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A STORY OF JUDICIAL DEFERENCE TO THE WILL OF THE PEOPLE

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One of the central and continual debates of constitutional litigation is how much deference the courts owe the elected branches in determining the constitutionality of challenged laws. Much of this debate takes place in the abstract and focuses on reasons why the courts should defer. Yet, a critical and commonly ignored part of this debate is how often courts *actually* defer in determining the constitutionality of legislation and how the amount of deference has increased, or decreased, since the founding era.

This article adds context to the longstanding debates surrounding judicial deference to the "political branches." It does so by surveying eight terms employed by the courts, which signal

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judicial deference to the legislature due to the idea that legislation represents the will of the people—a commonly offered justification for deference. The terms surveyed include: (1) will of the people; (2) judicial restraint; (3) will of the majority; (4) deference to the political branches; (5) defer/deference to Congress; (6) second-guess the legislature; (7) highly deferential; and (8) unelected judges. This survey shows that the use of these terms continues to increase, despite that fact that number of cases heard by federal courts has trended downward in recent years.

This is especially true for the Supreme Court of the United States and the cornerstone term: will of the people. The Supreme Court has referenced the "will of the people" from the early years of the Republic. In the early years, the Court often, but not exclusively, used the term to refer to the Constitution as the will of the people. This changed in the mid to late 1880s, especially with the appointment of the first Justice Harlan, who employed the phrase repeatedly to reference legislation. By the mid-1900s, the Court used it to refer to free speech principles and the need for election accessibility for the government to know the "will of the people." But, in the past two decades, the Supreme Court has used the term to refer to legislation more than any two decades other than between 1880-1900. Together with the other phrases, this article demonstrates that at least rhetorically, the inclination of the Supreme Court has become increasingly deferential.

INTRODUCTION

Article III of the United States Constitution established the judiciary as the primary adjudicator of constitutional disputes.[1] The founders intended the judges of the judicial branch to be "bulwarks of a limited Constitution against legislative encroachments."[2] These

[1] U.S. CONST. art. III.
[2] THE FEDERALIST NO. 78, at 382 (Alexander Hamilton) (Dover ed. 2014).

judges were granted independence from the legislative and executive branches through life tenure and a prohibition on their salaries being decreased while in office.[3] The founders deemed independence, and the role of the judiciary by extension, as essential to a limited Constitution.[4] Alexander Hamilton explained that this independence was essential because limitations placed on what the legislature could do by the Constitution could only be preserved if the judiciary was empowered to "to declare all acts contrary to the manifest tenor of the Constitution void."[5] Because "[w]ithout this, all the reservations of particular rights or privileges would amount to nothing." Without the judiciary, the legislature would be empowered to ignore the limits the Constitution places on their power.

But there has always been debate over how unconstitutional a law must be before the courts should declare it void.[6] That is, there has always been debate over what it means for a law to be "contrary to the manifest tenor of the Constitution."[7] The problem is that a judiciary too quick to hold that a law is contrary to the manifest tenor of the Constitution could end up voiding constitutional laws that have the imprimatur of the representatives of the people (the legislature and the executive). This is commonly referred to as the "counter-majoritarian difficulty."[8]

This "difficulty" is one of the main reasons advanced for why the judiciary should give some level of deference to the legislature when

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[3] U.S. CONST. art. III, § 1.

[4] *See* THE FEDERALIST NO. 78, *supra* note 2, at 382.

[5] *Id.* at 380.

[6] *See, e.g.*, Alice M. Batchelder, *Anti-Federalism and Judicial Review*, 4 CORNELL J.L. & PUB. POL'Y 515, 516 (1995); Jordan T. Cash, *The Court and the Old Dominion: Judicial Review Among the Virginia Jeffersonians*, 35 LAW & HIST. REV. 351, 359–70 (2017); Johnny C. Burris, *Some Preliminary Thoughts on A Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 OKLA. CITY U. L. REV. 585, 591 (1987). *See generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 237, 255, 398–99 (2008); Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7 (2006).

[7] THE FEDERALIST NO. 78, *supra* note 2, at 380.

[8] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

determining the constitutionality of challenged laws. That is, under the current system, with the tiers of scrutiny, judges require different levels of justification and evidence depending on the perceived importance of the rights that the law is alleged of violating.[9] The way judges commonly defer to the legislature is by accepting evidence presented by the government with little scrutiny and by reading the powers granted to the Congress broadly, and the limitations on those powers narrowly.[10] This is done to ensure that the courts are not overturning acts that represent the "will of the people."

To be sure, the laws and acts of Congress *should* represent the will of the people. This is the basic idea of representative democracy. People elect their representatives, and their representatives enact the laws. If the laws are not to the liking of the people, then the people will vote in new representatives who will enact their will. As members of Congress "represent" the people, it is assumed that they listen to their constituents and enact laws favorable to them. Common sense teaches us that the representatives s*hould* do that because not doing what their constituents want could harm their reelection chances.

Yet we also know, especially through public choice theory, that legislation frequently does not represent the will of the people.[11] Rather, it represents the will of interest groups that can promise a cohesive voting block for the next election. In other words, legislation frequently represents not the will of the people but the will of interest

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[9] Suzanne A. Kim et al., *Equal Protection*, 1 GEO. J. GENDER & L. 213, 218–20 (2000).

[10] *See generally* Gonzales v. Raich, 545 U.S. 1, 57–58 (2005) (Thomas, J., dissenting) ("If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 NYU J.L. & LIBERTY 898 (2005).

[11] William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 Harv. J.L. & PUB. POL'Y 195 (1997).

groups.[12] To be sure, this is not the case for every piece of legislation. Nor is it the case for every vote cast by a legislator. But, it is the case often enough to rebut the idea that judges should defer to the judgment of the other branches simply because legislation represents the will of the people.

Moreover, even without the guidance of public choice theory there would still be some issues with judges deferring to legislators' determinations (based on the idea that legislation represents the will of the people) when determining the constitutionality of challenged law. It is the role of the judiciary to check the will of the majority of the people.[13] The Constitution places limits on the legislative and executive powers—limits that are not waived if a law is supported by a certain percentage of voters. So, while laws theoretically may represent the transitory "will of the people," that shouldn't matter in the judicial calculation of whether the given law is constitutional. The Constitution places extensive limits on the powers of both the legislature and the executive and, through the Bill of Rights and the Fourteenth Amendment, offers expansive protections for individual rights. Given this, whether a law represents the will of the people is somewhat beside the point from a constitutional perspective.

Yet, it bears noting that the idea that legislation does represent the will of the people has some validity. It is certainly better than laws representing the will of a monarch or dictator. And there are certainly areas, especially at the state and local levels, where the will of the people is given more constitutional leeway. Still, legislation frequently does *not* represent the will of the people. What is more, it is not a valid justification in and of itself for judicial deference, especially as the limits the Constitution places on the federal government, and the rights that it protects, are the "will of the people" too. Just because the judiciary is countermajoritarian does not mean it should defer to majoritarian elements—its Article III role,

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[12] *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

[13] *See generally* THE FEDERALIST NO. 78, *supra* note 2.

its purpose, is to check majorities.[14] So while legislation should represent the will of the people, it should not be a central reason for judicial deference to the legislature's determination of constitutionality, especially as the restrictions and rights protected in the Constitution are the will of the people too.

And while it may not seem like it, the courts have become more deferential over the past few decades than they were in the past.[15] Public perception says the exact opposite. Cases such as *Heller*,[16] *McDonald*,[17] *Citizens United*,[18] and *Obergefell*[19] jump to mind as examples of a less deferential Supreme Court. In each of these cases, the Supreme Court recognized that the Constitution protected rights the Court had not protected in the past. But the simple fact that the Court has included more rights in the pantheon of protected constitutional rights does not necessarily mean that the Court is less deferential overall. In fact, Professor Keith Whittington has conducted extensive research on the frequency with which the Supreme Court has struck down statutes as unconstitutional. His research shows that "[u]nder Chief Justice Roberts, the Court has struck down statutes at an annual average rate of 3.8 cases, which is the fewest of any Court since before the Civil War."[20] Here then, it seems like public perception is at odds with reality, which is likely due to both the controversial nature of the cases where the Court is seen as not deferring and the relatively boring (at least to a general audience) nature of the cases in which the Court does defer.

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[14] *See generally id.*

[15] *See generally* KEITH E. WHITTINGTON, REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT (2019) [hereinafter WHITTINGTON, REPUGNANT LAWS].

[16] District of Columbia v. Heller, 544 U.S. 570 (2008).

[17] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[18] Citizens United v. FEC, 558 U.S. 310 (2010).

[19] Obergefell v. Hodges, 564 U.S. 644 (2015).

[20] Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219, 2227 (2014).

Further, to say that the Supreme Court and other federal courts are more deferential now than in the past is not the same as saying that they were completely non-deferential in the past. It is not intended to leave readers with the impression that there was some golden age of judicial review where the courts deferred just the right amount. Rather, this article is intended to present a general overview of certain terms used by the courts in the course of deferring and to examine the frequency with which the courts employed those terms over the decades.

As such, it is important to note that the judicial branch was not looking for ways to strike down laws during the founding era. To borrow from Professor Christopher Green's work on state courts, the courts then were generally less deferential, requiring something akin to clarity rather than employing a "presumption of constitutionality" which later required unconstitutionality to be proved beyond a reasonable doubt.[21] Each state has required clarity (plain, manifest, evident) before its courts found a law to be unconstitutional.[22] In his research, Green discovered that in only one state does a "no reasonable doubt" requirement for finding a law unconstitutional predate the establishment of the clarity standard.[23] That is, the courts have always been hesitant to strike down laws as unconstitutional, but as time went on the hesitancy of wanting the unconstitutionality to be clear or plain morphed into requiring a lack of reasonable doubt of constitutionality.

This development can be seen in many parallel developments, including through the judicial opinions of the first Justice Harlan,[24]

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[21] Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169 (2015). Under the clarity standard, the courts required a "full examination of constitutional issues" and under the clarity standard "courts exercising judicial review shoulder a burden to justify their conclusions against all proffered counterarguments." *Id.* at 188. Whereas, under the reasonable doubt standard, the courts would only hold a law unconstitutional if that unconstitutionality is proved beyond a reasonable doubt. *Id.* at 170.

[22] *Id.* at 176–77.

[23] *Id.* at 182–83.

[24] *See infra* Section II.A.1.

the work of James Bradley Thayer,[25] Justice Oliver Wendell Holmes' many writings[26], and the rational basis test. The development can also be seen through the use of certain terms, including the term "will of the people."

