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A New Perspective on the “Central Obsession” of Constitutional Theory**

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Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory

Ilya Somin*

I. INTRODUCTION

The “countermajoritarian difficulty” has long been considered the most fundamental issue in American constitutional law.¹ It is “the central obsession of modern constitutional scholarship.”² As Alexander Bickel famously put it in his classic work *The Least Dangerous Branch*,³ “the root difficulty is that judicial review is a counter-majoritarian force in our system.”⁴ For Bickel and innumerable later writers, “judicial review is a deviant institution in American democracy” because it enables an unelected

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¹ For useful recent histories of the debate over the countermajoritarian difficulty, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002); and G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 523-607 (2002). See also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996) (placing the countermajoritarian difficulty debate in the broader context of the development of liberal legal thought).

² Barry Friedman, *The Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998).

³ It was Bickel who coined the phrase “countermajoritarian” difficulty in 1962. *Id.* For Bickel’s first published use of the term, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). On the development of Bickel’s views on the countermajoritarian difficulty, see Anthony Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L. J. 1567 (1985); John Moeller, *Alexander M. Bickel: Toward a Theory of Politics* 47 J. POL. 113 (1985).

⁴ Bickel, *supra* note 3 at 16.

judiciary to override the majoritarian will of the people represented by elected legislatures.⁵ Since Bickel wrote *The Least Dangerous Branch* in 1962, a vast academic literature has addressed the counter-majoritarian difficulty, spawning an assortment of scholarly debates.⁶ Both conservative and liberal legal scholars have recently advocated the abolition or severe restriction of judicial review in order to prevent an unelected institution from overriding the will of a democratic majority.⁷ According to Robert Bork, the most prominent conservative critic of judicial review, the invalidation of legislation by judges is objectionable because it creates “new disabilities for democratic government.”⁸ Neal Katyal, a leading liberal constitutional law scholar, echoes Bork’s concern, expressing his fear that “[f]or those worried about the vigor of popular rule in America, there is much to fear from judicial interpretation [of the Constitution].”⁹

⁵ *Id.* at 18.

⁶ The literature is too vast to cite. For a few of the more notable recent works addressing the counter-majoritarian difficulty, see RONALD DWORIN, *FREEDOM’S LAW* (1996); CHRISTOPHER EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2003); PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* (1992); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (2000); JED RUBENFELD, *FREEDOM IN TIME* (2001); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999); Rachel Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Steven G. Calabresi, *Textualism and the Counter-majoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373 (1998); Larry D. Kramer, *The Supreme Court 2000 Term, Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty*, 94 MICH. L. REV. (1995); Friedman, *supra* note 1; Friedman *supra* note 2.

⁷ For advocacy of the abolition of judicial review by a prominent liberal legal scholar see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Kramer, *supra* note 6, comes close to reaching the same conclusion. For a similar argument by a noted conservative, see ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 196 (1996). For recent proposals to alleviate the counter-majoritarian difficulty by severely restricting judicial review without eliminating it entirely, see, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM AT THE SUPREME COURT* (2000) (prominent liberal scholar arguing that the judiciary should strictly limit the scope of decisions invalidating legislation in order to give the democratic process maximum opportunity to address problems as they arise); RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977) (arguing that most recent instances of judicial review have been unjustified restraints on democracy); Barkow, *supra* note (arguing that judicial review should be severely constrained by a revival of the political question doctrine); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1358-94 (2001) (arguing that Congress should assert its own power as a constitutional interpreter coequal with the Supreme Court and in some instances override Court decisions).

⁸ Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695, 697 (1979). It is important to note that Bork wrote these words years before he came to believe that judicial review should be abolished entirely, a position first expressed in print in 1996. See BORK, *supra* note 7.

⁹ Katyal, *supra* note 7 at 1340.

The idea of the countermajoritarian difficulty rests on the assumption that laws enacted by legislatures reflect the will of electoral majorities, which in turn relies on the assumption that the latter possess sufficient political knowledge to control what their representatives do. Yet despite the centrality of the supposedly majoritarian electorate to the issue in dispute, the literature does not include even a single assessment of the relevance of voter ignorance to the debate. Such neglect is all the more significant in view of the consensus verdict of decades of social science research on political knowledge. As one leading political scientist puts it, “[n]othing strikes the student of public opinion and democracy more forcefully than the paucity of information most people possess about politics.”¹⁰ Just as the legal academic literature on the countermajoritarian difficulty has ignored the potential relevance of massive voter ignorance, the extensive political science literature on voter knowledge has generally ignored the possible implications of its findings for judicial review.¹¹

This Article seeks to plug the hole in the literature on the countermajoritarian difficulty.¹² I argue that an understanding of the depth and pervasiveness of voter ignorance should lead us to reconsider the countermajoritarian dilemma in several fundamental ways. If most of the electorate has little or no information on politics and does not know much about government policy, it is highly likely that much legislative output does not in fact represent the will of the majority in the way that Bickel and later

¹⁰ John Ferejohn, *Information and the Electoral Process*, in INFORMATION AND DEMOCRATIC PROCESSES 3, 3 (eds. John Ferejohn & James Kuklinski 1990).

¹¹ For the most thorough political science analysis of voter ignorance see MICHAEL X. DELLI CARPINI & SCOTT KEETER, *WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS* (1996) (documenting widespread voter ignorance and explaining importance of political knowledge to the democratic process); see also Ilya Somin, *Voter Ignorance and the Democratic Idea*, 12 CRITICAL REV. 413 (1998) (assessing dangers of voter ignorance and critically analyzing literature on the subject).

¹² Although virtually of the legal academic literature on the countermajoritarian difficulty ignores the importance of voter ignorance, fairness requires that I take note of the one partial exception I have been able to find. In a 1999 student-written article, Mihui Pak argues that judicial review of referendum initiatives should take account of the fact that many initiatives are passed by an “uninformed electorate,” many of whose members do not know what they are voting for. Mihui Pak, *The Countermajoritarian Difficulty in Focus: Judicial Review of Initiatives*, 32 COLUM. J.L. & SOC. PROBS. 237, 254 (1999). Pak’s discussion of the problem is extremely brief, however, and it does not consider the possibility that voter ignorance may also undercut the majoritarian credentials of laws enacted by legislatures and administrative agencies. Cf. Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1536-37, 1555-57 (1990) (arguing that low voter knowledge levels justify heightened judicial scrutiny of referendum initiatives as compared to laws passed by legislatures). Unlike, Pak, Eule does not contend that low knowledge levels indicate that judicial invalidation of referenda poses fewer countermajoritarian difficulties than invalidation of ordinary laws. Rather, he contends only that such invalidation is less problematic because referenda are less likely to result in good public policies because they are adopted with less effective deliberation and less consideration of constitutional implications and are more likely to disadvantage minorities. *Id.* at 1536-37, 1555-63.

theorists assumed. Judicial invalidation of such legislation, though potentially problematic for any number of other reasons, is not nearly as “countermajoritarian” as generally supposed. And this important point is only the first of several important implications of voter ignorance for the central question of constitutional theory.

To avoid misunderstanding, I emphasize that my argument is not intended to provide a comprehensive solution to the countermajoritarian difficulty or to address the full range of issues raised in the prior scholarly literature on the subject. I do, however, hope to show that voter ignorance is a fundamental problem that the literature has unjustifiably ignored. The purpose of this Article is to begin a debate over the implications of political ignorance for judicial review, not to provide a complete and definitive resolution of the issue.

In Part II of the Article, I explain how the theory of majoritarian democracy underpinning the countermajoritarian difficulty assumes at least some substantial political knowledge on the part of the electorate. Even the most minimalistic theories of majoritarian representative government turn out to require considerable political knowledge on the part of a majority of voters. More demanding theories of democratic participation, such as the ideas of republicanism and “deliberative democracy” embraced by many prominent legal scholars,¹³ require much greater levels of political knowledge.

Part III surveys the evidence on the actual level of political knowledge among the American public. In addition to relying on the extensive prior research on political knowledge produced by earlier studies, I rely on political knowledge survey data derived from the 2000 National Election Study (NES),

¹³ For works by leading legal scholars advocating deliberative democracy or republicanism, see, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 25-29 (1993); Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984) [hereinafter, Sunstein, *Naked Preferences*]. For major works by political theorists along similar lines, see, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); JAMES BOHANNON, *PUBLIC DELIBERATION* (1996); and Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *Democracy and Difference* (ed. Seyla Benhabib 1996). I have previously criticized the deliberative democracy advocates for their failure to confront the challenge of voter ignorance. See Somin, *supra* note 11 at 438-42. For a criticism of republican theory along different lines, see Richard A. Epstein, *Modern Republicanism – Or the Flight from Substance*, 97 *YALE L.J.* 1633 (1988).

an extensive nationwide survey conducted during the closely contested 2000 presidential election.¹⁴ My analysis is the most extensive study of voter knowledge data utilizing survey evidence from recent years.¹⁵ I argue that the levels of knowledge documented in this and earlier studies fall far short of those assumed by theorists of the countermajoritarian difficulty.

Part III also shows that low levels of voter knowledge are not just accidental and are not primarily a product of poor access to political information or low levels of education. Instead, they are at least in large part a result of “rational ignorance” caused by the insignificance of any one vote to electoral outcomes, and the consequent lack of incentive for voters to acquire political information solely for the purpose of casting a “better” vote.¹⁶ This may explain why voter knowledge has failed to rise during the post-World War II era, despite massive increases in education levels and in the availability of political information.¹⁷ The apparent intractability of voter ignorance strengthens the conclusion that theories of constitutional and democracy and judicial review must take account of it.

In Part IV, I consider the implications of low overall levels of voter knowledge for the countermajoritarian difficulty. I contend that low levels of political knowledge suggest that large portions of legislative output cannot be considered products of “majoritarian” will in any meaningful sense because most voters are unlikely to even know of their existence, much less be able to understand their likely effects. This is particularly true of highly complex and nontransparent statutes and administrative

¹⁴ Data from the 2000 National Election Study is available for downloading from the University of Michigan Interuniversity Consortium on Political and Social Research website: www.icpsr.umich.edu. The 2000 NES is data set number 3131. A modified version of the data set with recoded variables for purposes of the present study is available from the author.

¹⁵ DELLI CARPINI & KEETER, *supra* note 11, by far the most extensive study of voter knowledge of the last decade, relied almost entirely on data collected in 1988 and 1989 or earlier. See DELLI CARPINI & KEETER, *supra* note 11 at chs. 2-3 (relying on data from 1988 NES and a 1989 survey designed by the authors).

¹⁶ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* ch. 13 (1957).

¹⁷ For studies showing little or no increase in political knowledge over time, see Delli Carpini & Keeter, *supra* note 11 chs. 2-3; ERIC R.A.N. SMITH, *THE UNCHANGING AMERICAN VOTER* (1989); Stephen E. Bennett, ‘*Know-Nothings*’ Revisited: *The Meaning of Political Ignorance Today*, 69 *SOC. SCI. Q.* 476 (1988) [hereinafter Bennett, ‘*Know Nothing*’s Revisited]; Stephen E. Bennett, *Know-Nothings Revisited Again*, 18 *POL. BEHAVIOR* 219 (1996); Stephen E. Bennett, *Trends in Americans’ Political Information, 1967-87*, 17 *AM. POL. Q.* 422 (1989); Michael X. Delli Carpini & Scott Keeter, *Stability and Change in the U.S. Public’s Knowledge of Politics*, 55 *PUB. OPINION Q.* 583 (1991).

decisions. Judicial invalidation of this type of legislation poses little or no countermajoritarian problem, though it may of course be undesirable or illegitimate for other reasons.

