. Horizontal lines depict 95% confidence intervals. Note that the states are ordered separately in each plot.
deviation and simulate distributions of estimates for each state.\textsuperscript{26} The top panel reveals that the distributions of opinion across states using the disaggregation measures are roughly similar to the MRP estimates. However, for many states, the uncertainty is much larger in the disaggregation estimates compared to the MRP estimates—especially in the estimates of support for full repeal, which are based on smaller sample sizes.

Next, Figure B-2 replicates Figure 4 in the paper, and shows a positive relationship between public opinion and policy; states with greater public support for liberalization were more likely to have more liberal laws, as of the decision in \textit{Roe v. Wade}. But, using the disaggregation estimates of opinion, we see in the bottom right quadrant that many states with majorities that supported moving away from a strong ban on abortion where policy remained unchanged.

Next, Figure B-3 replicates Figure 5 in the paper and depicts the probability that policy was congruent with state opinion, using the disaggregation estimates of opinion. This plot again shows high probabilities of incongruence in many states in which there was no policy

\textsuperscript{26} Some smaller states with a few number of respondents have 95\% confidence intervals that extend below 0 and above 1; I truncate those intervals at 0 and 1, respectively.
change. The two-by-two table under this figure confirms that when the public favored change, more often that not the status quo remained in place.

Figure B-4 replicates Figure 6 in the paper, shows a positive relationship between disaggregation estimates of state-level public opinion and the probability of judicial invalidation. As public support for policy change increases, so does the likelihood of a court striking down the state statute.

Finally, B-5 shows similar patterns and results to Figure 7 in the paper: courts were more congruent with public opinion than legislatures were in the pre-\textit{Roe} period.
Figure B-3: Congruence between state opinion and state policy, based on disaggregation estimates. The plot shows the probability that policy is congruent with opinion, for states with (top) and without (bottom) policy change. The table presents a crosstab of when opinion matches policy. The percentages are cell percentages for the number of states in which each condition is met. The brackets contain 95% confidence intervals, which are based on the simulated estimates of opinion.
Figure B-4: State-level public opinion and the probability of a judicial invalidation of a state abortion statute, based on disaggregation estimates. The top panel includes all states. The middle panel only includes states that did not change their laws at all. The bottom panel only includes states in which cases were brought. In all three, the probability of a judicial invalidation is increasing in state-level support for changing policy away from the status quo.
Figure B-5: Congruence between state opinion and judicial review, in states in which court challenges to existing statutes were heard, based on disaggregation estimates. The plot shows the probability that policy is congruent with opinion, for states with (top) and without (bottom) policy change. The table presents a crosstab of when opinion matches policy, based on states in which the legislature did not change abortion policy. The percentages are cell percentages for the number of states in which each condition is met. The brackets contain 95% confidence intervals, which are based on the simulated estimates of opinion.