This article adds far-reaching empirical analysis of terms signifying judicial deference to the conversation. "Will of the people" was used by the courts in the early 1800s to describe the Constitution as "the will of the people."[27] Then, by the late 1800s, it switched, and the term was used almost exclusively to refer to legislation.[28] Moreover, it was used in a way which counseled deference to that legislation.[29] What is more, there has been a recent rise of judicial deference over the past two decades that has been accompanied by a decrease in the number of cases that the Supreme Court, and to a lesser extent lower federal courts, have heard.[30] The use of the phrase "will of the people" and other similar terms not only bear this out, but also give an indication as to the reason federal courts have taken a more deferential turn over the past few decades.

This article will present eight phrases used by federal courts which indicate that courts have become more deferential because of the idea that legislation represents the will of the people. We will track the progression of the term "will of the people," along with the use and rise of similar terms also used in the course of deferring to

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[25] *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 122–27 (2019); Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2348–50 (2017).

[26] *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927); Lochner v. New York, 198 U.S 45 (1905) (Holmes, J., dissenting); Jackson, *supra* note 24, at 2351–54.

[27] *See infra* Section II.A.1 and accompanying chart "Use of the phrase 'will of the people' to refer to the constitution, legislation, or something else in the Supreme Court."

[28] *Id.*

[29] *Id.*

[30] *See infra* Section II.C and accompanying charts.

legislation—deference that is justified on the basis of legislators' responsiveness to the will of the people and legislation articulating the will of the people. Part I will present these phrases, give a brief explanation for why those terms were chosen, and explain the methodology and reliance on federal courts. Part II will survey the eight chosen terms. Finally, Part III will give a brief analysis of the survey and offer context to the numbers.

I. PART I

A. LAYING OUT THE TERMS

Courts use many different terms to justify upholding laws in deference to Congress and state legislatures. Surveying all such phrases would fill numerous volumes. But not all terms and phrases signaling deference are the same, and different phrases are used to signal deference for different reasons. The terms and phrases selected for this article focus on phrases that generally signal deference because of the belief that legislation represents the will of the people.

The main phrase this article surveys is "will of the people." It has been used by federal courts thousands of times, including over a hundred times by the Supreme Court. It has been used thousands of times by state courts as well. The use by courts stretches back to the founding era and has continued unabated. Courts employed this phrase in the earlier years to refer to the Constitution, but gradually it started to be used to refer to legislation and then used in a more philosophical way in the context of challenges to election laws or laws limiting free speech, and now it has returned to referring to legislation.

The next survey phrase is "judicial restraint." Federal courts have used this term since the founding era but it became more popular in recent years, especially with the rise of Judge Bork and Justice Scalia, as well as with Justice Stevens' article, *Judicial Restraint.*[31] After that, the article surveys the term "will of the

[31] John P. Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437 (1985).

majority." This phrase gets at the idea that majorities are generally entitled to rule through their elected representatives. Each of these first three phrases have been used since the founding era.

The article then turns to five phrases that did not enter the lexicon of federal courts until after the first century of our constitutional republic. The phrases are: "deference/defer to the political branches," "deference/defer to Congress," "second guess the legislature," "highly deferential," and "unelected judges." Each signals judicial deference to the other two branches and frequently due to the idea that legislation is the "will of the people."

"Highly deferential" is the most used phrase this article surveys. Much of its use is attributable to habeas corpus and prisoner litigation.[32] But it is also used in connection with the courts applying the rational basis test. The rational basis test is the pinnacle of judicial deference as, under it, courts will only hold a law unconstitutional if there is no rational relationship to any legitimate government purpose.[33] When this term is used in connection with the rational basis test, it signals the exact type of deference this article is interested in documenting. The rational basis test is designed for courts to defer to legislation on the belief that it represents the will of the people.

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[32] This phrase has been used over 7880 times by the federal courts of appeals alone, and over 2500 cases focus on Habeas Corpus alone. Further, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a "highly deferential" standard for habeas petitions. Pub. L. No. 104–132, 110 Stat. 1214 (1996). The phrase was used over 10,000 times in district court opinions alone between 2017 and the end of 2020 and over 5000 of those cases concerned the AEDPA.

[33] FCC v. Beach Commc'ns, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

B. METHODOLOGY AND FORUM SHOPPING

The survey of the terms in the article were conducted using Westlaw. Some of the earlier phrases were a bit tricky. In early cases court reporters and publishers frequently included counsels' arguments, or summaries of their arguments, above the actual opinion, and those are generally included in Westlaw's database. Because of this, a search of the phrases "will of the people" or "will of the majority" returns more results than cases that actually use the phrase in the text of the opinion. Cases where "will of the people" or "will of the majority" is not in an actual opinion are not included in this survey. The survey does include, however, cases where a phrase is only used in a footnote quoting the use of the phrase in another opinion.

As for the forum, the article focuses on the use of phrases by federal courts, especially the Supreme Court. At times, courts of appeals opinions that use the phrases will be discussed when they add important context to how the phrases are used. This article will present the frequency with which district courts employ the phrases, but no district court opinions will be discussed.

There are two reasons for the focus on the Supreme Court and its use of these phrases. The first reason is expediency. There are thousands of courts of appeals and district court decisions handed down each year. In contrast, the Supreme Court generally only issues (over the centuries) roughly one hundred written decisions each year (often much more or less).[34] Even during the peak of Supreme Court opinion issuing, there were generally under two-hundred written opinions issued each year.[35] This makes the data set much more manageable.

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[34] FEDERAL JUDICIAL CENTER, CASELOADS: SUPREME COURT OF THE UNITED STATES, METHOD OF DISPOSITION, 1932–1969 (last visited Aug. 13, 2021) [https://perma.cc/NZ3U-4HRV]; FEDERAL JUDICIAL CENTER, CASELOADS: SUPREME COURT OF THE UNITED STATES, METHOD OF DISPOSITION, 1970–2016 (last visited Aug. 13, 2021) [https://perma.cc/3Y2J-EDYH].

[35] *Id.*

Second, the Supreme Court leads the way. It is, after all, the highest court in the land, and its use of language and phrases will guide inferior courts. For that reason, it should be no surprise that many of the terms presented below are first used by the Supreme Court. Or at least they did not "take off" until used by the Supreme Court.

Lastly, while this article will acknowledge the use of terms by state courts, it will not present them for every term. Further, there will be little discussion of the cases in which the phrases were used by state courts. Similar to district courts, full discussion of states court cases using these terms would be a monumental undertaking. But in situations where the use of the phrases by states courts provides a useful context, we will note them.

II. PART II: SURVEY SAYS!

A. TERMS WHOSE USE BEGAN BEFORE THE 1900S

1. "Will of the People"

The phrase "will of the people" has been used over 800 times[36] by federal courts.[37] The phrase's earliest appearance in a Westlaw search comes from a 1793 case heard by the federal circuit court for the district of Pennsylvania.[38] But its use in that case is not found in

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[36] As of December 1, 2020.

[37] It has been used an additional 4000 times in state courts with its first use being in *Smith v. Crawford*. 1 Yeates 287 (Pa. 1773). It has continued to be used in state courts since that time with California, Pennsylvania, and Texas courts each using the phrase over 200 times.

[38] Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) ("On the third branch of the laws of the United States, viz: their constitution and statutes, I shall be concise. Here, also, one great unerring principle, viz: the will of the people, will take the lead. The people of the United States, being by the grace and favour of Heaven, free, sovereign and independent, had a right to choose the form of national government which they should judge most conducive to their happiness and safety. They have done so, and have ordained and established the one which is specified in their great and general

the opinion itself. Rather, it is recorded as being used by Chief Justice John Jay (riding circuit) in instructing a grand jury.[39] Notably, Chief Justice Jay used the phrase "will of the people" to refer to the U.S. Constitution.[40] The first time a federal court used the phrase in an actual opinion was in *Penhallow v. Doane's Adm'rs*, a 1795 Supreme Court decision written by Justice Blair.[41] Justice Blair used the phrase to refer to the powers of Congress, noting that the source of Congress' power is "either mediately or immediately the will of the people; usurpation can give no rights." [42]

Justice Chase used the phrase the next year, using it to describe the Constitution in *Ware v. Hylton*,[43] one of the foundational cases for judicial review. There, the Court used the phrase in reference to the Constitution and the Supremacy Clause, through which all treaties made by the United States were made superior to the constitutions and laws of the states.[44] The Supreme Court next used the phrase in the groundbreaking decision of *McCulloch v. Maryland*.[45] The Court there used the phrase to explain that the states, while sovereign and preceding the federal government, were still subject to the laws of

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compact or constitution—a compact deliberately formed, maturely considered, and solemnly adopted and ratified by them. There is not a word in it but what is employed to express the will of the people; and what friend of his country, and the liberties of it, will say that the will of the people is not to be observed, respected and obeyed.").

[39] *Id.*

[40] This is the situation with many early federal cases. The arguments of the attorneys in the case are appended to the decision. As a result, when a certain term is searched, Westlaw will pull language from the attorneys' arguments as well from the decision itself, which, on first glance, makes it appear that a certain term was used more by courts than it actually was. A closer inspection of the cases reveals whether the phrase was used as a part of the opinion or in the attorney argument section.

[41] Penhallow v. Doane's Adm'rs, 3 U.S. (3 Dall.) 54, 109 (1795) (opinion of Blair, J.).

[42] *Id.*

[43] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[44] *Id.* at 237 (opinion of Chase, J.) ("It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State; and their will alone is to decide.").

[45] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

the federal government as the "will of the people"—the Constitution—made those laws supreme.[46]

Even during these early days, this term was not exclusively used to reference the Constitution. In *Wilkinson v. Leland*,[47] Justice Story's opinion used the term in a more philosophical manner, referring to an amorphous "will of the people" but not to any specific statute or constitution. It was not until 1845 that the Supreme Court used the phrase to specifically reference a statute in *Pollard v. Hagan*.[48] There, Justice McKinley delivered the opinion of the Court and declared that "[e]very constitutional act of Congress is passed by the *will of the people* of the United States, expressed through their representatives." [49] Still, this phrase was not used in a way to encourage judicial deference. Rather it was used to explain that law, but only that those laws which are constitutional, "are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not" because, as the will of the people, they represent the supreme law of the land.[50] The term was again used by Justice Campbell in his concurring opinion in the infamous *Dred Scott*

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[46] *Id.* at 378. *See also* Mayor of N.Y. v. Miln, 36 U.S. (11 Pet.) 102, 123 (1837) ("The state governments could form no such constitution; they had no powers to do so, delegated or intrusted to them. The people are the sources of this power, both of the state and general governments; and after forming the constitution, they declared 'this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties, &c., shall be the supreme law of the land.' The constitution, then, so far as it extends, is, by the declared will of the people, supreme; and is so to be considered in all courts, and by all persons in the United States.").