Moreover, voter ignorance implies that judicial decisions limiting the power and scope of government may actually make our political system *more* majoritarian by reducing the knowledge burden placed on the electorate. The vast scope and complexity of modern government is one of the main obstacles to democratic control of public policy by a rationally ignorant electorate. Judicial limitations on legislative power are highly unlikely to fully resolve this problem, but they may be able to help alleviate it at the margin. In this way, taking political ignorance into account shows us that judicial constraints on the scope of government power may, in John Hart Ely's famous terminology, be "representation-reinforcing."¹⁸ By removing government power over some areas, courts may enable voters to exercise greater leverage over others by reducing the amount of knowledge necessary to exercise majoritarian control over public policy. Although this point does not provide anything approaching a comprehensive theory of the appropriate size and scope of government or judicial review thereof, it does indicate an important and previously neglected consideration that must be taken account of.

Part V considers the implications of voter ignorance for judicial review of federalism issues,¹⁹ an area where critics of the Supreme Court's recent jurisprudence have been especially vocal in raising the issue of countermajoritarianism.²⁰ I argue that taking voter ignorance into account shows that judicial review of federalism issues is even less likely to be countermajoritarian than in most other areas. Because issues of the distribution of power between different levels of government are unusually complex and often lack transparency, the electorate is unlikely to be able to understand federalism questions or to take them into account in making voting decisions. As a result, the so-called "political safeguards of federalism" are unlikely to work, at least to the extent that they rely on the presence of an informed electorate.

¹⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST* chs. 4-5 (1980).

¹⁹The most controversial of the recent federalism decisions are of course those limiting congressional power under the Commerce Clause. *See* *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act).

²⁰ See works cited in nn. 243-44 below.

Political ignorance also suggests a way in which judicial review of federalism promotes “representation-reinforcement.” To the extent that limits on federal power strengthen interstate diversity and competition, citizens will have an increased ability to “vote with their feet” by moving to states with more congenial or effective public policies. Unlike political information acquired for the purpose of voting at the ballot box, voting with your feet is not subject to the constraints of rational ignorance because each individual citizen or business chooses to move or stay independently of the decisions of others. Judicial limits on federal government power may thus shift political participation to an arena where citizens have greater incentive to acquire relevant knowledge, and therefore a heightened capacity to make informed decisions and control public policy outcomes.²¹

The argument of Part V does not provide a comprehensive theory of federalism, or even of judicial review of federalism issues. It does, however, highlight the importance of political knowledge to the debates over these issues, a factor that has previously been ignored in the literature.

In Part VI, I point out that, in addition to assessing the import of low aggregate levels of political knowledge, we must also consider the significance of the severely unequal distribution of knowledge among politically relevant groups. Both earlier studies and evidence from the 2000 NES show that blacks have, on average, substantially lower levels of political knowledge than whites.²² Similarly, women have much lower average knowledge levels than men.²³ Low average levels of political knowledge make it more difficult for African-Americans, women, and possibly other groups to defend their interests in the political process. This fact supports the argument of numerous judges and legal scholars that legislation discriminating against these groups should be subjected to stricter judicial scrutiny than that which

²¹I have briefly made a similar point in a previous publication. See Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL'Y 753, 796 (2000) (arguing that individual exit rights from government programs reduce the problem of rational ignorance by allowing individual citizens to make unilateral decisions regarding their use of government services). However, I did not draw the connection to federalism and judicial review in this earlier discussion.

²² See, e.g., DELLI CARPINI & KEETER, *supra* note 11 at 184-85. Further evidence is presented in Part V below.

²³ See NANCY BURNS, ET AL., *THE PRIVATE ROOTS OF PUBLIC ACTION: GENDER, EQUALITY, AND POLITICAL PARTICIPATION* (2001) (documenting lower knowledge political knowledge levels among women); DELLI CARPINI & KEETER, *supra* note 11 at 203-209 (same); Sidney Verba, et al., *Knowing and Caring About Politics: Gender Differences in Political Engagement*, 59 J. POL. 1051, 1054-57 (1997) (same); see also evidence from the 2000 NES discussed in Part VI below.

disadvantages white males.²⁴ It also suggests that the Supreme Court may need to rethink precedents that make it extremely hard to invalidate facially neutral legislation enacted with a covert discriminatory intent.²⁵ Legislators seeking to enact legislation that discriminates against low-knowledge groups without suffering a political backlash are particularly likely to do so by enacting legislation that seems facially neutral. The less political knowledge group members possess, the more difficult it is for them to penetrate the veneer of facial neutrality and use their voting power to punish the offending legislators at the ballot box.

Like judicial review of federalism, heightened judicial protection for particular groups is often criticized as countermajoritarian. The problem of group differences in political knowledge suggests a previously unanticipated response to this criticism. Heightened judicial protection may be a representation-reinforcing response to groups' disadvantages in the political process.

II. POLITICAL KNOWLEDGE AS A PREREQUISITE OF MAJORITY RULE.

Theories of the countermajoritarian difficulty assume that “the decisions of the [legislative and executive] branches, or of state and local governments, . . . represent popular will.”²⁶ As one of the Supreme Court’s critics puts it, “when the Court invalidates a statute, it is overturning the decision of a popularly elected body; in essence, it is enforcing its own will over that of the electorate.”²⁷ If legislation invalidated by the Court does not actually represent the “will . . . of the electorate,”²⁸ the Court’s actions cannot be said to be countermajoritarian, even though they may of course be open to question for other reasons. Yet in order for voters to be able to ensure that legislation reflects the will of the majority in some meaningful sense, they must have at least some substantial level of political knowledge. A largely ignorant electorate will often be unable to impose majoritarian control over elected officials.

²⁴ See, e.g., ELY, *supra* note 18 at ch. 6 (arguing for heightened scrutiny of legislation disadvantaging women and racial minorities); see also works cited in note.

²⁵ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* 429 U.S. 252, 264-268 (1977) (setting a high evidentiary threshold for proof of discriminatory intent in cases involving changes to facially neutral legislation).

²⁶ Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 630 (1993).

²⁷ Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community From Itself*, 70 MINN. L. REV. 611, 613 (1986).

²⁸ *Id.*

Unfortunately, legal academic theories of the countermajoritarian difficulty rarely specify with any precision the model of representation they have in mind when they describe legislation as “majoritarian.”²⁹ This is an important omission for present purposes because differing theories of representation may place very different knowledge burdens on the electorate. The more complex the decision voters are required to make, the greater the level of knowledge they must possess.

In this Part, I consider four prominent theories of representation derived from the legal and political science literature. In ascending order of their knowledge requirements, the four are retrospective voting,³⁰ Burkean trusteeship,³¹ representation of popular preferences on specific issues,³² and deliberative democracy.³³ I argue that all four of these theories require substantial levels of political knowledge in the electorate in order to ensure majoritarian control of the legislative process. This finding is particularly important in the case of the first two theories, which are often thought to require very little of voters.

With respect to each theory, it is important to keep in mind that majoritarian rule requires not only that voters have opinions on the matters in question, but that those opinions be at least minimally informed. Otherwise, there is no reason to believe that, even if the voters are able to get their way, the resulting policies will actually serve the voters’ underlying objectives.³⁴

²⁹ See, e.g., BICKEL, *supra* note 3 at 17 (stating merely that he assumes statutes enacted by legislatures represent the will of “the prevailing majority”); Tushnet, *supra* note (arguing that legislation is more democratic than judicial review but failing to specify a model of representation); BERGER, *supra* note 7 (same); ELY *supra* note 18 at chs. 1, 4-5 (same); BORK, *supra* note 7 (same).

³⁰ For the most prominent modern theories of retrospective voting, see V.O. KEY, *THE RESPONSIBLE ELECTORATE* (1966) and MORRIS FIORINA, *RETROSPECTIVE VOTING IN AMERICAN PRESIDENTIAL ELECTIONS* (1981).

³¹ For an analysis of the Burkean trusteeship theory, see HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* ch. 8 (1967).

³² Much of the political science literature on government responsiveness to majoritarian control adopts this perspective. See, e.g., LAWRENCE JACOBS & ROBERT SHAPIRO, *POLITICIANS DON’T PANDER* (2000) (criticizing political leaders for failing to follow centrist public opinion on important issues); ROBERT ERIKSON, ET AL., *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* (1993) (measuring political responsiveness of state governments by their adherence to popular preferences on specific issues); LAWRENCE JACOBS, *THE HEALTH OF NATIONS: PUBLIC OPINION AND THE MAKING OF AMERICAN AND BRITISH HEALTH POLICY* (1993) (measuring popular control of health policy in the same way). For my assessment of some of this literature, see Ilya Somin, *Do Politicians Pander?* 14 *CRITICAL REV.* 147 (2001) (reviewing JACOBS & SHAPIRO, *POLITICIANS DON’T PANDER* (2000)).

³³ See works cited in note 13.

³⁴ For more detailed discussion of this point see Somin, *supra* note 11 at 415-16; Ilya Somin, *Resolving the Democratic Dilemma?* 16 *YALE J. ON REG.* 401, 410-11 (1999) (book note) (explaining distinction between voter control of choice of policy and voter understanding of which policies actually advance their interests). See also discussion in Section II.C below.

This Part does not consider the possibility that even relatively ignorant voters can make up for their lack of knowledge by using “information shortcuts.” I do evaluate this theory at some length in Section III.D below.

A. Retrospective Voting and the Replacement of Failed Leaders by the Electorate.

Retrospective voting is often considered the least demanding theory of representation. It holds that adequate majoritarian control of government is achieved so long as voters have the ability to remove leaders whose performance they deem unsatisfactory. According to economist Joseph Schumpeter, the most famous modern exponent of the theory, “electorates normally do not control their political leaders in any way except by refusing to reelect them” when dissatisfied with their efforts.³⁵ Advocates of retrospective voting hope that “the replacement of officials” by popular vote will discipline political leaders because “the electorate can change officials if many people are dissatisfied or hope for better performance.”³⁶ Interestingly, retrospective voting may have been the theory of representation Bickel had in mind when he first expounded the countermajoritarian difficulty; he claimed that the requirements of democracy are satisfied so long as “a representative majority has the power to accomplish a reversal” of policy.³⁷

The theory thus assumes that citizens can assess the performance of incumbent office-holders and vote to remove those who have performed badly or those likely to be inferior to their competitors, from whom we can expect “better performance.”³⁸ Thus, at the very least, retrospective voting requires that the electorate possess sufficient knowledge to determine how well political leaders are performing their assigned duties. In a well-known book, political scientist Morris Fiorina argued that this task is easily accomplished because “in order to ascertain whether the incumbents have performed well or poorly

³⁵ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 272 (3d ed. 1950). Schumpeter himself did not use the term “retrospective voting,” which comes from later political science literature. I have used the modern term for convenience.

³⁶ WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE, 9, 11 (1982).

³⁷ BICKEL, *supra* note 3 at 17.

³⁸ RIKER, *supra* note 36 at 11.

citizens need only calculate the changes in their own welfare.”³⁹ Unfortunately, such a formulation greatly underestimates the knowledge burden required of citizens by the theory of retrospective voting.

In order to be able to assess the impact of incumbent office-holders on “their own welfare,” citizens must first know which parts of their “welfare” government can affect. For example, they may need to be able to determine whether a recession has been caused by mistakes by political leaders or by a business cycle turndown that those leaders had no ability to control. If the political incumbents’ policies were the best available given the circumstances, then it would be counterproductive for retrospective voters to punish them at the ballot box, even if a painful recession still occurred. In addition to understanding whether government in general can impact a particular problem, citizens need to know which particular office-holders are responsible for a given issue area. Thus, they need to know whether to blame federal, state, or local officeholders for a particular problem, or perhaps all three. It is also important to note that citizens must know how a given problem or issue area has fared during the incumbent’s term in office, something which cannot always be determined by looking merely at changes in one’s own personal “welfare.”

Finally, effective retrospective voting requires citizens to make some determination as to whether or not “better performance” can be expected from the incumbents’ political opponents.⁴⁰ Voting incumbents out of office can only succeed in forcing political leaders to attend to the needs of the electorate if the new leaders are likely to do better than their predecessors. If the incumbents’ policies were the best that could be had under the circumstances, effective retrospective voters should retain them in office even if they remain unsatisfied with political or economic conditions. To be sure, it may be easy to determine that the opposition cannot be worse than the incumbents in those cases where the latter have presided over a massive, highly visible disaster such as the Great Depression. Retrospective voting is effective in giving leaders an incentive to avoid, large, highly visible and unambiguous disasters, such as

³⁹ FIORINA, *supra* note 30 at 5. Fiorina himself has since qualified this view; see the discussion in Somin, *supra* note at 447 n.6. I cite it here not to criticize Fiorina, but to assess the theory of retrospective voting more generally.

⁴⁰ RIKER, *supra* note 36 at 11.

mass famines. This is one of the major advantages of democracy over other forms of government.⁴¹ In most elections, however, there is no such vast disaster present, and the relative performance of the incumbents is far more difficult to assess.

Thus, retrospective voting requires that voters 1) have some understanding of which problems are caused by government policies or can be alleviated by it, 2) know which incumbent officeholders are responsible for which issue areas, 3) know what happened with respect to those issues during the incumbent's term and 4) be able to determine whether the incumbents' policies were the best available under the circumstances, or whether their opponents' ideas might have fared better. Fiorina is probably right to assert that "retrospective voting requires far less of the voter than prospective voting," under which voters must assess the likely impact of opposing candidates' policies in advance.⁴² Nonetheless, it seems to require a much greater level of political knowledge than the theory's most enthusiastic advocates acknowledge.⁴³

B. Burkean Trusteeship.

The trustee theory of representation associated with Edmund Burke is another model that at first glance seems to require very little voter knowledge. Instead of determining the outcome of specific policy issues or even assessing the job performance of political leaders, Burke claimed that voters should choose representatives of superior judgment and virtue – a "natural aristocracy" – and then leave actual policy decisions to them.⁴⁴ Explicitly factoring voter ignorance into his theory, Burke argued that leaving political decisions to the discretion of an elected elite is the best option because most ordinary citizens lack sufficient sophistication to "think or act without direction."⁴⁵

⁴¹ See, e.g., AMARTYA SEN, DEVELOPMENT AS FREEDOM 178 (1999) (famously noting that no mass "famine in history has ever taken place in a functioning democracy").

⁴² FIORINA, *supra* note 30 at 10; see also KEY, *supra* note 30 at 60-61 (making the same claim).

⁴³ For a more detailed analysis of the limitations of retrospective voting as a device for reducing the amount of knowledge required of voters, see Somin, *supra* note 11 at 426-27.

⁴⁴ Edmund Burke, *An Appeal from the New to the Old Whigs* [1791], in BURKE, BURKE'S POLITICS 397-98 (1949).

⁴⁵ *Id.* at 398. This brief summary deliberately ignores many internal contradictions and qualifications in Burke's own views because my interest is not in Burke per se, but in the knowledge requirements of the trusteeship theory of representation more generally. For a more nuanced analysis of Burke's theory of trusteeship representation, see PITKIN, *supra* note 31 at 127-31 & ch. 8.

Superficially, it may seem that trusteeship theory places very little knowledge burden on voters. Instead of being forced to evaluate complex public policy options or even retrospectively assess the performance of incumbent office-holders, voters need only determine which candidates have the greatest ability and virtue – in other words, which would be the better trustees - and then vote them in.

Unfortunately, however, the amount of knowledge necessary to make this decision is far from trivial. At the most basic level, voters guided by the trusteeship theory need to know who the candidates are and something about their background and qualifications. In order to determine who is most qualified to serve as a trustee office-holder, citizens surely also need to know something about the responsibilities of the office – that is to know what the would-be political leader is to be a trustee over. Furthermore, as modern critics of Burke have pointed out, there may well be disagreement over the question of what skills and virtues are most important in a good trustee-leader; voters with differing ideologies and interests may well reach divergent conclusions on this question.⁴⁶ For example, the bitter debate over the impeachment of President Bill Clinton was in part a result of deeply rooted disagreements between liberals and conservatives as to the importance of personal virtue in political leaders.⁴⁷ In order for voters to be able to choose Burkean trustees, they must have an understanding of the connection between different personal qualities of candidates and their ability to make good public policy. To the extent that opposing ideologies have divergent answers to these questions, voters must have some ability to assess those ideologies as well.

Thus, like retrospective voting, Burkean trusteeship turns out to require greater political knowledge in the electorate than may initially seem to be the case. At the very least, voters must know 1) the responsibilities of a given office, and 2) the connection between the skills and virtues of opposing

⁴⁶ PITKIN, *supra* note 31 at 183-89.

⁴⁷ For a good discussion of this disagreement and its impact on the impeachment, see RICHARD A. POSNER, AN AFFAIR OF STATE: THE IMPEACHMENT OF BILL CLINTON ch. 6 (1999).

candidates and their ability to fulfill those duties. In addition, they may also need to be able to assess the differing answers that opposing ideologies may give to question 2.⁴⁸

C. Representing Majority Preferences on Specific Issues.

The representation of majoritarian views on particular issues is probably the most intuitive concept of representation and arguably the one that most commonly comes to mind when we think of the countermajoritarian difficulty. It is also the notion of representation most commonly adopted in the political science literature.⁴⁹ Unfortunately, it requires that voters possess substantial political knowledge. In the classic formulation of Angus Campbell and his colleagues, majoritarian control of policy outcomes on a particular issues requires that voters 1) know of the issue's existence, 2) have a position on the issue, and 3) know the positions of opposing candidates on the issue.⁵⁰ In previous publications, I have argued that these three prerequisites – formidable in themselves - are in fact insufficient. Voters must also know how the opposing candidates' policy proposals relate to the advancement of their ultimate goals.⁵¹

To recycle an example I analyzed in one of these previous pieces,⁵² let us assume that voters have the goal of reducing crime and that one candidate in an election proposes to accomplish this goal by expanding prison space, while his or her opponent criticizes this approach. Clearly, it is not enough for voters to know that they wish to reduce crime and that one side in an election seeks to do so by building

⁴⁸ It is also worth pointing out that few modern theorists fully subscribe to the Burkean trusteeship model. As Hannah Pitkin points out, Burke's elitist theory of trusteeship implicitly assumes that the trustees can effectively represent the "true" interests of the people because those interests can be determined in an "objective" and unbiased manner. Pitkin, *supra* note 31 at 189. Once this assumption is dropped or questioned, Burke's elitist conclusions become more problematic. Nonetheless, I have discussed Burke's model because elements of it – particularly the emphasis on the need for personal virtue in political leaders – persist in modern thought, as the debate over the Clinton impeachment recently showed. Moreover, many modern scholars endorse Burke's notion that personal character traits are a vital element to be taken account of in the selection of political leaders. *See, e.g.*, JAMES D. BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* (4th ed. 1992) (arguing that presidential performance in office is heavily influenced by presidents' personality traits).

⁴⁹ See works cited in note 32.

⁵⁰ Angus CAMPBELL, ET AL., *THE AMERICAN VOTER* ch. 8 (1960).

⁵¹ Somin, *supra* note 11 at 415-16; Ilya Somin, *Resolving the Democratic Dilemma?* 16 *YALE J. ON REG.* 401, 410-11 (1999) (book note).

⁵² Somin, *supra* note 51 at 410-11 (criticizing the use of this example in an experimental study in MICHAEL McCUBBINS & ARTHUR LUPIA, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 186-95 (1998)). My use of this example in the present article is somewhat different from that in the earlier piece.

more prisons. It is also necessary for them to have sufficient knowledge to make some judgment as to whether building new prisons really will help to control crime or not.

As argued in Part III below,⁵³ meeting all four of these knowledge is often very difficult, especially with regard to issues that are complex or not transparent to the public. The size and scope of modern government arguably make it impossible for most ordinary citizens to even be aware of much of what the government does, much less have an informed opinion on it.⁵⁴

D. Deliberative Democracy.

In recent years, numerous legal scholars and political theorists, have advocated the theory of deliberative democracy as an alternative to the more traditional conceptions of democratic government described above.⁵⁵ Deliberative democracy advocates contend that it is not enough for voters to be able to force political leaders to follow their “naked preferences” on particular issues.⁵⁶ Instead, citizens must be able to engage in fairly sophisticated deliberation about public policy, and to base their advocacy of particular policies on the right “type of reasons.”⁵⁷ Only the results of such deliberation should be taken into account by public officials when they seek to follow the majority will.

Different theorists of deliberative democracy disagree among themselves as to what criteria citizen deliberation should meet.⁵⁸ For example, Amy Gutmann and Dennis Thompson claims that citizens must “appeal to reasons that are recognizably moral in form and mutually acceptable in content” and that, if they rely on empirical claims, those assertions must be “consistent with relatively reliable methods of inquiry.”⁵⁹ Other scholars, such as John Rawls and Ronald Dworkin, would require citizens

⁵³ See nn. 137-40 and accompanying text.

⁵⁴ Somin, *supra* note 11 at 444-46.

⁵⁵ See, e.g., works cited in note 13.

⁵⁶ The phrase is borrowed from Sunstein, *Naked Preferences*.

⁵⁷ Bohannon, *supra* note 13 at 25.

⁵⁸ For examples of several different criteria advanced in the literature, see Somin, *supra* note ,at 439-440.

⁵⁹ GUTMANN & THOMPSON, *supra* note 13 at 57-58.

engaged in political deliberation to abjure all claims based on religion or on a “comprehensive moral doctrine.”⁶⁰

Whatever the details of any given theory of deliberative democracy, all such theories place even greater knowledge burdens on citizens than those demanded by the conventional model of representation of policy views, described above.⁶¹ In addition to knowing the details of a given policy issue, citizens of a deliberative democracy must have sufficient reasoning ability and philosophical knowledge to be able to analyze and debate the issue in the way that the theory demands. They must also have sufficient knowledge and sophistication to avoid making arguments based on “naked preferences” or on other criteria that the theory in question deems illegitimate. Whatever the other strengths and weaknesses of deliberative democracy, it is important to recognize that it places an enormous knowledge burden on the electorate.⁶²

In sum, all four of the most commonly advanced theories of majoritarian representative government entail a significant knowledge burden on voters, though some, particularly deliberative democracy, require more knowledge than others. Whatever theory analysts of the countermajoritarian difficulty choose to endorse, they cannot avoid its implications for voter knowledge. If a sufficient level of political knowledge to satisfy the demands of the theory is not present in the electorate, the basic assumption of the countermajoritarian difficulty is called into question. In the next Part, I will argue that empirical evidence shows that this is precisely our situation.

III. EMPIRICAL EVIDENCE OF POLITICAL IGNORANCE.

⁶⁰ John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 777 (1997); see also JOHN RAWLS, *POLITICAL LIBERALISM* ch. 6 (1993) (elaborating Rawls’ theory of permissible democratic deliberation more fully).. For similar arguments by Dworkin, see RONALD DWORKIN, *LIFE’S DOMINION* (1993) (arguing that the political debate over abortion and the right to die should exclude arguments derived from religious viewpoints, a category he describes very broadly).