[47] Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829) ("The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people.").

[48] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845).

[49] *Id.* at 224.

[50] *Id.*

v. Sandford. [51] There, Justice Campbell explained that the amendments, specifically the Tenth Amendment, were the final expression of the "will of the people."[52]

This phrase was employed in yet another infamous case: Justice Harlan's dissent in *Plessy v. Ferguson*.[53] In his dissenting opinion, Justice Harlan explained "[t]here is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of *judicial interference with the will of the people as expressed by the legislature*."[54] Justice Harlan used the phrase in rebutting the argument of Louisiana officials that a law must be "reasonable." Louisiana was responding to the suggestion that the law requiring separate rail cars based on race was no different than requiring different cars for Catholics and Protestants, different cars for naturalized citizens and native citizens, a sheriff segregating a courtroom based on color, or segregating legislative halls or political rallies based on color.[55] Louisiana argued that the difference was that those differences would be unreasonable while the separation based on race in rail cars was reasonable.[56]

Justice Harlan rejected the idea that the Court should look behind any laws to see if there were any nefarious, or unconstitutional, motives in enacting a given law.[57] Instead, Justice Harlan correctly examined the overall legal scheme and concluded that Louisiana had no power to enact the statute because the Civil War amendments to the Constitution prohibited such a restriction based on race. But his assertion that reasonableness of a statute is irrelevant in constitutional litigation is, in light of both the law of the day and of our day, questionable at best.[58]

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[51] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 506 (1857) (Campbell, J., concurring).

[52] *Id.*

[53] Plessy v. Ferguson, 163 U.S. 537, 552–564 (1896) (Harlan, J., dissenting).

[54] *Id.* at 558 (emphasis added).

[55] *Id.* at 557–58.

[56] *Id.* 558–559.

[57] *Id.*

[58] *Id.* at 563–64.

Plessy was not the first case in which Justice Harlan employed "will of the people" to reference a statute.[59] And it was not the last time.[60] Two other cases bear further mention. First, in *Atkin v. Kansas*, Justice Harlan, writing for the majority, took his usual language about the "will of the people" a step further.[61] He wrote that the Court should not overturn the "will of the people" "unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution.[62]" It is in this iteration of Justice Harlan's use of the phrase "the will of the people" that we see both how deferential this phrase is intended to be, and the beginnings of what would become the rational basis test: the idea that because

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[59] Mugler v. Kansas, 123 U.S. 623, 662 (1887) ("If, therefore, a state deems the absolute prohibition of the manufacture and sale within her limits, of intoxicating liquors, for other than medical, scientific, and mechanical purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."); Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465 (1888) (Harlan, J. dissenting) ("Thus, the mere silence of congress upon the subject of trade among the states in intoxicating liquors is made to operate as a license to persons doing business in one state to jeopard the health, morals, and good order of another state, by flooding the latter with intoxicating liquors, against the expressed will of her people."); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 679 (1895) (Harlan, J. dissenting) ("Are they [the Judiciary] to override the will of the people, as expressed by their chosen servants, because, in their judgment, the particular means employed by congress in execution of the powers conferred by the constitution are not the best that could have been devised, or are not absolutely necessary to accomplish the objects for which the government was established?").

[60] La Abra Silver Mining Co. v. United States, 175 U.S. 423, 454 (1899) ("But in order that his refusal or failure to act may not defeat the will of the people, as expressed by Congress, if a bill be not approved and be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him."); United States v. Lee Yen Tai, 185 U.S. 213, 222 (1902) ("A statute enacted by Congress expresses the will of the people of the United States in the most solemn form. If not repugnant to the Constitution, it is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced.").

[61] Atkin v. Kansas, 191 U.S. 207 (1903).

[62] *Id.* at 223–24.

legislation is the will of the people, the Court should defer to the constitutional judgment of the legislature. In other words, the legislature's judgment regarding the constitutionally of any particular action is given primacy and the judiciary is only supposed to strike down the "plainly unconstitutional" while still enforcing the "probably unconstitutional" because the law is the "will of the people."

Justice Harlan again employed this phrase in his dissent in *Lochner v. New York*.[63] In his opinion, Justice Harlan argued that the maximum hour law for bakery employees should have been upheld by the Court. In doing so, he concluded that: "the public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution." [64] Again, Justice Harlan is concluding that the decision of the legislature that a law is constitutional takes precedence over the judiciary's decisions because he believes that legislation represents the "will of the people." The way Justice Harlan looks at it, the tie goes to the government. Or, to borrow a football replay analogy, there has to be indisputable evidence that the ruling on the field was incorrect, and here, the ruling on the field is always that the law is constitutional. This means that the court is implicitly okay with some unconstitutional laws being enforced. The view seemingly is: better to let some unconstitutional laws be enforced than risk striking down a constitutional one.

What is interesting about comparing the early decisions that use the phrase "will of the people" to these later decisions by Justice Harlan is the shift in what the phrase was used to refer to. At first, it was almost exclusively used in reference to the U.S. Constitution. That is, the U.S. Constitution represents the "will of the people." But the phrase shifted over time and began to be used to describe

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[63] Lochner v. New York, 198 U.S. 45 (1905).
[64] *Id.* at 74 (Harlan, J., dissenting).

legislation. It was used to describe legislation and justify judicial deference to all but the blatantly unconstitutional. It was used in a manner that put the government on notice that it could pursue unconstitutional means so long as it dressed it up with a constitutionally permissible reason. That is, if Harlan's vision won out.[65]

Use of " will of the people" by the courts over the last century				
2010-2019	231	8	45	174
2000-2009	133	5	20	84
1990-2000	85	7	27	49
1980-1989	89	10	31	47
1970-1979	63	14	14	35
1960-1969	54	14	10	28
1950-1959	25	7	7	10
1940-1949	27	7	8	12
1930-1939	17	5	5	7
1920-1929	9	3	1	3
1910-1920	17	1	6	10
1900-1909	14	7	0	7
	All	Supreme Court	Courts of Appeals	District Courts

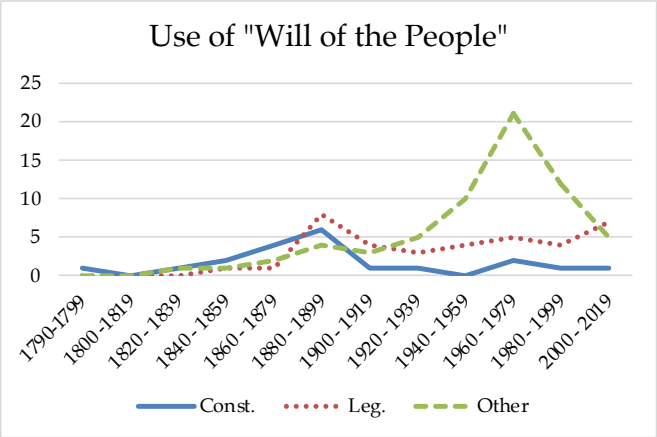
Originally, the courts used the phrase "will of the people" to either refer to the Constitution or legislation. But at other times, especially in the mid-1900s, the Court has used it when discussing election laws or laws that limited freedom of speech or the press, as each is a way the government can determine the "will of the people." As a result, it would be useful to see how the term was used by the Supreme Court.[66] While the laws regulating elections are certainly "legislation" the Court did not generally use the phrase to refer to the

[65] It certainly did, just with different language, starting with *Carolene Products* and the development of the rational basis test. United States v. Carolene Prods. Co., 304 U.S. 114 (1938). Once the rational basis test and its accompanying language came into the lexicon of the courts, it was less necessary to couch deference in terms of the will of the people as such an idea was incorporated with the rational basis test.

[66] The full list of Supreme Court opinions using "will of the people" can be found in the Appendix.

legislation. Rather, the phrase was directed at the idea that elections a way for government officials to gauge the will of the people. That is, it did not refer to any election regulation as the will of the people but as elections being a way to determine the will of the people.

Use of the phrase " will of the people" to refer to the constitution, legislation, or something else in the Supreme Court				
2000-2019	13	1	7	5
1980-1999	17	1	4	12
1960-1979	28	2	5	21
1940-1959	14	0	4	10
1920-1939	8	1	3	4
1900-1919	8	1	4	3
1880-1899	18	6	8	4
1860-1879	7	4	1	2
1840-1859	4	2	1	1
1820-1839	2	1	0	1
1800-1819	0	0	0	0
1790-1799	1	2	0	0
	Total	Const.	Leg.	Other



What it interesting about this data is that beginning in the 1940s, this phrase is used much more often to refer to a more amorphous concept: that freedom of speech and freedom of the press, as well as free elections, are necessary for the government to determine the will of the people. Particularly intriguing is the rise in recent years of the

phrase being used to refer to legislation and its continued drop off in referring to free speech or election laws.[67]

A look at how state courts used the phrase shortly after the founding era reaffirms the idea that "will of the people" originally referred to the Constitution. In 1793, the General Court of Virginia explained that the Constitution is "the permanent will of the people."[68] In 1796, the Constitutional Court of Appeals of South Carolina explained that "[i]f an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives, expressed in any law."[69] In 1804, the Superior Court of Laws and Equity of North Carolina explained the Constitution is "the permanent will of the people" and that legislatures are "creatures of the constitution . . . owe their existence to the constitution . . drive their power from it . . . [so] all their acts comfortable to it, or else they will be voided."[70]

There are other cases in which the notion of the Constitution representing the "will of the people" has also appeared in the context of counseling deference to legislation. However, in many of these cases, courts still refused to defer to the legislature. For example, in *Jones v. Crittenden*, the Supreme Court of North Carolina had to determine whether "the will of the Legislature, as expressed in this act, be incompatible with the will of the people, as expressed in their fundamental law, the Constitution of the United States."[71] But the court explained that "we disclaim all right or power to give judgment against the validity of a legislative act, unless its collision with the constitution appear to our understanding manifest and

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[67] *See* Nebbia v. New York, 291 U.S. 502 (1934); *Carolene Prods.*, 304 U.S. 144.
[68] Kamper v. Hawkins, 3 Va. 20, 49 (Va. Gen. Ct. 1793).
[69] Lindsay v. Comm'rs, 2 S.C.L. (2 Bay) 38, 61–62 (Ct. App. 1796).
[70] Trustees of Univ. v. Foy, 3 N.C. (2 Hayw.) 310, 316 (1804).
[71] Jones v. Crittenden, 4 N.C. (Car. L. Rep.) 55, 55 (1814).

irreconcilable." [72] Thus, the North Carolina Supreme Court's understanding of deference in this instance stemmed from their conception of the judicial function, and not from the idea that legislation represents the will of the people. Further, after the admonishments for care and deference, the North Carolina Supreme Court held that the law was unconstitutional.[73]

2. "Judicial Restraint"

Federal courts have used the phrase "judicial restraint" over 5,000 times. It first made its way into their lexicon in 1872 with a decision by a federal circuit court in Louisiana.[74] But it was not used by the Supreme Court until the 1886 decision *Ex parte Lothrop*,[75] a case dealing with the validity of Arizona's territorial courts. Even then, the phrase did not catch fire. In fact, federal courts only used it 15 times before 1940. But the 1940s saw an uptick in the use of the term. It peaked at the Supreme Court in the 1980s and its use there has dipped in recent years. The lower courts began using the term in earnest at the turn of the millennium.