⁶¹ See Section II.C.

⁶² For a detailed critique of deliberative democracy theory for failing to take into account the problem of voter ignorance, see Somin, *supra* note 11 at 438-42.

Decades of research on political knowledge have uniformly showed it to be very low.⁶³ In this Part, I summarize the evidence on American political knowledge. In addition to relying on data gathered in previous studies, I also use newer data from the 2000 National Election Study (NES), a detailed survey of over 1800 respondents⁶⁴ that included thirty-one political knowledge items covering a wide range of subjects.⁶⁵

A. Summarizing Earlier Research on Political Knowledge.

The most important point established in some five decades of political knowledge research is that the majority of American citizens lack even very basic political knowledge. To borrow the terminology of political scientist Stephen Bennett, almost one third of American adults are political “know nothings” who possess almost no useful knowledge of politics at all.⁶⁶ For present purposes, it is important to stress that the majority of citizens lack basic “rules of the game” knowledge,⁶⁷ information about which public officials and agencies are responsible for what issues. For example, the majority do not know the respective functions of the three branches of government, who has the power to declare war, or what institution controls monetary policy.⁶⁸ A related problem is that citizens are often ignorant of which political party controls what institutions of government. A survey taken immediately after the November 2002 congressional elections found that only about 32% of respondents knew that the Republicans had

⁶³ For a some of the more thorough studies, see CAMPBELL, ET AL., *supra* note 49; DELLI CARPINI & KEETER, *supra* note 11; W. RUSSELL NEUMANN, *THE PARADOX OF MASS POLITICS* (1986); SMITH, *supra* note 17; Stephen E. Bennett, *Trends in Americans’ Political Information, 1967-87*, 17 AM. POL. Q. 422 (1989); Bennett, *supra* note 12; Philip Converse, *The Nature of Belief Systems in Mass Publics*, in *IDEOLOGY AND DISCONTENT* 206 (David Apter ed. 1964); Somin, *supra* note 11.

⁶⁴ A total of 1543 respondents had complete data on answers to all 31 knowledge items.

⁶⁵ See the bibliographic information on the NES discussed in note 14 [hereinafter NES].

⁶⁶ Bennett, *‘Know Nothing’s Revisited*. Bennett’s 1988 study extended a 1947 study by Herbert Hyman and Paul Sheatsley, which also found that about one third of the public are “know nothings” in their understanding of politics. See Herbert Hyman & Paul Sheatsley, *Some Reasons Why Information Campaigns Fail*, 11 PUB. OPINION Q. 412 (1947).

⁶⁷ The term “rules of the game” is borrowed from Delli Carpini & Keeter, *supra* note 11 at 69-70.

⁶⁸ *Id.* at 70-71.

held control of the House of Representatives prior to the election.⁶⁹ This result is consistent with research showing widespread ignorance of party control of Congress in previous elections.⁷⁰

If voters do not know which political office holders are responsible for which issues or which party controls which branches of government, it seems difficult or impossible for them to achieve even minimal accuracy in assessing praise and blame to political incumbents. Thus, they do not meet the minimal knowledge criteria of the retrospective voting theory,⁷¹ much less the more severe demands of the policy representation and deliberative democracy theories.⁷²

Regarding knowledge of public policy issues, the situation is perhaps even more dire. It is, of course, not surprising that the public is often ignorant of relevant details of specific issues.⁷³ Much more troubling is the fact that majorities are generally ignorant of interconnections between issues as well.⁷⁴ In particular, most ordinary citizens seem not to understand the meaning of the liberal and conservative ideologies that serve as useful organizing principles to categorize issues for political activists and elites.⁷⁵ Obviously, failure to understand the basics of the major competing political ideologies is itself a serious informational deficiency.⁷⁶

Many more specific examples of public ignorance on policy issues can be cited as well. To take a few examples, the vast majority of survey respondents over many years cannot name a single

⁶⁹ Data calculated from National Election Study 2002, variable 025083. Data from the 2002 National Election Study is available from the author or from the National Election Study website: <http://www.umich.edu/~nes/>.

⁷⁰ See, e.g., NEUMANN, *supra* note 63 at 15; Stephen E. Bennett & Linda Bennett, *Out of Sight Out of Mind: Americans' Knowledge of Party Control of the House of Representatives, 1960-1984*, 35 POL. RES. Q. 67 (1992).

⁷¹ See Section II.A.

⁷² See Section II.C and II.D.

⁷³ For the most thorough summary of the evidence on this point, see DELLI CARPINI & KEETER, *supra* note 11 at 80-86.

⁷⁴ I have previously stressed the significance of this point in Somin, *supra* note 11 at 418.

⁷⁵ *Id.* at 418. See also NEUMANN, *supra* note 63 at 17-22; CAMPBELL, ET AL., *supra* note 49; Converse *supra* note 63; SMITH, *supra* note 17; Stephen Earl Bennett, *Americans' Knowledge of Ideology, 1980-1992*, 23 AM. POL. Q. 259 (1995); M. Kent Jennings, *Ideological Thinking Among Mass Publics and Political Elites*, 56 PUB. OPINION Q. 419 (1992).

⁷⁶ For the classic study on this point, see Converse, *supra* note 63 at 219-31 (showing that understanding of ideology enables respondents to be more consistent in their stances across issues); see also Jennings, *supra* note 74 (showing that political elites and the minority of well-informed citizens do better on this score than the vast majority who do not have a strong grasp of ideology).

congressional candidate in their district even at the height of an election.⁷⁷ During the 2000 elections, only about 15 percent of NES survey respondents were able to name even one candidate running for the House of Representatives in their district.⁷⁸ Near the height of the Cold War, in 1964, only 38 percent of respondents knew that the Soviet Union was not a member of NATO,⁷⁹ and in the 1980s, in the midst of an ongoing debate over nuclear policy, only 22 percent of Americans knew that it was US policy to initiate the use of nuclear weapons in the event of a Soviet invasion of Western Europe.⁸⁰ The main point, however, is that public knowledge of specific policy issues tends to be uniformly low.

B. Political Knowledge Evidence from the 2000 National Election Study.

1. Summary of the Aggregate Findings.

Most of the research cited in the previous section relied on evidence collected in the late 1980s or earlier. Even Michael Delli Carpini and Scott Keeter's massive 1996 book, *What Americans Know About Politics and Why it Matters*, usually considered the definitive work in the field, relied primarily on evidence drawn from surveys taken in 1988-89 or earlier.⁸¹ There has not as yet been a large-scale study of American political knowledge utilizing survey items from the last several years. I attempt to remedy this gap by drawing on the 2000 National Election Study, a large-scale survey conducted immediately before and after the hotly contested 2000 election. Utilizing evidence from the 2000 NES minimizes the chance of underestimating any recent increases in voter knowledge that might have occurred. Because the 2000 election was so closely contested, political parties and activist worked unusually hard to mobilize and inform voters, thereby maximizing the chance of knowledge acquisition.⁸² As the most thorough social scientific survey of the US electorate, undertaken during every election since 1948, the NES also

⁷⁷ Somin, *supra* note 11 at 417.

⁷⁸ See Table 1.

⁷⁹ Somin, *supra* note 11 at 417.

⁸⁰ Thomas Graham, *The Pattern and Importance of Public Knowledge in the Nuclear Age*, 32 J. OF CONFLICT RESOLUTION 319, 331-32 (1988)

⁸¹ DELLI CARPINI & KEETER, *supra* note 11 at chs. 2-3.

⁸² Scholars have long recognized that political parties and activists increase efforts at mobilization during close elections. See, e.g., John Aldrich, *Rational Choice and Turnout*, 37 AM. J. POL. SCI. 246, 267-70 (1993) (noting the longstanding nature of this finding).

contains numerous control variables that enable us to assess the determinants of political knowledge and compare knowledge levels of different groups.

The 2000 NES contained a total of 31 political knowledge questions. These are listed in Table 1, along with the percentage of respondents giving correct answers:

Table 1
Political Knowledge Survey Items from the 2000 NES⁸³

Item	% Giving Correct Answer
Identify Texas as home state of George W. Bush	90
Know Bill Clinton is moderate or liberal	81
Al Gore favors higher level of government spending on services than George W. Bush	73
Democratic vice presidential candidate Joe Lieberman is Jewish	70
Identify Tennessee as home state of Al Gore	68
Federal budget deficit decreased, 1992-2000	58
Gore more liberal than Bush	57
Democrats favor higher level of government spending on services than Republicans	57
Identify post held by Attorney General Janet Reno	55
Republicans controlled House of Representatives before election	55
Gore more supportive of gun control than Bush	51
Republicans controlled Senate before election	50
Democrats more supportive of government guarantee of jobs/standard of living than Republicans	49
Know George W. Bush is conservative	47 (30 chose moderate)
Gore more supportive of abortion rights than Bush	46
Gore more supportive of government guarantee of jobs/standard of living than Bush	46
Democrats favor higher level of government aid to blacks than Republicans	45
Gore more supportive of environmental regulation than Bush	44
Bush more likely to favor jobs over environment than Gore	41
Know presidential candidate Pat Buchanan is conservative	40
Gore favors higher level of government aid to blacks than Bush	40
Know Al Gore is liberal	38 (36 chose moderate)
Know federal spending on the poor increased, 1992-2000	37
Know crime rate decreased, 1992-2000	37
Identify post held by British Prime Minister Tony Blair	35
Identify Connecticut as home state of Democratic vice presidential candidate Joe Lieberman	30
Identify Wyoming as home state of Republican vice-presidential candidate Dick Cheney	19
Correctly name at least one candidate for House of Representatives in respondent's district	15
Identify post held by Supreme Court Chief Justice William Rehnquist	11
Identify post held by Senate Majority Leader Trent Lott	9
Correctly name second candidate for House of Representatives in respondent's district.	4

All percentages rounded to whole numbers.

N=1543 respondents

⁸³ Exact wording of questions is available from the author or can be found in the 2000 NES codebook available for downloading from the ICPSR website. See citation at note. I have recoded the questions in order to make the data tractable for use in the present study. A list of coding changes is available from the author upon request.

Nearly all of the 31 survey items identified in Table 1 are quite basic in nature and would be well-known to political elites and activists at the time.⁸⁴ Most addressed issues that were widely debated during the 2000 campaign, including environmental policy, government spending on services, abortion, policy towards African-Americans, and others.⁸⁵ Several questions related to factual matters relevant to the record of the Clinton administration, for which Democratic presidential candidate Al Gore and the Democratic Party more generally attempted to claim a share of credit.⁸⁶ While the thirty-one questions do not cover all possible relevant issues and facts, they do include a wide range and are therefore a good representative sampling of Americans' political knowledge. Moreover, previous studies have found that political knowledge in one area is highly intercorrelated with knowledge in others.⁸⁷ Thus, we can be reasonably confident that individuals who scored well on the 31 items in the 2000 NES also possess greater political knowledge on other matters than those who scored low.

2. A Glass Half-Empty or Half-Full: How Low is the Knowledge Level Revealed in the NES Data?

a. The Evidence Shows a Low Level of Knowledge.

The average knowledge level in the 2000 NES was roughly similar to that detected in earlier studies and generally low. On average, respondents answered only 14.4 questions correctly out of 31.⁸⁸ The data also seem to confirm Stephen Bennett's findings that about one third of respondents are "know

⁸⁴ The possible exceptions are the home states of vice presidential candidates Dick Cheney and Joe Lieberman (Wyoming and Connecticut respectively), and possibly being able to name a second House candidate in one's congressional district, especially in cases when the House race was not close. Eliminating these three items would not change any of the results analyzed in this paper significantly. Moreover, the first two of them were repeatedly mentioned in the press during the campaign and likely would have been picked up by anyone who followed the campaign at all closely. Cheney's residency in Wyoming was even the subject of a minor campaign controversy. See James C. Ho, *Much Ado About Nothing: Dick Cheney and the Twelfth Amendment*, 5 TEX. R. L. & PUB. POL'Y 227 (2000) (describing controversy over Cheney's residency status).

⁸⁵ See items in Table 1.

⁸⁶ These items were the reduction in the federal deficit in the Clinton years, the reduction in crime, and increased government spending to help the poor. See Table 1.

⁸⁷ DELLI CARPINI & KEETER, *supra* note 11 at 138-52.

⁸⁸ Data calculated from questions listed in Table 1.

nothings” possessing almost no politically relevant knowledge.⁸⁹ About 25% of respondents got 8.5 correct answers or fewer.⁹⁰ Since 17 of the 31 questions had only three possible answers,⁹¹ two had only 2 possible answers,⁹² one more had two correct answers out of a possible three,⁹³ and several others could also potentially be guessed with lower probabilities of success,⁹⁴ a score of 8.5⁹⁵ is almost exactly equal to the score that could be expected as the result of random guessing.⁹⁶ My finding of 25% “know-nothings” is very similar to Bennett’s finding of 29%.⁹⁷

Nonetheless, it is possible to argue that the average knowledge level revealed in the 2000 NES is not too low because the average respondent did achieve correct answers on almost half the questions (46%). This claim is flawed for two reasons. First, with minor exceptions, the items in the survey represent very basic political knowledge, without which it is difficult or impossible to place more complex and specific knowledge in useful context.⁹⁸ Knowledgeable political activists and even citizens

⁸⁹ Bennett, *‘Know-Nothings’ Revisited*.

⁹⁰ Data calculated from answers to items listed in Table 1.

⁹¹ These seventeen were the twelve items comparing Bush’s and Gore’s or Democratic and Republican issue positions, the three questions asking about changes in the crime rate, the deficit, and spending on the poor in the 1992-2000 period, and the two questions regarding identification of Bush’s and Pat Buchanan’s ideology (moderate, liberal or conservative). Although some of these questions had more than 3 options on the original survey, I collapsed them into three for recoding purposes, with the result that respondents who guessed randomly would have had a 1 in 3 chance of getting the correct answer. For the questions regarding Bush’s and Gore’s ideologies, I gave half-credit to respondents who picked “moderate,” even though, arguably, most knowledgeable observers would not agree with such answers. Al Gore ran an explicitly liberal campaign emphasizing the theme of “the people vs. the powerful.” See, e.g., John F. Harris & Ceci Connolly, *Shaking off the Clinton Strategy: With Populist Push, Gore Looks Toward a Different set of Swing Voters*, WASH. POST, Aug. 24, 2000, at A1 (describing Gore’s adoption of liberal “People, not the Powerful” campaign theme). Bush famously described himself as a “compassionate conservative” and prominently proposed a number of strongly conservative policies, including a large income tax cut and the privatization of social security.

⁹² These were the two questions regarding party control of the House of Representatives and Senate prior to the election.

⁹³ I decided to code as correct answers both “moderate” and “liberal” on the question asking the respondent to identify Bill Clinton’s ideology.

⁹⁴ Guessing, albeit with low probabilities of success, was possible on the questions asking for identification of the four candidates’ home states, Joe Lieberman’s religion, and the positions held by Lott, Blair, Reno, and Rehnquist.

⁹⁵ Half points were possible because I allowed half credit for certain answers on two questions. See note.

⁹⁶ I assume that a respondent guessing randomly would have gotten right, on average, 5.67 of the 17 questions with three possible answers, one of the two binary questions, and 0.66 points on the question regarding Clinton’s ideology (see analysis in note above), and on average one more question from the remaining ten, for a total score of 8.33.

⁹⁷ Bennett, *‘Know-Nothings’ Revisited*.

⁹⁸ For an analysis of the exceptions, see discussion in note 84. See also DELLI CARPINI & KEETER, *supra* note 11 at 220-38 (showing that lack of basic political knowledge severely impairs political participation and prevents accurate voting on more specific issues).

who follow politics reasonably closely would probably be able to answer all but a tiny handful of the questions correctly. If the average citizen has large gaps even in the most basic political knowledge such that he or she knows only about half as much information as would be expected of the politically well-informed, such a result cannot be viewed as an adequate level of knowledge.

The second reason for pessimism regarding the 2000 NES results is that they probably actually overestimate current American political knowledge. This overestimation is the result of two factors. First, surveys in general somewhat overestimate the amount of political information possessed by the public because of the possibility of guessing by respondents and because more knowledgeable citizens may be overrepresented among those surveyed.⁹⁹ The average respondent in the 2000 NES got only about six more correct answers out of thirty-one than could be expected as a result of random guessing.¹⁰⁰ Although NES respondents had the option of giving “don’t know” answers to questions, past research shows that survey respondents often express opinions even about issues they know nothing about in order to avoid seeming ignorant.¹⁰¹ Thus, it seems likely that many respondents who did not really know the answer to various knowledge questions attempted to guess, especially on those items that had only two or three possible answers.¹⁰²

Second, three of the five items with the highest percentage of correct answers represent personal information about candidates in the 2000 election that has little or no value for understanding politics more generally.¹⁰³ These three are the home states of George W. Bush and Al Gore (90% and 68% correct

⁹⁹ See, e.g., Scott L. Althaus, *Information Effects in Collective Preferences*, 92 AM. POL. SCI. REV. 545, 545-46 (1998) (noting that the more knowledgeable may be overrepresented among those giving opinions on surveys).

¹⁰⁰ See calculation in note.

¹⁰¹ For the classic survey result showing that many respondents will express opinions even about complete fictitious legislation invented by researchers, see Stanley Payne’s famous finding that 70 percent of respondents expressed opinions regarding the nonexistent “Metallic Metals Act.” STANLEY PAYNE, *THE ART OF ASKING QUESTIONS* 18 (1951).

¹⁰² See discussion of such items in Subsection III.B.1.

¹⁰³ This finding replicates similar results from earlier research. See, e.g., DELLI CARPINI & KEETER, *supra* note 11 at 101 (presenting evidence that the most widely known facts about politicians are personal tidbits with little real information value). For example, the most widely known facts about the first President Bush were his distaste for broccoli and the fact that he had a dog named “Millie.” *Id.*

answers respectively), and Joe Lieberman's religion (70).¹⁰⁴ Bill Clinton's ideology, the second-highest scoring item (81% correct answers), is an artifact of generous coding on my part, under which both "liberal" and "moderate" answers were deemed correct.¹⁰⁵ Eliminating the three high-scoring low-value items, plus two other similar questions which produced much lower percentages of correct answers,¹⁰⁶ produces an average score of 11.5 correct answers out of 26 questions, for a 45% average, a slightly lower percentage than that observed on the 31 point scale.¹⁰⁷ Much more significantly, the elimination of the 5 low-value questions (while retaining the Clinton ideology question) increases the proportion of "know-nothings" to about 34%, a percentage considerably higher than Bennett's estimate.¹⁰⁸ Table 2 summarizes the aggregate results of three knowledge scales from the 2000 NES:

¹⁰⁴ See Table 1. It might be argued that these three items do in fact provide useful political information because knowing the state where a politician comes from might provide useful clues to his or her stances on issues. A candidate from a liberal state is likely to be liberal himself and vice versa for one from a conservative state. Similarly, knowing a candidate's religion might also help predict issue positions if one knows the views taken by most of his or her co-religionists. In the case of the three questions above, however, this information was of very limited utility because Gore's issue positions were much more liberal than what might be inferred from his residency in conservative Tennessee (a state he failed to carry in 2000), and Lieberman was considerably less liberal than most other American Jews. Lieberman was widely regarded as perhaps the most conservative Democratic senator in the Senate because of his support for school choice, his questioning of affirmative action, and his fiscal conservatism. Only Bush's Texas residency could be viewed as providing a clue to his conservatism.

¹⁰⁵ See discussion in note.

¹⁰⁶ These were the home states of Lieberman (30% correct) and Republican vice presidential nominee Dick Cheney (19%). Ironically, these two items probably had greater informational value than at least two of the three similar questions that many more respondents answered correctly. Lieberman's issue positions were reasonably representative of moderately liberal Connecticut, while Cheney's conservatism was certainly representative of majority political opinion in Wyoming.

¹⁰⁷ If we also eliminate the Clinton ideology question, we are left with a slightly lower average score of 10.5 out of 24 (44% correct).

¹⁰⁸ Figure calculated using the methodology outlined in note. I continue to assume that respondents employing random guessing would get about 5.67 correct answers out of the 17 questions with three options, 1 point from the two binary questions, 0.66 points from the Clinton ideology question. Since, however, the number of other items has been reduced from 10 to 5, I have assumed that they would get only 0.5 correct answers from these items by guessing rather than 1.0 as in model for the 30 item scale. Thus, a total of just under 8 predicted correct answers. A total of 35% of respondents scored eight correct answers or fewer on the 25 point scale.

Table 2
Aggregate Knowledge Scales from the 2000 NES

Scale	Average Number of Correct Answers	% “Know-Nothing” Respondents
31 Question Scale	14.4 (46%)	25
26 Question Scale (excluding 5 low value questions)	11.7 (45%)	34
25 Question Scale (excluding 5 low-value questions and Clinton ideology question)	10.9 (44%)	35 ¹⁰⁹

As Table 2 shows, the already low average knowledge scores on the 2000 NES conceal the existence of a large political knowledge underclass of “know-nothings” who possess very little if any basic political knowledge at all. Depending on which scale is used, this group constitutes from 25 to 35% of the American public.

Overall, considering 1) the very basic nature of the questions asked, 2) the possibility of guessing, and 3) the high percentage of “know-nothing” respondents, it is difficult to avoid the conclusion that the 2000 NES, like most research using earlier evidence, reveals a low level of political knowledge.

b. The Problem of Separating Voters from Non-Voters.

A possible criticism of my findings from the 2000 NES – and of virtually all earlier studies of political knowledge¹¹⁰ - is the failure to measure knowledge among voters relative to non-voters. Only about half of all eligible citizens vote in presidential election years, and only a about one

¹⁰⁹ “Know-nothings” include those who scored 7.5 or fewer correct answers out of 24. The calculation is identical to that in note except that I subtracted .67 from the expected score based on random guessing to take account of the absence of the Clinton item.

¹¹⁰ See, e.g., works cited in note 11. I have not been able to find even one article in the political science literature that attempts to assess political knowledge among voters and nonvoters separately.

third in off year elections.¹¹¹ Since voting is highly correlated with income, education, and interest in politics, it is reasonable to assume that political knowledge among voters should be considerably higher than among non-voters. To the extent that the theory of the countermajoritarian difficulty may be interpreted to require adequate knowledge levels only among those who vote, the failure to separate out voters from nonvoters may be an important shortcoming in my findings.