In the 1940s, the Supreme Court certainly used the phrase to signal deference to the legislative and administrative processes. Since 1940, the Supreme Court has employed the term to express deference to congressional determinations. [76] It was also employed in dissenting opinions in landmark criminal procedure cases in the

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[72] *Id.*

[73] *Id.*

[74] Goddard v. Weaver, 10 F. Cas. 513 (C.C.D. La. 1872) (Case No. 5495).

[75] *Ex parte* Lothrop, 118 U.S. 113 (1886).

[76] *See, e.g.*, United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) ("But whatever may be the scope of the judicial power to determine what is a 'public use' in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject [i]ts decision is entitled to deference until it is shown to involve an impossibility. Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question." (emphasis added)).

1960s.[77] But it is not always used in a manner counseling deference to the legislative branches.[78]

" Judicial Restraint "				
2020	410	3	41	22
2010-2019	2061	16	286	1629
2000-2009	1057	25	286	667
1990-1999	629	25	265	285
1980-1989	507	31	191	227
1970-1979	283	18	109	151
1960-1969	90	8	40	38
1950-1959	33	6	9	18
1940-1949	25	8	7	9
	All	Supreme Court	Courts of Appeals	District Courts

It would be useful to analyze how the Supreme Court used the phrase at its peak, the 1980s, and then quickly examine how it has been used since that time. As noted in the above chart, the Supreme Court employed the term 31 times in the 1980s. In the 1980s, "judicial restraint" was used most often by Justice Stevens and typically in concurrences or dissents—over 20 of the 31 cases it appeared in were concurrences or dissents.[79] When it was used, the justices did so in

[77] Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J. dissenting); Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

[78] N.Y. Times Co. v. United States, 403 U.S. 713, 725 (1971) (Brennan, J., concurring) (using the phrase in reference to restraints on periodicals publishing stories).

[79] Webster v. Reprod. Health Servs., 492 U.S. 490, 526 (1989) (O'Connor, J., concurring); Pennsylvania v. Ritchie, 480 U.S. 39, 72 (1987) (Stevens, J., dissenting); Int'l Paper Co. v. Ouellette, 479 U.S. 481, 509 (1987) (Stevens, J., concurring); Bowen v. Roy, 476 U.S. 693, 723 n.20 (1986) (Stevens, J., concurring); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 773 n.2 (1986) (Stevens, J., concurring), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Delaware v. Van Arsdall, 475 U.S. 673, 702 n.11 (1986) (Stevens, J., dissenting); California v. Carney, 471 U.S. 386, 397 (1985) (Stevens, J., concurring); United States v. Sharpe, 470 U.S. 675,

two main ways: first, to signal deference to the legislature,[80] and second, to explain the principle that courts should not answer constitutional questions unless absolutely necessary.[81]

Over the next two decades, the use of the phrase remained relatively steady and the justices employed it in some controversial cases including: *Employment Division v. Smith*,[82] *Lucas v. South Carolina Costal Council*,[83] *Bush v. Gore*,[84] *Kyllo v. United States*,[85] and *Washington State Grange v. Washington State Republican Party*.[86] But

727 (1985) (Stevens, J., dissenting); New Jersey v. T.L.O., 469 U.S. 325, 375 (1985) (Stevens, J., concurring); United States v. Leon, 468 U.S. 897, 962 (1984) (Stevens, J., concurring); Berkemer v. McCarty, 468 U.S. 420, 445 (1984) (Stevens, J., concurring); New York v. Uplinger, 467 U.S. 246, 251 (1984) (Stevens, J., concurring); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 127 (1984) (Stevens, J., dissenting); Michigan v. Long, 463 U.S. 1032, 1067 (1983) (Stevens, J., dissenting); Karcher v. Daggett, 462 U.S. 725, 751 (1983) (Stevens, J., concurring); United States v. Grace, 461 U.S. 171, 189 (1983) (Stevens, J., concurring); Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 98 (1982) (Brennan, J., dissenting); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 496 (1982) (Brennan, J., dissenting); Rhodes v. Chapman, 452 U.S. 337, 362 (1981) (Brennan, J., concurring); Carlson v. Green, 446 U.S. 14, 32 (1980) (Rehnquist, J., concurring); Rummel v. Estelle, 445 U.S. 263, 287 (1980) (Powell, J., dissenting).

[80] Carlson v. Green, 466 U.S. at 32 (Rehnquist, J., dissenting); Rhodes v. Chapman, 452 U.S. at 362 (Brennan, J., concurring).

[81] United States v. Grace, 461 U.S. at 189 (Stevens, J., concurring); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1988).

[82] Emp't Div. v. Smith, 494 U.S. 872, 909 n.2 (1990) (Blackmun, J., dissenting).

[83] Lucas v. S.C. Costal Council, 505 U.S. 1003, 1061 (1992) (Stevens, J., dissenting) ("Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question.").

[84] Bush v. Gore, 531 U.S. 1046, 1047 (2000) (Stevens, J., dissenting) ("To stop the counting of legal votes, the majority today departs from three venerable rules of judicial restraint that have guided the Court throughout its history.").

[85] Kyllo v. United States, 533 U.S. 27, 51 (2001) (Stevens, J., dissenting) ("Although the Court is properly and commendably concerned about the threats to privacy that may flow from advances in the technology available to the law enforcement profession, it has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future.").

[86] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008) ("Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the

most notably, this phrase was used by the unanimous court in *FCC v. Beach Communications, Inc.*[87] This case is famous (or infamous depending on where you stand) for its articulation of an extremely deferential form of the rational basis test. There, the Court explained that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[88] The Court defined this standard of review as "a paradigm of judicial restraint."[89]

3. Will of the Majority

Federal courts have used the phrase "will of the majority" approximately 463 times.[90] We first have evidence of it appearing in an American opinion in a Pennsylvania Admiralty Court in 1781.[91] In 1845, the Supreme Court became the first federal court to use the term. [92] This occurred in reference to Congress passing a bill, with the Court explaining that it is only the statute passed by both houses of Congress that constitutes the law—not "the construction placed upon it by individual members of Congress."[93]

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necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.").

[87] FCC v. Beach Commc'ns, Inc., 508 U.S. 307 (1993).

[88] *Id.* at 313.

[89] *Id.* at 314.

[90] As of September 14, 2020.

[91] Hainey v. The Tristram Shandy, 11 F. Cas. 171 (Pa. Adm. 1781) (No. 5,906).

[92] Aldridge v. Williams, 44 U.S. (3 How.) 9 (1845).

[93] *Id.* at 24. ("In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that

This phrase was used only 35 times by federal courts before the 1900s and, of those 35 instances, the Supreme Court used it 11 times. The interesting thing here is that the Supreme Court went almost three decades between using the term in 1886[94] and then not using it again until 1915.[95] Moreover, after the Supreme Court used the term in 1915, it did not use it again until 1937.[96] Since then, the Supreme Court's use of the term became a bit more regular, though it was notably absent in the 1950s before having its most popular decade in the 1960s.

" Will of the Majority"					
2010-2019	61	4	18	38	1
2000-2009	58	1	15	40	2
1990-1999	65	4	23	34	4
1980-1989	58	3	23	28	4
1970-1979	35	4	13	17	1
1960-1969	43	8	14	19	2
1950-1959	21	0	10	8	3
1940-1949	33	4	21	8	0
1930-1939	21	1	13	16	1
1920-1929	6	0	2	1	3
1910-1919	12	1	5	5	1
1900-1909	9	0	4	5	0
	All	Supreme Court	Courts of Appeals	District Court	Other

Recently, the Court has often used this phrase in election law cases to explain that free elections are necessary to ascertain the "will of the majority" of the people. But it has been, and still is, used to signal judicial deference to legislation. For example, in *McGowan v.*

will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.")

[94] Daviess Cty. v. Dickerson, 117 U.S. 657 (1886).

[95] Cumberland Glass Mfg. Co. v. De Witt, 237 U.S. 447 (1915).

[96] Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937).

Maryland,[97] the Court heard a challenge to Maryland's blue law which only allowed for the sale of certain items on Sundays. In a concurring opinion written by Justice Frankfurter, and joined by Justice Harlan the younger, the pair of justices explained "[t]he will of a majority of the community, reflected in the legislative process during scores of years, presumably prefers to take its leisure on Sunday."[98] The way the phrase was used there is clearly a reference to legislation being the "will of the majority." This manner of employing "will of the majority" was not the outlier.[99]

B. TERMS WHOSE USE BEGAN AFTER 1900

1. "Deference to the Political Branches"

Federal courts have used the phrase "deference to the political branches" in 115 opinions.[100] Justice Marshall was the first to use it in a dissent, joined by Justice Brennan.[101] The Court there considered whether the actions of the Attorney General denying a visa to a scholar to "attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?"[102] The majority determined that Congress had granted plenary power to the executive branch to make certain determinations of admissibility.[103] Thus, "when the Executive exercises this power

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[97] McGowan v. Maryland, 366 U.S. 420 (1961).

[98] *Id.* at 507.

[99] Lathrop v. Donohue, 367 U.S. 820, 883 (1961) (Douglas, J., dissenting) ("Although in political democracy the rule of the majority is necessary, the American system of democracy is based upon the recognition of the imperative necessity of limitations upon the will of the majority."); Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 754 (2011) ("But the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the *will of the majority*. When it comes to protected speech, the speaker is sovereign." (emphasis added)).