Unfortunately, it is difficult or impossible to assess political knowledge among voters only because numerous survey respondents who do not vote routinely tell pollsters that they did.¹¹² Those citizens most likely to incorrectly report voting are those with the highest levels of income, education, and interest in politics – that is, the same people who are most likely to have high levels of political knowledge.¹¹³ Thus, any attempt to disaggregate the 2000 NES data, or other similar survey results, by self-reported voting rates would lead to very large overestimations of the relative knowledge of voters; most of the more knowledgeable nonvoters would be falsely coded as having voted.¹¹⁴

Fortunately, there are good reasons to include both voters and nonvoters in any assessment of political knowledge for purposes of deriving implications for the countermajoritarian difficulty. Analysts of the countermajoritarian difficulty have never asserted that the theory of majoritarianism applies only to voters, as opposed to adult citizens as a group. Presumably, a majoritarian government is one that represents the majority of all its citizens, and not merely of voters. Moreover, recent research finds that low political knowledge is itself a major cause of nonvoting,¹¹⁵ just as it also impedes other types of

¹¹¹ See, e.g., RUY TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* (1992).

¹¹² This is a longstanding and well-established finding in the social science research. See, e.g., Robert P. Abelson, et al., *Attempts to Improve the Accuracy of Self-Reports of Voting*, in *QUESTIONS ABOUT QUESTIONS*, 138 (Judith Tanar ed. 1992); Aage Clausen, *Response Validity: Vote Report*, 32 *PUB. OPINION Q.* 588 (1968). One recent study notes that “overreporting of voting behavior” is “[o]ne of the most frequently observed survey measurement errors.” Robert F. Belli, et al., *Reducing Voter Overreporting in Surveys*, 63 *PUB. OPINION Q.* 90 (1999).

¹¹³ See Brian D. Silver, et al., *Who Overreports Voting?* 80 *AM. POL. SCI. REV.* 613, 613-14, 620-22 (1986) (finding that these factors are all strongly correlated with overreporting of voting).

¹¹⁴ Studies show that about 25-30 percent of all nonvoters claim that they voted on surveys. *Id.* at 613.

¹¹⁵ Popkin & Dimock, *Political Knowledge and Citizen Competence*, in *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 117, 142 (Stephen Elkin & Karol Soltan eds. 1999) (finding that “the dominant feature of nonvoting in America is lack of knowledge about government; not distrust of government, lack of interest in politics, lack of media exposure to politics, or feelings of inefficacy”); see also Thomas Palfrey & Keith Poole, *The Relationship Between Information, Ideology, and Voting Behavior*, 31 *AM. POL. SCI. REV.* 511, 524-29 (1987) (finding that political knowledge levels are a stronger predictor of voting).

political participation.¹¹⁶ It is possible that a higher average level of political knowledge would also increase voting rates. Voters tend to be unrepresentative of the population as a whole in a number of ways, particularly in their greater affluence and education.¹¹⁷ To the extent that lack of political knowledge contributes to this skewing of the electorate, it undermines the majoritarian nature of government by this mechanism perhaps almost as much as it undermines the effectiveness of those who do vote.¹¹⁸

One could argue that the implications of nonvoting, even when caused by low levels of political knowledge, should not trouble theorists of the countermajoritarian difficulty because nonvoters forego participation voluntarily. Any loss of representation that results might be considered their own “fault.” The problem with this sort of intuitive argument, however, is that voting is a public good in the economic sense of the term.¹¹⁹ Citizens can benefit from the existence of an adequately representative political process even if they don’t contribute to its support; conversely, the contribution of any one voter to the maintenance of the system is in itself almost completely immaterial. While any one vote has virtually no impact on electoral outcomes and thus on political representation,¹²⁰ nonvoting by large numbers of citizens could have a substantial effect. Thus, it will often be rational for a given individual to forego because his or her action will have no effect, even though the aggregate of effect of similar decisions by many eligible voters could have a large impact.¹²¹ For this reason, it is not enough to cite the “voluntary” nature of nonvoting as a way of dismissing its importance. The incentives facing any individual voter are misaligned with the potential benefits of voting for the electorate as a whole.

¹¹⁶ See generally DELLI CARPINI & KEETER, *supra* note 11 at 220-238. See also evidence summarized in William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANNUAL REV. POL. SCI. 217 (2001).

¹¹⁷ See, e.g., TEIXEIRA, *supra* note 110; RAYMOND WOLFINGER & STEVEN ROSENSTONE, *WHO VOTES?* (1980).

¹¹⁸ Scholars have found that the political views of nonvoters on issues do not differ very much from those of voters. See works cited in note 117. However, this lack of difference may itself be in part a result of low political knowledge among the nonvoters. See DELLI CARPINI & KEETER, *supra* note 11 at 255-58 (finding that low-knowledge citizens are less likely to grasp connections among issues); Althaus, *supra* note 98 (finding that increases in political knowledge lead to change in views on issues, even when controlling for numerous other variables); Converse, *supra* note 63 (classic study finding that low-knowledge citizens are far less consistent in their views on issues).

¹¹⁹ For a general discussion of public goods theory, see JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* (1968).

¹²⁰ See William H. Riker & Peter Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25 (1968).

¹²¹ See also the discussion of political knowledge as a collective action problem in Subsection of this paper.

C. Implications for Theories of Representation and the Countermajoritarian Difficulty.

In Part II of this article, I outlined the knowledge prerequisites of four theories of representation that could potentially underpin the theory of the countermajoritarian difficulty. Here, I explain how the knowledge prerequisites of all four are far from being met.

1. Retrospective Voting.

Retrospective voting requires citizens to, at the very least, know what has happened in a given issue area during the incumbent's term, and also to know which incumbents are responsible for which issues.¹²² The evidence from the 2000 NES does not address the second issue directly. Nonetheless, past studies have repeatedly found that citizens have at best a very limited knowledge of how authority over issue areas is distributed in our complex political system.¹²³

The 2000 NES does shed some light on the question of whether citizens possess knowledge of the even more basic question of what has happened with respect to major issues during an incumbent's term. Only 37 percent of citizens knew that the crime rate gone down during the term of the incumbent President Clinton, 37 percent knew that federal spending on the poor had gone up, and a more impressive 58 percent knew that the federal budget deficit had gone down.¹²⁴ Since crime, the deficit, and welfare reform were indisputably three of the most important political issues of the 1990s and all three were repeatedly stressed by both major parties, the low knowledge levels revealed in the 2000 NES create room for serious doubt that the knowledge prerequisites of retrospective voting have been met for most citizens. Even the 58 percent figure for deficit reduction is not very substantial given the prominence of the issue in political discourse of the 1990s. Furthermore, for all three questions, my coding gave the respondent credit for a correct answer so long as he or she got the trend line correct; it therefore did not

¹²² See discussion in Section II.A.

¹²³ See nn. 66-72 and accompanying text.

¹²⁴ See data in Table 1.

catch mistakes such as underestimation or overestimation of the *degree* of change.¹²⁵ These results are consonant with research conducted by others, which shows that voters are often ignorant of even very basic issue trends, such as inflation and unemployment.¹²⁶

Given that majorities are ignorant of even basic information regarding trends in issues, it is hard to avoid the conclusion that most citizens fail to meet the knowledge prerequisites of the retrospective voting theory because they often do not know what is happening in a given issue area. Even if they manage to surmount this particular hurdle, the low knowledge levels observed in surveys over the decades make it unlikely that the majority can achieve the more difficult tasks of 1) determining which problems can be affected by government policy, and 2) understanding which officials are responsible for what issues.¹²⁷

2. Burkean Trusteeship.

Trusteeship theory is concerned more with the personal qualities of political leaders than with their policies or issue positions.¹²⁸ The most basic knowledge requirement is that voters at least know who the leaders are, a prerequisite that is often not met, except in the case of those aspiring to the presidency. In the 2000 NES, only 15 percent of respondents could name even one candidate running for the House of Representatives in their district.¹²⁹ An earlier study found that only 30 percent can name both their state's US senators.¹³⁰ The 2000 NES also revealed that only a mere 9 percent could name the post held by Senate Majority Leader Trent Lott, then the federal government's most powerful and prominent

¹²⁵ For all three questions, the original survey instrument allowed the respondent to say that the relevant variable had gotten only "somewhat" larger or smaller since 1992, as opposed to "much larger" or "much smaller." Such responses were coded as correct so long as they trended in the right direction. It could, however, be argued that they should have been coded as incorrect or only partially correct because the declines in crime and the deficit and the increase in spending on the poor were all very large relative to previous levels.

¹²⁶ See, e.g., Larry Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 AM. J. POL. SCI. 194 (1996) (showing that voters' inaccurate estimation of the unemployment and inflation rates played a decisive role in the 1992 presidential election).

¹²⁷ See Section 2.A for a discussion of the relevance of these two types of knowledge to retrospective voting.

¹²⁸ See discussion in Section 2.B.

¹²⁹ See Table 1.

¹³⁰ DELLI CARPINI & KEETER, *supra* note 11 at 94.

Republican elected official.¹³¹ Only 11 percent could name the position held by Supreme Court Chief Justice William Rehnquist.¹³²

Given that the majority of citizens often do not even know who the political leaders are, it is unlikely that they can know enough about their qualifications and personal virtue to meet the demands of the trusteeship theory. In many cases, voters seeking to apply the trusteeship approach may also be stymied by their ignorance of the responsibilities of the office involved.¹³³

3. Knowledge of Specific Policy Issues.

As discussed previously, majoritarian control of public policy on specific issues requires at the very least that voters know about the existence of the issue, where the parties stand on it, and whether or not the policies advocated by the opposing parties are likely to advance the voters' values and interests.¹³⁴ This question has been the focus of extensive social science research over many years, with consistent findings showing that voters have little knowledge of most policy issues.¹³⁵ The 2000 NES confirms these findings with more recent evidence. The NES contained ten questions asking respondents to compare George W. Bush's and Al Gore's or Democratic and Republican Party positions on major policy issues. Table 3 summarizes the results.

A majority of respondents correctly placed the two parties or candidates' relative positions on only three of ten questions, and on two of these the percent giving the correct answer was only slightly over fifty percent.¹³⁶ As in the case of the questions on 1992-2000 trendlines discussed above,¹³⁷ this data probably overestimates the true level of respondent knowledge because full credit for a correct response

¹³¹ See Table 1. The low profile of Lott is telling in light of the trusteeship theory's emphasis on personal virtue. Even before his eventual resignation as Majority Leader in December 2002 on charges of racism, Lott had often been criticized, even by some fellow conservatives, for his longstanding ties to the racist Council of Conservative Citizens. See, e.g., Jeff Jacoby, *Renounce the Racists*, BOSTON GLOBE, April 19, 1999 at A19 (criticism of Lott's ties to the CCC by prominent conservative columnist).

¹³² See Table 1. Although Supreme Court justices are not, of course, elected officials, their qualifications and ideologies were, of course, major campaign issues in 2000, and in many previous elections.

¹³³ See Subsection III.C.1 (citing evidence that most citizens do not know which officials are responsible for which policies).

¹³⁴ See Section II.C.

¹³⁵ For the most thorough summary see DELLI CARPINI & KEETER, *supra* note 11 at ch. 2.

¹³⁶ 57 Percent knew that the Democrats favor a higher level of government spending on services than the Republicans and 51 percent knew that Gore was more supportive of gun control than Bush.

¹³⁷ See discussion in Subsection III.C.1.

was given for any answer that placed Democrats to the ideological left of Republicans or Gore to the left of Bush on the issue in question. My coding did not consider the correctness of the absolute placement of the parties or candidates on the survey's scale, nor did it measure the accuracy of the size of the gap the respondent perceived between their positions.

Table 3
Political Knowledge Survey Items on Specific Policy Issues
2000 NES¹³⁸

Item	% Giving Correct Answer
Al Gore favors higher level of government spending on services than George W. Bush	73
Democrats favor higher level of government spending on services than Republicans	57
Gore more supportive of gun control than Bush	51
Democrats more supportive of government guarantee of jobs/standard of living than Republicans	49
Gore more supportive of abortion rights than Bush	46
Gore more supportive of government guarantee of jobs/standard of living than Bush	46
Democrats favor higher level of government aid to blacks than Republicans	45
Gore more supportive of environmental regulation than Bush	44
Bush more likely to favor jobs over environment than Gore	41
Gore favors higher level of government aid to blacks than Bush	40

All percentages rounded to whole numbers.

N=1543 respondents

Consideration of these factors, if it had been possible, would almost certainly have led to an even bleaker portrayal of voter knowledge of the issues addressed in the comparison items. In any event, it seems clear that on a wide range of basic public policy issues, a majority of citizens failed to meet a basic

¹³⁸ All questions are taken from Table 1.

knowledge prerequisite of the issue representation model: knowing where the opposing candidates and parties stand on the issue in question.¹³⁹ It should also be noted that the respondents' poor performance on the three 1992-2000 trendline questions is also an indicator of low knowledge of specific policy issues. It reflects widespread ignorance of basic information relevant to three major public policy issues.¹⁴⁰

Ignorance of basic facts about an issue surely impairs one's ability to vote intelligently on it.

It should be stressed that the evidence presented here shows that citizens often lack information on the *easiest* of the knowledge prerequisites for effective issue voting: knowing where the parties stand relative to each other. It does not assess whether voters possess sufficient knowledge to accomplish the much more difficult task of predicting the likely consequences of the opposing parties' policies for their own values and interests. Unfortunately, survey evidence on this point is quite sparse, but it seems unlikely that those ignorant of basic knowledge of public policy would often possess much more complex knowledge.¹⁴¹

Although not completely comparable, earlier research on specific public policy issues also revealed widespread ignorance.¹⁴² The new evidence from the 2000 NES suggests that little has changed, and that the most citizens continue to fall short of the knowledge prerequisites of the issue representation model.

4. Deliberative Democracy.

Since the knowledge demands of deliberative democracy are much greater than those of the other three theories considered here,¹⁴³ little discussion is necessary to show that most citizens fail to meet the exacting knowledge prerequisites of this theory of representation. Given the popularity of the deliberative

¹³⁹ See discussion in Section II.C.

¹⁴⁰ See discussion in Subsection III.C.1.

¹⁴¹ See DELLI CARPINI & KEETER, *supra* note 11 at 138-52 (presenting evidence that different types of political knowledge are highly intercorrelated).

¹⁴² See, e.g., DELLI CARPINI & KEETER, *supra* note 11 at ch. 2; Bartels, *supra* note 126; Bennett, 'Know-Nothings' Revisited.

¹⁴³ See discussion in Section II.D.

democracy model in the legal academy,¹⁴⁴ much work remains to be done to show that this theory can somehow be made workable in a world of pervasive voter ignorance.¹⁴⁵

D. The Possible Relevance of Knowledge Shortcuts.

1. Shortcuts cannot replace basic knowledge.

To this point in the discussion, I have deliberately set aside the substantial political science literature on knowledge shortcuts. It must now be pointed out that a substantial number of scholars have argued that even voters with very low levels of actual political knowledge can still choose candidates who advance their views and interests effectively by using knowledge “shortcuts,” such as cues from respected opinion leaders,¹⁴⁶ knowledge about political parties,¹⁴⁷ and politically relevant information from everyday life.¹⁴⁸ If these theories are correct, the political ignorance of the majority of American citizens may not matter, because voters can use information “shortcuts” to substitute for what they don’t know.

In an earlier publication, I analyzed the shortcut literature in great detail and argued that information shortcuts, while certainly useful, cannot provide an adequate substitute for basic factual knowledge about politics.¹⁴⁹ Here, I only briefly summarize my earlier argument and provide some additional points developed in more recent literature.

Perhaps the greatest shortcoming of information shortcuts in politics is that many of them require a foundation of basic knowledge to use effectively.¹⁵⁰ As we have seen in our discussion of retrospective voting, itself an information shortcut advocated in the literature,¹⁵¹ our ability to use the vote to punish

¹⁴⁴ See works cited in note 13.

¹⁴⁵ See also my earlier discussion of this problem in Somin, *supra* note 11 at 438-42.

¹⁴⁶ MCCUBBINS & LUPA, *supra* note 52; Philip Converse, *Popular Representation and the Distribution of Information*, in INFORMATION AND DEMOCRATIC PROCESSES, *supra* note 10.

¹⁴⁷ See, e.g., JOHN ALDRICH, WHY PARTIES 47-49, 170-74 (1995); DOWNS, *supra* note 16 at chs. 7-8; V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION ch. 14 (1949); Morris Fiorina, *An Outline for a Model of Party Choice*, 21 AM. J. POL. SCI. 601 (1977).

¹⁴⁸ For the leading advocate of the efficacy of this shortcut, see SAMUEL POPKIN, THE REASONING VOTER (1991); Samuel Popkin, *Information Shortcuts and the Reasoning Voter*, in INFORMATION, PARTICIPATION, AND CHOICE I (Bernard Grofman ed. 1993); see also DONALD WITTMAN, THE MYTH OF DEMOCRATIC FAILURE ch. 1 (1996).

¹⁴⁹ Somin, *supra* note 11 at 419-31.

¹⁵⁰ *Id.* at 418-19, 421.

¹⁵¹ See, e.g., FIORINA, *supra* note 30 at 1-12 (arguing that retrospective voting is an effective shortcut to well-informed voting decisions).

and reward incumbent politicians is dependent on knowing 1) what issues they are responsible for, 2) what has happened to those issues during their term, and 3) whether alternative policies would have performed better.¹⁵² A citizen who seeks to determine whether a recession is grounds for voting the incumbent president out needs to have some basic knowledge of how much presidents can actually affect economic conditions and whether alternatives to the incumbent's policies might have led to an even deeper recession. Similarly, a voter intending to make decisions based on generalizations from his or her own personal experience with unemployment or inflation needs to have sufficient knowledge of economics and politics to be able to tell how much of what she experiences can really be affected by government policy and in what ways. Unfortunately - if predictably - research shows that poorly informed citizens are far less likely than well-informed ones to be able to draw accurate connections between experience and policy.¹⁵³ Given that many and often most citizens lack even very basic contextual political information, such as an understanding of the functions of different branches of government, the differences between liberal and conservative ideology, and the relative positions of opposing parties on key issues,¹⁵⁴ the low level of political knowledge among citizens is a serious problem for shortcut optimists.

A second key problem with the use of shortcuts to political knowledge is that these shortcuts are often not only ineffective but actively misleading to voters who lack adequate contextual information. To extend our previous example, an electorate that uses the retrospective voting shortcut in deciding to vote out a president who presides over a recession may end up with a new administration whose economic policies are worse than those of the defeated leader, thereby actually making the next recession more severe. Greater knowledge might have enabled the voters to recognize that the first president's policies might have been the best available under the circumstances. Recent research supports the intuition that

¹⁵² See discussion in Section II.A.

¹⁵³ See, e.g., Diana Mutz, *Direct and Indirect Routes to Politicizing Personal Experience: Does Knowledge Make a Difference?* 57 PUB. OPINION Q. 483 (1993) (showing that low political information leads to inaccurate generalization of personal experience in making political decisions).

¹⁵⁴ See generally evidence cited in Sections IIIA-C of this Article.

information shortcuts may be actively harmful in the absence of basic background knowledge.¹⁵⁵ Indeed, rational ignorance and the insignificance of any one vote to electoral outcomes may actually give voters an incentive to stick to misleading heuristics and factually inaccurate political beliefs.¹⁵⁶ Rationally ignorant voters may limit not only the amount of information they acquire but “how rationally they process the information they do have.”¹⁵⁷ The insignificance of the individual vote that leads a voter to resort to shortcuts in the first place may also cause him or her to avoid making much effort to choose the right shortcuts or to use them effectively.¹⁵⁸ Instead of choosing shortcuts for their effectiveness, they may choose them based on the degree to which they conform to preexisting prejudices or create other forms of psychological gratification.¹⁵⁹

Third, relatively ill-informed voters reliant on information shortcuts are unusually vulnerable to deception and manipulation by political leaders, and the use of shortcuts might facilitate such deception rather than impede it. For example, a common rhetorical strategy in politics is to portray opponents of a particular policy such as increasing punishment for convicted criminals as opponents of the goal of the policy (here, reducing crime). They are said to be “soft on crime,” according to proponents’ rhetoric. If voters are applying information shortcuts to determine which side to support on the crime issue, they can easily fall for the “soft on crime” rhetoric and not give serious consideration to the alternative proposals of those who believe that crime is better reduced by other means.¹⁶⁰ This example of deceptive conservative political rhetoric, of course, has its counterparts in liberal rhetoric, for example the claim that

¹⁵⁵ See, e.g., Richard Lau & David Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decisionmaking*, 45 AM. J. POL. SCI. 951 (2001) (presenting experimental evidence showing that political information shortcuts improve voting decisions by well-informed experts, but decrease the quality of decisions made by relative “novices”).

¹⁵⁶ See Bryan Caplan, *Rational Ignorance vs. Rational Irrationality*, 54 KYKLOS 3 (2001) (showing that the insignificance of any one vote leads voters to base their decisions on misleading heuristics and poorly developed opinions because, for any individual voter, there is no cost to holding inaccurate views).

¹⁵⁷ *Id.* at 5.

¹⁵⁸ *Id.* at 5, 12-22.

¹⁵⁹ *Id.*

¹⁶⁰ For further discussion, see Somin, *supra* note 34 at 407 (criticizing advocates of information shortcuts for ignoring this possibility).

proponents of school vouchers seek to “destroy public education,”¹⁶¹ even though the voucher proponents true contention is that competition between public and private schools will *improve* the quality of the former.¹⁶² This kind of rhetorical strategy is of course only one of many ways in which politicians and activists can deceptively use information shortcuts to their advantage.¹⁶³

For these and related reasons, even some of the strongest proponents of the various shortcut hypotheses have recently conceded that lack of basic political knowledge does in fact impair effective voting and political participation significantly.¹⁶⁴ For present purposes, there is no need to show that information shortcuts are completely useless, and indeed I believe that they are not.¹⁶⁵ It is sufficient to conclude that they are not an adequate substitute for the basic political knowledge that the majority of the American electorate apparently lacks.

2. The False Promise of Aggregation.

One theory present in the political science literature does not rely on shortcuts to dismiss the need for an informed electorate. Instead, it argues that the “miracle of aggregation”¹⁶⁶ can ensure that only the informed minority of voters has a real impact on electoral outcomes even if the vast majority of citizens are woefully ignorant. If the ill-informed portion of the electorate commits its errors randomly, the power of aggregation will ensure that these errors cancel each other out. Every “erroneous” vote cast for Candidate X will be offset by a similarly mistaken vote for opposing candidate Y. Only the nonrandomly distributed

¹⁶¹ See, e.g., the National Education Association’s claim to this effect on its website: <http://www.nea.org/neatoday/0305/cover.html> (visited June 19, 2003).

¹⁶² See, e.g., JOHN C. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA’S SCHOOLS* (1990) (arguing that competition stimulated by vouchers can improve public schools).