[100] As of January 4, 2021.

[101] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[102] *Id.* at 754.

[103] *Id.* at 769–70.

negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[104] Justice Marshall, along with Justice Brennan, disagreed with the majority and used the phrase in explaining that the majority incorrectly read the precedent, concluding that the broad counsel of the precedent "about deference to the political branches is inapplicable."[105]

The Supreme Court has continued to use the phrase sparingly since that time, but it became popular with the lower courts beginning in the early 2000s.

" Deference to the Political Branches"					
2020	6	0	4	2	0
2010s	42	1	18	21	2
2000s	41	2	19	20	0
1990s	15	4	2	6	3
1980s	6	1	4	1	0
1970s	4	2	0	2	0
	All	Supreme Court	Courts of Appeals	District Court	Other

Intriguingly, in the ten Supreme Court decisions with this phrase, it only appears in the text of two majority opinions.[106] The Court also used the phrase in two of the cases in footnotes to the

[104] *Id.* at 770.

[105] *Id.* at 783 (Marshall, J., dissenting).

[106] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217–18, (1995) ("We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate to detract from this general rule."); Regan v. Wald, 468 U.S. 222, 242 (1984) ("Our holding in Zemel was merely an example of this classical deference to the political branches in matters of foreign policy.").

majority opinion.[107] It the other six cases, it was used in either a concurrence or a dissent.[108]

This phrase was used recently in a Second Circuit decision upholding New York's COVID-19 restrictions on attendance for religious services.[109] In dissent, Judge Park wrote that "*Jacobson* does not call for indefinite deference to the political branches exercising extraordinary emergency powers, nor does it counsel courts to abdicate their responsibility to review claims of constitutional violations."[110]

2. "Defer/Deference to Congress"

Federal courts have used the phrase "defer to Congress" in 303 decisions. It was first used in the appendix to Justice Douglas's 1971 dissenting opinion in *Victory Carriers, Inc. v. Law*.[111] Federal courts used the phrase a couple more times during the 1970s, but the usage of the phrase took off during the 1980s and has steadily increased since then. If the rate of usage in 2020 stays steady over the next nine years, the term will, once again see increased in this coming decade.

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[107] Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004); Miller v. Albright, 523 U.S. 420, 434 n.11 (1998).

[108] Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649, 1662 (2018) (Thomas, J., dissenting); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1432 (2018) (Sotomayor, J., dissenting); Boumediene v. Bush, 553 U.S. 723, 832 (2008) (Scalia, J., dissenting); Edmond v. United States, 520 U.S. 651, 669 (1997) (Souter, J., concurring); Weiss v. United States, 510 U.S. 163, 194 (1994) (Souter, J., concurring); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 715 (1976) (Powell, J., concurring); Kleindienst v. Mandel, 408 U.S. 753, 783 (1972) (Marshall, J., concurring).

[109] Agudath Israel of Am. v. Cuomo, 980 F.3d 222 (2d Cir. 2020).

[110] *Id.* at 230.

[111] Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971).

" Defer to Congress"					
2020	12	0	6	5	1
2010s	94	4	40	47	3
2000s	80	2	36	37	5
1990s	71	3	39	28	1
1980s	42	7	21	13	1
1970s	4	2	2	0	0
	All	Supreme Court	Courts of Appeals	District Court	Other

All in all, the Supreme Court has used the phrase another 17 times since that 1971 decision.[112] Intriguingly, this is one of the few terms that has been used more often by the courts of appeals than the district courts. The Ninth and D.C. Circuits each have referenced "defer to Congress" more than 20 times, and with the Eleventh Circuit using the term 19 times. The Seventh Circuit only used the phrase in one decision while all other circuits have used it at least in 6 cases.

[112] *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185, 259 (2014) (Breyer, J., dissenting) (arguing that an evidentiary record is needed for the court to determine how much it should defer to Congress' setting of aggregate campaign contribution limits); Christian Legal Soc'y v. Martinez, 561 U.S. 661, 721 (2010) (Alito, J., dissenting) (explaining that the Court does not defer to Congress when it comes to the interpretation and application of the right to free speech."); Gonzales v. Raich, 545, U.S. 1, 47 (2005) (O'Connor, J., dissenting) (arguing that if the broad deference employed by the majority became the norm then "little may be left to the notion of enumerated powers."); McConnell v. FEC, 540 U.S. 93, 355 (2003) (Rehnquist, C.J., dissenting) (explaining "I doubt, however, the Court would seriously contend that we must defer to Congress' judgment if it chose to reduce the influence of political endorsements in federal elections."); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 129 (1989) ("To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment.") Marshall v. Barlow's, Inc., 436 U.S. 307, 330 (1978) (Stevens, J., dissenting) (arguing that a congressional statute authorizing the Secretary of Labor to perform inspections in furtherance of OSHA requirements did not violate the Fourth Amendment's warrant requirements and that "I would defer to Congress' judgment regarding the importance of a warrantless-search power to the OSHA enforcement scheme.").

Deference to Congress. Federal courts have employed the phrase "deference to Congress" in around 583 decisions since the 1940s. It was first used in 1946 in *Prudential Insurance Co. v. Benjamin*.[113] It was not used for another nine years until 1955 when the Supreme Court again used it in *Bisso v. Inland Waterways Corp*.[114] Much like the phrase "defer to Congress," its use really started to pick up in the 1980s.

"Deference to Congress"					
2020	25	0	9	13	3
2010s	176	3	83	87	3
2000s	184	5	56	112	11
1990s	111	14	50	42	5
1980s	68	8	28	31	0
1970s	11	2	4	4	1
1960s	4	2	0	2	0
1950s	3	1	0	1	1
	All	Supreme Court	Courts of Appeals	District Courts	Other

The term had its heyday at the Supreme Court in the 1990s, when it was used almost twice as much as the decade in second place—the 1980s. "Deference to Congress" has been used both to caution against deference to Congress and to advocate for additional deference to Congress. In *Whole Woman's Health v. Hellersted*, it was used to explain that in cases involving abortion regulations "uncritical deference to Congress' factual findings is inappropriate."[115] Yet about a decade earlier, Justice Scalia used the phrase in his dissent in

[113] Prudential Ins. Co. v. Benjamin, 328 U.S. 405 (1946).
[114] Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).
[115] Whole Woman's Health v. Hellersted, 136 S. Ct. 2292, 2310 (2016).

Boumediene v. Bush, arguing that the Court should be deferring even more to Congress's judgement regarding procedures for the treatment of detainees.[116]

The Eleventh, Ninth, and D.C. Circuits still are the three appeals courts who used the term most often, but this time the Eleventh Circuit takes the top spot. Most often, the Eleventh Circuit used the phase in the context of deferring to Congress in determining punishments for certain crimes. In the D.C. Circuit, it is often used in appeals from administrative agencies and questions about the release of government documents. This phrase, just like "defer to Congress," is on pace to be used more in the 2020s than in the 2010s.

3. "Second Guess the Legislature"

Federal courts have used this phrase in 107 decisions beginning with a 1972 district court decision.[117] After this, it has been used relatively consistently. Notably, it has only been used once by the Supreme Court.[118]

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[116] Boumediene v. Bush, 553 U.S. 723, 832 (2008) (Scalia, J., dissenting) ("We have frequently stated that we owe great deference to Congress's view that a law it has passed is constitutional.").

[117] N.J. Welfare Rights Org. v. Cahill, 349 F. Supp. 491, 497 (D.N.J. 1972) (explaining that the role of a court is not to "second-guess the Legislature as to the best method of accomplishing its purposes" but only determining "whether the method chosen is rationally related to the purpose."), *rev'd*, 411 U.S. 619 (1973).

[118] FBI v. Abramson, 456 U.S. 615, 641 (1982) (O'Connor, J., concurring).

"Second Guess the Legislature"					
2020	7	0	1	6	0
2010s	48	0	10	36	1
2000s	19	0	4	14	1
1990s	13	0	7	5	1
1980s	12	1	3	6	2
1970s	7	0	2	5	0
	All	Supreme Court	Courts of Appeals	District Court	Other

The Third Circuit used the phrase in a decision upholding a licensing scheme for midwives.[119] The plaintiffs in that case argued that the licensing scheme was too burdensome and that an apprenticeship program could train midwives just as well as a more formal training. The court held that the plaintiffs could be right, but that the "elected representatives of the people of New Jersey who voted for the statute took a contrary view" and that the disputed legislative facts were irrelevant in a judicial proceeding.[120] The court determined that the plaintiffs' only recourse was to "take their evidence and advocacy to the halls of the New Jersey legislature."[121]

The Third Circuit used this phrase in the course of explaining the application of the rational basis test. The court explained: when "engaging in rational basis review [a court] is not entitled to second guess the legislature on the factual assumptions or policy considerations underlying the statute." [122] The Third Circuit's decision also explained: "[i[f the legislature has assumed that people will react to the statute in a given way or that it will serve the desired

[119] Sammon v. N.J. Bd. of Med. Exam'rs, 66 F.3d 639, 645 (3d Cir. 1995).
[120] *Id.* at 647.
[121] *Id.*
[122] *Id.*

goal, the court is not authorized to determine whether people have reacted in the way predicted or whether the desired goal has been served."[123]

The First Circuit used the phrase in an eminent domain case in *Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno*.[124] In *Fideicomiso*, a land trust created by Puerto Rico challenged the transfer of certain lands back to other governmental entities after the land had been transferred from those agencies to the land trust. The trust argued that this action violated the Takings Clause of the U.S. Constitution as the transfer did not constitute a "public use."[125] The First Circuit explained that the Takings Clause is not a way to "second-guess" the legislature's mechanism of achieving public policy goals, even if those goals were achieved through the taking of property.[126]

In both situations, the courts of appeals have used "second-guess the legislature" as a way to explain why they were not going to look at the factual evidence presented and determine whether the restriction on liberty would actually achieve the government's stated purpose.

4. "Highly Deferential"

"Highly deferential," is referenced more than any other term described in this article. It was first used in 1974 by the Eighth Circuit in a civil rights action brought by a state prisoner.[127] Since that case, the phrase has been employed in over 40,000 cases. The Supreme Court has used the phrase in 46 cases, including 21 occasions in the

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[123] *Id.*

[124] Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno, 604 F.3d 7 (1st Cir. 2010).

[125] U.S. CONST. amend. V.

[126] Fideicomiso, 604 F.3d at 19.

[127] Rinehart v. Brewer, 491 F.2d 705, 706 (8th Cir. 1974) ("Nevertheless, we also remain highly deferential to the discretion of the prison administrator where, as here, a reasonable disciplinary regulation is enforced with at least the minimal procedural fairness required by the constitution.").

2010s. Courts of Appeals have used the term over 7,000 times, including 3,400 times in the 2010s, and U.S. District Courts used the phrase in over 25,000 cases in the 2010s alone. In contrast, this term was only used a combined 11,886 times in the 2000s, 2,162 times in the 1990s, 464 times in the 1980s, and only 23 times in the 1970s.

"Highly Deferential"					
2020	46	0	7	22	17
2010s	31,342	21	3,465	27,374	483
2000s	11,651	13	2,427	9,068	143
1990s	2162	5	1,000	1,059	98
1980s	464	5	292	164	3
1970s	23	0	8	15	0
	All	Supreme Court	Courts of Appeals	District Court	Other

The first time this phrase appeared in the Supreme Court was in a dissent by Chief Justice Rehnquist in *Zobel v. Williams*.[128] There, Chief Justice Rehnquist lamented the fact that the Court was taking a step away from a "highly deferential approach which we invariably have taken towards state economic regulations."[129] Notably, the phrase was also employed by Justice Breyer in his dissent in *McDonald v. City of Chicago*, where he explained that state courts were highly deferential towards the limits state governments put in place regarding the right to bear arms.[130] But, more often than not, the

[128] Zobel v. Williams, 457 U.S. 55 (1982).
[129] *Id.* at 84 (Rehnquist, C.J., dissenting).
[130] McDonald v. City of Chicago, 261 U.S. 745, 940 (2010) (Breyer, J., dissenting).

Supreme Court uses the phrase in the context of habeas corpus petitions[131] and cases arguing ineffective assistance of counsel.[132]

Courts of Appeals have employed this phrase in over 7,500 decisions since it was first used by the Eighth Circuit in 1974 in a case challenging hair length regulations in Iowa state prisons.[133] Over half of the decisions issued by the Courts of Appeals with this phrase are unpublished decisions.[134] This is likely related to the number of immigration and habeas cases where this phrase is used. Still, this phrase is also used in cases involving the exercise of constitutional rights. For example, the Eighth Circuit used the phrase as a descriptor of rational basis review in a challenge to the Durbin Amendment to the Dodd-Frank Act.[135] The Tenth Circuit used the phrase in a similar way when a former police officer challenged an official reprimand for an off-duty sexual encounter with a police officer from another department.[136] In fact, the term "rational basis"

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[131] Buck v. Davis, 137 S.Ct. 759, 786 (2017) (Thomas, J., dissenting); Davis v. Ayala, 576 U.S. 257, 269 (2015); Brumfield v. Cain, 576 U.S. 305, 334 (2015); Burt v. Titlow, 571 U.S. 12, 18 (2013); Parker v. Matthews, 567 U.S. 37, 40 (2012); Cash v. Maxwell, 565 U.S. 1138, 1142 (2012); Hardy v. Cross, 565 U.S. 65, 66 (2011); Cullen v. Pinholster, 563 U.S. 170, 181, 190 (2011); Felker v. Jackson, 562 U.S. 594, 598 (2011); Harrington v. Richter, 562 U.S. 86, 105 (2011); Premo v. Moore, 562 U.S. 115, 122 (2011); Allen v. Lawhorn, 562 U.S. 1118, 1121 (2010); Renico v. Lett, 559 U.S. 766, 773 (2010); Wong v. Belmontest, 558 U.S. 15, 17 (2009); Knowles v. Mirzayance, 556 U.S. 111, 124 (2009); Rompilla v. Beard, 545 U.S. 374, 401 (2005); Bell v. Cone, 543 U.S. 447, 455 (2005); Yarborough v. Gentry, 540 U.S. 1, 6 (2003); Wiggins v. Smith, 539 U.S. 510, 538 (2003); Woodford v. Visciotti, 537 U.S. 19, 24 (2002); Bell v. Cone, 535 U.S. 685, 698 (2002); Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000); Lindh v. Murphy, 521 U.S. 320, 333 n.7 (1997); Burger v. Kemp, 483 U.S. 776, 789 (1987); Kimmelman v. Morrison, 477 U.S. 365, 381 (1989); Darden v. Wainwright, 477 U.S. 168, 185 (1986); Strickland v. Washington, 466 U.S. 668, 689 (1984).

[132] Garza v. Idaho, 139 S. Ct. 738, 753 (2019); Strickland v. Washington, 466 U.S. at 689.

[133] Rinehart v. Brewer, 491 F.2d 705, 706 (8th Cir. 1974).

[134] Over 4000 decisions are unpublished while just over 3600 have been published.

[135] TCF Nat'l Bank v. Bernanke, 643 F.3d 1158, 1163 (8th Cir. 2011).

[136] Seegmiller v. LaVerkin City, 528 F.3d 762, 772 (10th Cir. 2008).

was used in conjunction with the phrase "highly deferential" in over 1,500 of the decisions issued by the courts of appeals.[137]

5. "Unelected Judges"

Federal courts have referenced "unelected judges" in 76 decisions dating to 1983, when it was first used by a federal district court in a campaign finance case.[138] Since then, district courts have used the phrase another 30 times. But it has been used more by the federal courts of appeals—one of the few phrases used more by the courts of appeals than the district courts.

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[137] *See, e.g.*, Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) ("Rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature's power. A statute is constitutional under rational basis scrutiny so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the" statute."); Winston v. City of Syracuse, 887 F.3d 553, 560 (2d Cir. 2018) ("Here, we apply rational basis review because the City has neither targeted a suspect class nor has Winston argued that opening a water account is a fundamental right. This form of review is highly deferential."); Shoemaker v. City of Howell, 795 F.3d 553, 567 (6th Cir. 2015) ("This standard is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances.").

[138] Democratic Party of the U.S. v. Nat'l Conservative PAC, 578 F. Supp. 797, 822 (E.D. Pa. 1983) ("The argument is, in essence, that in *NRWC* the Supreme Court adopted the position of Justice White in his dissent in *Buckley* that unelected judges should defer to the expertise of elected legislators in determining whether specified campaign practices have the potential to corrupt.").

	" Unelected Judges"				
2020	18	3	8	7	0
2010s	25	6	10	9	0
2000s	12	2	5	5	0
1990s	10	2	3	4	1
1980s	4	0	2	2	0
	All	Supreme Court	Courts of Appeals	District Courts	Other

The courts have used this phrase more often over the decades, with the 2010s being a high-water mark. The phrase was used more in 2020 than it had been used in any previous decade except the 2010s. In the 2010s it was a phrase of dissent often used to cast aspersions on the majority opinion. Supreme Court justices used the phrase in six opinions in the 2010s, but only in *Sessions v. Dimaya* was it used in anything but a dissent.[139] The other five cases employing references to "unelected judges" were all dissents: *Campbell-Ewald Co. v. Gomez*,[140] *Obergefell v. Hodges*,[141] *NLRB v. Noel Canning*,[142] *United States v. Windsor*,[143] and *Holland v. Florida*.[144] This trend continued in

[139] Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring).

[140] Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 183–84 (2016) (Roberts, C.J., dissenting) ("The case or controversy requirement serves an essential purpose: It ensures that the federal courts expound the law only in the last resort, and as a necessity. It is the necessity of resolving a live dispute that reconciles the exercise of profound power by unelected judges with the principles of self-governance, ensuring adherence to the proper—and properly limited—role of the courts in a democratic society.") (internal quotation marks omitted).

[141] Obergefell v. Hodges, 576 U.S. 644, 706 (2015) (Roberts, C.J., dissenting); *id.* at 714 (Scalia, J., dissenting); *id.* at 737 (Alito, J., dissenting).

[142] NLRB v. Noel Canning, 573 U.S. 513, 581–82 (2014) (Scalia, J., dissenting) ("The majority must hope that the in terrorem effect of its 'presumptively too short' pronouncement will deter future Presidents from making any recess appointments during 4-to-9-day breaks and thus save us from the absurd spectacle of unelected judges evaluating (after an evidentiary hearing?) whether an alleged catastrophe was sufficiently urgent to trigger the recess-appointment power.").

[143] United States v. Windsor, 570 U.S. 744, 808–09 (2013) (Alito, J., dissenting).

[144] Holland v. Florida, 560 U.S. 631, 673 (2010) (Scalia, J., dissenting).

2020. It was used in dissent in both *Selia Law v. CFPB*[145] and *Bostock v. Clayton County*,[146] and once in a concurring opinion in *United States v. Sineneng-Smith*.[147] It is highly informative that seven of the nine cases in which "unelected judges" have been referenced since 2010 have been in dissents. Further, both of the popularly described "sides" of the Court have used this phrase in dissent. This phrase, which signals that judges should defer because they are unelected, certainly has become a term of criticism. But it probably should not be. One need only read Federalist 78 to understand that unelected judges are a feature of our federal constitutional adjudication system, rather than a bug.[148]

C. A QUICK LOOK AT THE FEDERAL DOCKET

The frequency of the use of the above terms is important. This information, especially about the rise in use of many of these phrases, is even more important when viewed in relation to how the federal caseload has expanded over the decades.

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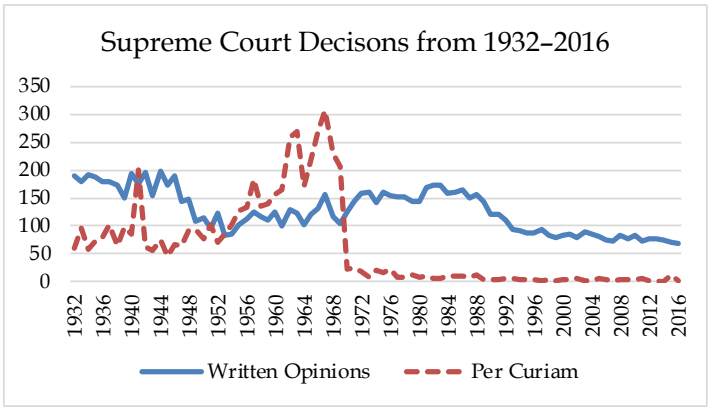
[145] Selia Law v. CFPB, 140 S. Ct. 2183, 2245 (2020) (Kagan, J., dissenting).

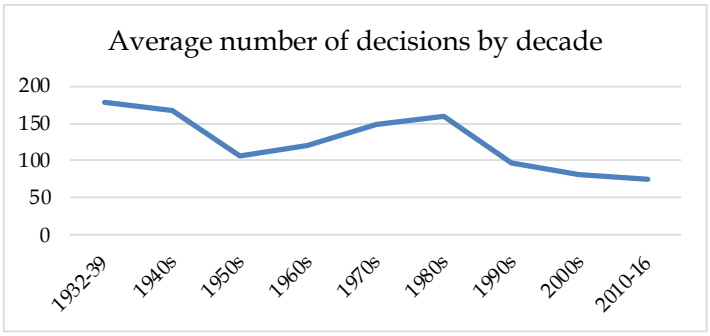
[146] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1836 (2020) (Kavanaugh, J., dissenting).

[147] United States v. Sineneng-Smith, 140 S. Ct. 1575, 1584 (2020) (Thomas, J., concurring).

[148] As Alexander Hamilton explained, a limited Constitution can be preserved only "through the medium of courts of justice whose duty it much be to declare all acts contrary to the manifest tenor of the Constitution void. THE FEDERALIST NO. 78, *supra* note 2, at 380. The courts are to be "bulwarks of a limited Constitution against legislative encroachments." *Id.* at 382. Independence from the other two branches is necessary for the courts to succeed in this role, indeed, independence is "essential to the faithful performance of so arduous of duty." *Id.*

Data is sparse as to the number of Supreme Court opinions before 1932, but since then we can see several trends. [149]





The number of Supreme Court written opinions peaked in the 1940s, with 195 decisions in 1940, 196 decisions in 1942, and 199 decisions in 1944. There was a second peak in the 1980s when the

[149] FEDERAL JUDICIAL CENTER, CASELOADS: SUPREME COURT OF THE UNITED STATES, METHOD OF DISPOSITION, 1932–1969 (last visited Feb. 18, 2021) [https://perma.cc/2J2M-Y5FF]; FEDERAL JUDICIAL CENTER, CASELOADS: SUPREME COURT OF THE UNITED STATES, METHOD OF DISPOSITION, 1970–2016 (last visited Feb. 18, 2021) [https://perma.cc/Q6UK-34F6]. This second chart shows the average number of Supreme Court cases over the decades. But the first and last (1930s and 2010s) are a bit truncated by the available data.

Court crossed the 170s threshold in 1982 and 1983 for the last time. Since then, there has been a steady decline of Supreme Court decisions. The Court has not issued more than 100 decisions since 1992.

Yet many of the terms presented above, including "unelected judges," "highly deferential," and "deference/defer to Congress," surged in popularity during or after the 1990s, at least at the Supreme Court. Further, "will of the people" peaked at the Supreme Court during the 1960s, between the two peaks in the 1940s and 1980s. The same is true of the term "will of the majority." "Judicial restraint" peaked at the Supreme Court during the short-lived uptick in issued decisions during the 1980s. "Will of the majority" was used 31 times by the Supreme Court in the 1980s, as opposed to 18 times the decade before, and 25 times in each of the two subsequent decades.

Data from the courts of appeals is a little harder to come by. Further, the U.S. Courts of Appeals have to hear appeals from district courts, even if many appeals are without merits. This fact certainly makes the data a little less relevant. Whereas the Supreme Court has chosen to hear and decide fewer cases even as the number of filed cases increases, the Courts of Appeals have to hear all appealed cases, so it is possible to pair an increase in the use of terms with an increase in the number of cases. Given that the Supreme Court controls their own docket, it is harder to attribute a rise in the use of certain terms to simply a higher number of decisions. That being said, it is still important to have a big picture overview of the situation. [150]

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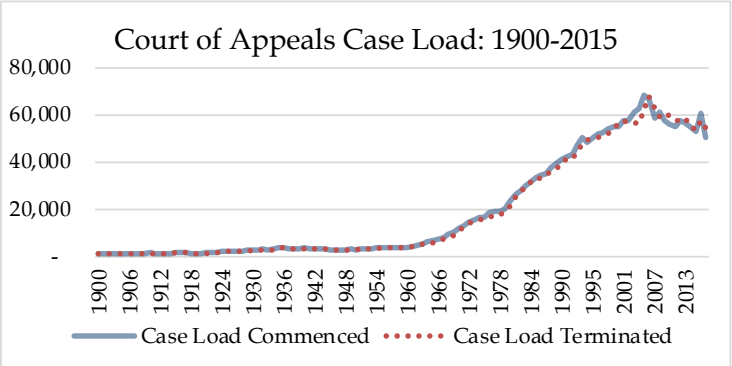
[150] FEDERAL JUDICIAL CENTER, CASELOADS: U.S. COURTS OF APPEALS, 1892–2017 (last visited Feb. 18, 2021) [https://perma.cc/F34L-NWU9].

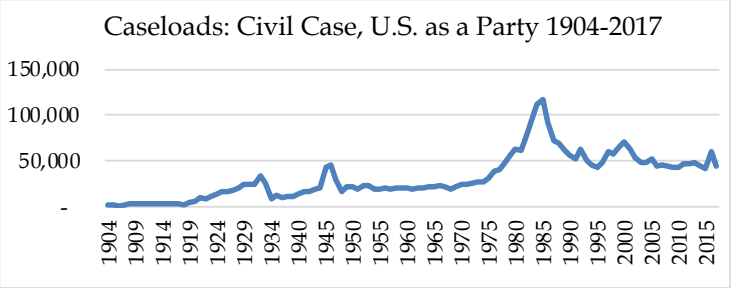


The caseloads for U.S. Courts of Appeals did not increase in any sort of dramatic fashion until the 1960s, with the real peak occurring in the late 1990s and early 2000s. Since 2005, there has been a mostly steady decline in the number of cases commenced and terminated, with only a couple of aberrations. It bears noting that many cases are likely irrelevant for purposes analyzing the use of many of these terms (with the exception of "highly deferential"), as criminal appeals and prison litigation constituted nearly 50% of the cases as recently as 2015.[151]

Turning now to cases in federal district courts, specifically those cases with the U.S. government as a party, the data is as follows: [152]

[151] *See* UNITED STATES COURTS, JUST THE FACTS: U.S. COURT OF APPEALS CHART 1 (Dec. 20, 2016) [https://perma.cc/AJ3C-8CVB].

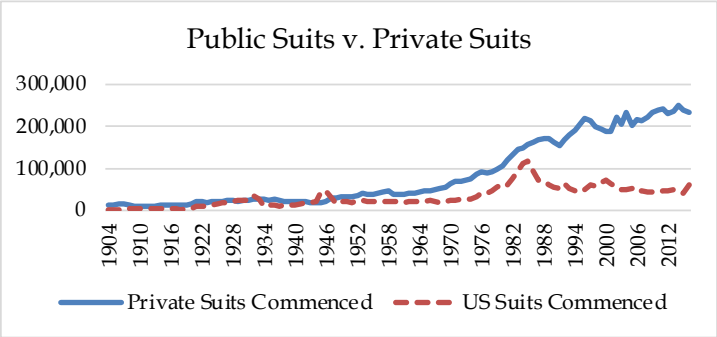
[152] FEDERAL JUDICIAL CENTER, CASELOADS: CIVIL CASES, U.S. A PARTY 1870–2017 (last visited Feb. 18, 2021) [https://perma.cc/2RBS-6NQ7].



The numbers here are a bit more interesting than with the Courts of Appeals, which were a bit steadier. Here, there was a peak in the district courts in the late 1920s, again in the mid-1940s and then a large peak that began in the mid-70s and eventually reached its apex in the early 1980s. While it has not returned to the earlier levels, it has been in general decline since 2000.

One interesting aspect of suits commenced in federal district court are those periods of time when suits against the government outpaced private suits. This happened in the late 1920s and early 1930s and once again in the middle 1940s. This corresponds to the first two peaks in caseloads. Since the 1950s, private suits have far outpaced public suits against the government. [153]

[153] FEDERAL JUDICIAL CENTER, TRIAL COURT CASELOADS SINCE 1870 (last visited Feb. 18, 2021) [https://perma.cc/EZ6K-LK83].



Overall, while the numbers of cases have certainly increased, the increase does not account for all instances of the use of a term increasing, especially those terms that have increased in more recent years. Thus, the trends in the terms discussed above are not solely driven by case volumes, which certainly lends support to the proposition that the increase in the usage of terms is related to a jurisprudential shift toward a more "restrained" judiciary, as will be discussed in the ensuing section.

III. PART III: MAKING SENSE OF IT ALL

A. THE SUPREME COURT AND THE CONSTITUTIONALITY OF FEDERAL STATUTES

This survey data becomes more interesting when viewed in light of Professor Keith Whittington's recent work, *Repugnant Laws: Judicial Review of Acts of Congress from the Founding To the Present*.[154] Included in his book is a data set of 1,308 cases from the founding through 2017 of challenges to federal statutes on constitutional grounds that reached the Supreme Court.[155] Professor Whittington catalogs each case and determines whether the Supreme Court

[154] WHITTINGTON, REPUGNANT LAWS, *supra* note 15.

[155] KEITH E. WHITTINGTON, JUDICIAL REVIEW OF CONGRESS DATABASE (last updated May 30, 2019) [hereinafter WHITTINGTON, CONGRESS DATABASE] [https://perma.cc/K6GZ-6WB2].

upheld the federal statute, stuck it down as applied to the parties, or stuck it down facially. But it is the number of statutes the Court has found unconstitutional that is very relevant here.

As explained above, the Court, while always deferential, was not *as* deferential as it is now. It also historically required that a constitutional violation be clear, but not that it be unconstitutional beyond a reasonable doubt.[156] The numbers presented by Professor Whittington bear this out. For example, out of the 1,308 cases, the Supreme Court upheld the statutes in 963 of the cases. [157] That is, the Supreme Court upheld congressional statutes against constitutional challenges about 73% of the time. But, if you look from the founding until the 1880s, when Justice Harlan began using the phrase "will of the people" to refer to legislation almost exclusively, the Court upheld the statute in 82 of 121 cases, or 67% of cases. Admittedly, this is not a drastic difference compared to the overall rate of 73%. But it does show a development to a greater level of deference, at least in situations where the federal statutes are challenged as unconstitutional. [158]

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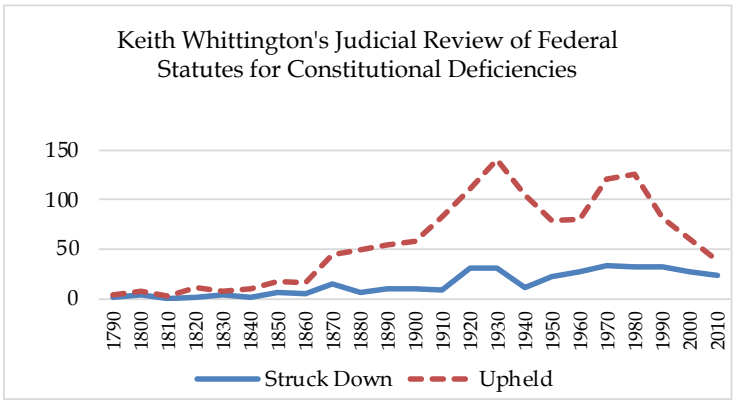
[156] *See* Green, *supra* note 21, at 172.
[157] WHITTINGTON, CONGRESS DATABASE, *supra* note 155.
[158] *Id.*



Professor Whittington's research shows that during the first century of the United States' existence, the Supreme Court heard relatively few challenges to federal statutes. And when it did, there was not a drastic difference between the number of statutes the Court struck down or upheld until the 1870s. There was a steady increase in the number of statutes upheld until it peaked in the 1930s. The number of statutes upheld tripled from the 1910s to the 1920s and remained the same in the 1930s. The number of statutes struck down dipped to 11 in the 1940s and has remained above 20 in each decade since. The number of laws upheld has also drastically dipped since the 1980s, which tracks the decline in the number of cases the Supreme Court has decided since that time.[159]

B. WILL OF THE PEOPLE & JUDICIAL DEFERENCE

Since the founding era, there has been a debate over judicial review and the extent to which the Constitution empowers courts to hold laws, regulations, and policies unconstitutional. Scholars, professors, judges, and litigators all argue over how much evidence is required before a law can be stuck down as unconstitutional. Much of this debate centers on the rights at stake and the perceived role of

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[159] *See supra* Chart "Average number of decisions by decade."

the judiciary. But a part of that debate is the popular assumption that the courts are more "activist" now and strike down laws with more frequency than at the founding.[160] Yet the evidence unambiguously refutes this.

The terms surveyed above describe the extent to which federal judges defer to both federal and state legislatures. Since 2010, the case load of federal courts has generally been trending downward with a couple blips. Despite this, the terms surveyed which signal deference have generally risen over that same period. "Will of the people" was used more in the 2010s than any other decade, including by the Supreme Court, and the last two decades have seen more cases use the phrase to describe legislation. "Will of the majority" was higher in the 2010s than the 2000s at the Supreme Court and the Courts of Appeals. Cases using the terms "highly deferential" were up at all levels, and "second guess the legislature" was up in both the courts of appeals and the district courts.

This is in line with research conducted by others. Keith Whittington, in *Repugnant Laws*, demonstrates that, overall, the Supreme Court actually struck down a higher percentage of federal laws before the 1880s than it has struck down since that time.[161] What is more, Professor Whittington explained that "[u]nder Chief Justice Roberts, the Court has struck down statutes at an annual average rate of 3.8 cases, which is the fewest of any Court since before the Civil War."[162] In fact, the evidence bears out that "Chief Justice Rehnquist and Chief Justice Roberts have overseen a Court that has surprisingly become one of the least activist in history."[163] This means that both have presided over Courts which defer to the other branches both in the number of cases accepted for review and in the limited number

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[160] WHITTINGTON, REPUGNANT LAWS, *supra* note 15, at 2227.
[161] WHITTINGTON, CONGRESS DATABASE, *supra* note 155.
[162] WHITTINGTON, REPUGNANT LAWS, *supra* note 15, at 2227.
[163] *Id.*

of cases in which the court actually rules on the constitutionality of the law.

But the question is, *why* do judges defer? This survey of terms sheds some light on that question. These terms signal deference to the legislature because legislation is believed to represent the will of the people. And many of these terms increase with the Rehnquist and Roberts Courts, even while the number of cases the Court was hearing was trending down.

This is especially exemplified by the term "will of the people." The phrase "will of the people" was used more between 2000-2019 to refer to legislation than any other time since 1880–99,[164] the heyday of Justice Harlan, who revolutionized the term. While the usage of the phrase has steadily decreased since the 1960s, the decrease has been in the cases where the Court used the phrase in reference to free speech in a philosophical manner and election law. This is in line with the research of Professor Whittington and others demonstrating that the Court has actually deferred more in recent years. It just might not seem that way due to the increased reporting on Supreme Court cases and the Court's role in some of the more controversial areas of American life.

Notably, the phrase was employed by Justice Thomas in his majority opinion in *Washington State Grange v. Washington State Republican Party*.[165] Justice Thomas, upholding Washington's blanket primary system, explained why the Court generally disfavors facial challenges. He explained that "facial challenges threaten to short circuit the democratic process by preventing laws embodying the *will of the people* from being implemented in a manner consistent with the Constitution."[166] To be sure, part of this may have been in reference to the fact that the primary system was adopted as an initiative rather than through legislation. But the phrase has been quoted numerous

[164] It was used eight times between 1880 and 1899 to refer to legislation.
[165] Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458 (2008).
[166] *Id.* at 451 (emphasis added).

times in cases referring to legislation.[167] This makes clear that the courts have understood this language and this reasoning to mean that legislation itself actually represents the will of the people. Such ideas are on the rise, and they are on the rise at the same time judicial deference to the political branches is also on the rise.

C. COVID-19 HAS LED TO EVENT MORE JUDICIAL DEFERENCE

The COVID-19 pandemic led to a great deal of judicial deference to the legislative and executive branches. The pandemic has actually led to the creation of a new phrase frequently used in opinions upholding restrictions: "second-guessing by an unelected federal judiciary." The phrase was coined by Chief Justice John Roberts in his opinion concurring in the denial of an injunction in *South Bay United Pentecostal Church v Newsom*.[168] The Chief explained: "Where those broad limits are not exceeded, they should not be subject to *second-guessing by an 'unelected federal judiciary,'* which lacks the background, competence, and expertise to assess public health and is *not accountable to the people*."[169] Both emphasized pieces of this quote fit in the juncture of the "will of the people" idea and the counter-majoritarian difficulty. They are two sides of the same coin and are both used to encourage deferential judicial review.

This phrase has been used in 70 subsequent decisions in federal courts.[170] This includes three more Supreme Court decisions, two decisions by the courts of appeals, and 45 decisions by district courts.

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[167] *See e.g.*, United States v. Hamilton, 699 F.3d 356, 366 (4th Cir. 2012); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 476 (7th Cir. 2012); Hightower v. City of Boston, 693 F.3d 61, 77 (1st Cir. 2012); Dickerson v. Napolitano, 604 F.3d 732, 741 (2d Cir. 2010); United States v. Stephens, 594 F.3d 1033, 1037 (8th Cir. 2010). *See also* State v. Weddle, 224 A.3d 1035, 1047 (Me. 2020) (Clifford, J., concurring); Morreno v. Brickner, 416 P.3d 807, 818 (Ariz. 2018) (Gould, J., concurring)

[168] South Bay United Pentecostal Church v Newsom, 140 S. Ct. 1613, 1614 (2020).

[169] *Id.* (emphasis added).

[170] As of January 10, 2021.

It was used in one case by the Sixth Circuit and once by the Ninth. It was also used once in a decision by the United States Court of Appeals for Veterans Claims in an unpublished opinion from July 17, 2020.[171] In that case, a veteran sought a writ of mandamus to require the Department of Veterans' Affairs to arrange a new examination after his last examination was found inadequate.[172] The problem is that the Board of Veterans' Appeals did not determine the examination was inadequate until May 2020, and an examination could not be scheduled due to the COVID-19 pandemic.[173] The court quoted Chief Justice Roberts' language in concluding that they could not second-guess the VA and its agents in determining that an examination could not be scheduled due to COVID-19.[174]

The long-term effects of this will not be known for years to come. We do not know how long the pandemic will rage, or at least how long its embers will smolder, or to what extent the increased control over everyday life will continue to be exercised in the years to come. It might even be a century before we have a real picture of the effect of this deference. *Jacobson v. Massachusetts*,[175] the last major pandemic case, has been cited by courts nearly 1000 times.[176] 305 of these citations have come since the beginning of 2020, meaning that a quarter of case's citations have come since the beginning of the COVID-19 pandemic. It has taken on a whole new life. The same could potentially happen to one or more of the Supreme Court cases counseling deference to the political branches in light of the COVID-19 pandemic.

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[171] *See* Gray v. Wilkie, No. 20-2232, 2020 WL 4033252 (Vet. App. July 17, 2020).
[172] *Id.* at *1.
[173] *Id.*
[174] *Id.* at *2 (Vet. App. July 17, 2020).
[175] Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[176] As of August 31, 2021.

CONCLUSION

Federal courts have always deferred to the other branches in determining the constitutionality of both federal and state statutes. But federal courts in recent years have become even more deferential despite what the popular perceptions may say. This is problematic enough. But the problem is expounded by the reason judges are deferring to the other branches. Judges are often deferring because of the idea that legislation represents the will of the people.

The first problem is that this just is not true. Public choice theory shows that much, perhaps most, of the time legislation represents the will of *interest groups* that are cohesive and promise the ability to round up enough votes for the particular member to win reelection. To be sure, not every single legislator acts this way all the time. Still, enough do to make it clear that legislation frequently does not actually represent the "will of the people." This means that the reason given for the deference largely does not exist. It is little more than a political fiction.

The second reason this is problematic is that courts are supposed to function as a check on the "will of the people."[177] The Constitution established a government of enumerated powers and guarantees many rights checking the government's power, even when Congress stays within its enumerated powers. But those limits only matter if the government stays within them. The founders knew that Congress and the executive could not be trusted to stay within the limits the Constitution set. That is why they created the judiciary as a coequal branch—to keep the other two in check.[178]

Yet, despite those problems, the survey of terms above indicates that courts are often deferring to the other branches and allowing them to determine the extent of their own power in many cases. The terms surveyed almost all rose in usage between the 2000s and the

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[177] *See generally* THE FEDERALIST NO. 78, *supra* note 2.
[178] *Id.*

2010s. So far, the data from 2020 suggest that the terms may be used more frequently in the 2020s than the 2010s. It will be interesting to see what it looks like in 2030 and what impact the increased deference due to COVID-19 will have on judicial deference in general. If the federal courts were to be truer to the founding ideals of the Constitution, we would see less use of these terms, with one exception: "will of the people," in the context of the Constitution itself.