¹⁶³ Cf. Glenn C. Loury, *Self-Censorship in Public Discourse: A Theory of Political Correctness and Related Phenomena*, 6 *RATIONALITY & SOC.* 428 (1994) (arguing that political leaders and activists often exploit information heuristics that confuse ends and means to stifle opposing points of view).

¹⁶⁴ See, e.g., Galston, *supra* note 116 at 218 (citing recent literature, and noting “signs of an emerging consensus” that “there is a level of basic knowledge below which the ability to make a full range of reasoned civic judgments is impaired); Popkin & Dimock, *supra* note 115 (article by coauthored leading advocate of shortcut hypothesis arguing that low knowledge severely impairs political judgment and participation); Robert Shapiro, *Public Opinion, Elites, and Democracy*, 12 *CRITICAL REV.* 50, 524-25 (1998) (article by leading advocate of shortcut theories claiming that his earlier work should not be interpreted to mean that public opinion formed by ill-informed citizens is of adequate quality, merely that it is stable over time).

¹⁶⁵ See Somin, *supra* note 11 at 421-22, 427 (noting that some heuristics, such as party identification and retrospective voting, can be highly effective in certain circumstances)

¹⁶⁶ The phrase is taken from Philip Converse, *supra* note 146 at 383.

votes of the well-informed minority will have an impact on the electoral outcome, ensuring that the outcome will be the same as it would be if all voters were well informed.¹⁶⁷

Unfortunately, the theory's key assumption of the random nature of error is falsified by reality. Information-related errors are in fact nonrandomly distributed and usually help one candidate more than the other.¹⁶⁸ This result should not be surprising in light of the fact that voters do in fact try to use information shortcuts and such shortcuts are often misleading in ways discussed above.¹⁶⁹ Rational ignorance actually gives voters an incentive to stick with heuristics and shortcuts whose errors are nonrandom so long as those shortcuts provide psychological or other forms of individual satisfaction.¹⁷⁰ There is no reason to expect information errors in real-world electorates to be randomly distributed.

A second problem with aggregation theory is that, even if the errors of the ill-informed *are* randomly distributed, the theory only works as a model of majoritarian democracy if the well-informed minority of voters who “decide” elections are truly representative of the needs and interests of the ill-informed majority whose “errors” cancel each other out.¹⁷¹ Unfortunately, overwhelming evidence suggests that the well-informed minority of citizens differ from the majority in any number of politically relevant ways, including race, class, gender, religion, and a host of other attributes.¹⁷²

¹⁶⁷ This summary of the theory of aggregation is slightly modified from Somin, *supra* note at 429-30. For defenses of the theory, see, e.g., WITTMAN, *supra* note 148 at ch. 11; BENJAMIN PAGE & ROBERT SHAPIRO, *THE RATIONAL PUBLIC* (1992); Converse, *supra* note 63.

¹⁶⁸ See Somin, *supra* note 11 at 429 and works cited there; see also Bartels *supra* note 125; Althaus, *supra* note 98; DELLI CARPINI & KEETER, *supra* note 11 at 255-60.

¹⁶⁹ See discussion in Subsection III.D.1; see also Somin, *supra* note 11 at 429.

¹⁷⁰ See Bryan Caplan, *Rational Irrationality and the Microfoundations of Political Failure*, 107 *PUB. CHOICE* 311 (2001); Caplan, *supra* note 156.

¹⁷¹ For more detailed discussion of this point, see Somin, *supra* note 11 at 429-30.

¹⁷² See *id.* and works cited there. The importance of this fact for majoritarian representation is not undermined by the well-supported research finding that most citizens do not vote in a purely self-interested way but instead focus on “sociotropic” indicators of general societal well-being. See, e.g., D. RODERICK KIEWIET, *MACROECONOMICS AND MICROPOLITICS* (1983); Donald Kinder & D. Roderick Kiewiet, *Economic Discontent and Political Behavior: The Role of Personal Grievances and Collective Economic Judgments in Congressional Voting*, 23 *AM. J. POL. SCI.* 495 (1979). Even if voters focus on societal indicators of well-being rather than narrowly personal ones, their judgment is still likely to be influenced by their social position and self-interest. See, e.g., DOUGLAS A. HIBBS, JR., *THE AMERICAN POLITICAL ECONOMY: MACROECONOMICS AND ELECTORAL POLITICS* 138-41 (1987) (showing that voters differ systematically by class, income, occupation, and partisan alignment on whether government should focus more on fighting inflation or unemployment). Moreover, non-self-interested motivation is for many voters compatible with motivations privileging one's own ethnic, racial, or social group at the expense of others. See, e.g., DONALD KINDER & LYNN SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* ch. 4 (1996) (contending that white hostility to blacks is largely unrelated to survey respondents' perceived personal self-

E. The Apparent Intractability of Political Ignorance.

This Section argues that the apparent rationality and intractability of political ignorance strengthens the case for taking it into account in assessing the countermajoritarian difficulty as an argument against various forms of judicial review. Critics of judicial use of empirical evidence rightly point out “that those who live by empirical research die by empirical research as well.”¹⁷³ Empirical evidence may be countered by other, better research, or simply rendered obsolete by changes in society. Even the social science cited in support of the Supreme Court’s most venerated decision, *Brown v. Board of Education*,¹⁷⁴ has since been challenged.¹⁷⁵

Reliance on empirical evidence in constitutional decisions may lead courts and legal theorists down a blind alley if the evidence turns out to be flawed. Because of this danger, it is important to stress that the widespread nature of political ignorance is a long-established fact that is unlikely to change in the foreseeable future. This is so in part because ignorance is not just a function of inadequate education or lack of information, but is in fact a rational response by individual citizens to their situation.

Since Anthony Downs’ pioneering work in the 1950s,¹⁷⁶ political scientists and economists have argued that voters may be “rationally ignorant” about politics. Because of the very low significance of any single vote,¹⁷⁷ there is a vanishingly small payoff to acquiring political knowledge in order to vote in an informed way. Even if a voter makes a tremendous effort to become highly informed, there is almost

interest); Donald Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism versus Racial Threats to the Good Life*, 40 J. PERSONALITY & SOC. PSYCH. 414 (1981) (same).

¹⁷³ MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 75 (1988).

¹⁷⁴ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing social science evidence of the harmful effects of segregated schooling on children).

¹⁷⁵ For evaluations of the social science evidence used in *Brown*, see, e.g., Stuart W. Cook, *Social Science and School Desegregation: Did We Mislead the Supreme Court?*, 5 PERSONALITY & SOC. PSYCHOL. BULL. 420 (1979) (evaluating the evidence cited in *Brown*); Harold B. Gerard, *School Desegregation: The Social Science Role*, 38 AM. PSYCHOL. 869 (1983) (criticizing the social science used in *Brown*). For an early criticism of one of the main studies cited by the *Brown* Court, see Ernest van den Haag, *Social Science Testimony in the Desegregation Cases--A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960). A recent article points out that, even today, social science research on the costs and benefits of school desegregations “is notoriously mixed and hotly debated.” James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1673 (2003).

¹⁷⁶ DOWNS, *supra* note 16 at ch. 13.

¹⁷⁷ See Riker & Ordeshook, *supra* note 120 (demonstrating that the chance of any one vote determining the outcome of a presidential election is roughly 1 in 100 million).

no chance that his or her well-informed vote will actually swing the electoral outcome in favor of the “better” candidate or party.¹⁷⁸ The acquisition of political information is a classic collective action problem, a situation in which a good (here, an informed electorate) is undersupplied because any one individual’s possible contribution to its production is insignificant and those who do not contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others.¹⁷⁹ Therefore, so long as becoming an informed voter is the only reason for acquiring political knowledge, most ordinary citizens will remain rationally ignorant, a prediction confirmed by studies showing that there has been little or no increase in voter knowledge during the post-World War II era, despite massive increases in education levels and in the availability of political information.¹⁸⁰ It is difficult to explain this striking finding by any theory other than rational ignorance.¹⁸¹

If most citizens really do remain relatively ignorant of politics primarily because of rational considerations rather than because of lack of opportunity or ability to acquire information, it follows that the problem of political ignorance is likely to persist on into the indefinite future. It certainly casts a pall on proposals to increase political knowledge by changing the education system or by improving access to political information.¹⁸²

This is not to suggest that rational ignorance theory implies that citizens will acquire no political knowledge at all. Some will acquire political information because they find it interesting as a source of recreation, in much the same way that others acquire detailed knowledge of professional sports teams. A small minority of political activists, of course, acquire political information because they can engage in forms of political activity that can influence public policy far more than an individual vote can. Rational

¹⁷⁸ *Id.*

¹⁷⁹ For general discussion of collective action theory, see the classic work by MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). See also RUSSELL HARDIN, *COLLECTIVE ACTION* (1982) (extending Olson’s argument with various applications to political participation).

¹⁸⁰ For studies showing little or no increase in political knowledge over time, see works cited in note. See also NORMAN H. NIE, ET AL. *EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA* chs. 7-8 (1996) (presenting extensive evidence showing that increases in formal education in the post-World War II era have failed to lead to commensurate increases in political knowledge).

¹⁸¹ Somin, *supra* note 11 at 435-38.

¹⁸² For examples of such proposals, see, e.g., DELLI CARPINI & KEETER, *supra* note 11 at ch. 7; THOMAS PATTERSON, *OUT OF ORDER* (1994); Galston, *supra* note 116 at 226-32; Doris Graber, *Why Voters Fail Information Tests: Can the Hurdles be Overcome?* 11 *POL. COMMUNICATION* 331 (1994).

ignorance does indicate, however, that there is little or no incentive to acquire political information *solely* for the purpose of voting, and the evidence of persistent ignorance in the face of increasing education and information availability suggests that most citizens have few other reasons to acquire political information as well. For the vast majority of citizens who do not engage in extensive political activity beyond voting, the main determinant of political knowledge will be the extent to which they find politics interesting enough to devote substantial time and effort to information acquisition. For most, it is not interesting enough.

Table 4 illustrates this point by presenting a regression analysis of the determinants of political knowledge in the 2000 NES. The model uses ordinary least squares (OLS) regression to assess the impact of various variables on political knowledge, while controlling for each others' effects. Thus, not surprisingly, education, income, and exposure to various forms of media information on politics all have a statistically significant upward impact on political knowledge. Consistent with earlier studies, the 2000 NES evidence also shows that women have lower levels of political knowledge than men and blacks lower levels than whites,¹⁸³ results which hold true even after controlling for numerous other variables.¹⁸⁴

¹⁸³ See works cited in notes 23-24, 321.

¹⁸⁴ The importance of racial and gender differences in political knowledge to the countermajoritarian difficulty is discussed in Part VI of this Article.

Table 4
Correlates of Political Knowledge in the 2000 NES

Variable Name	Unstandardized Coefficients	Standard Error	Standardized Coefficients	T-Statistic	Significance
Constant	-2.555	.770		-3.318	.001
Region (South=1)	-.351	.285	-.024	-1.229	.219
Watching TV News (number of days per week)	.127	.053	.050	2.391	.017
Newspaper (number of days per week)	.114	.049	.047	2.312	.021
Age (6 pt scale)	-2.987E-02	.107	-.006	-.280	.780
Education (7 pt scale)	1.289	.101	.292	12.818	.000
Working full time (30+ hrs/week)	-.658	.314	-.045	-2.099	.036
Union member in household	-2.490E-02	.380	-.001	-.066	.948
Household Income (5 point scale)	.849	.164	.119	5.193	.000
Race (black=1)	-1.522	.454	-.065	-3.353	.001
Hispanic (Hispanic=1)	-1.440	.647	-.042	-2.227	.026
Gender (female=1)	-2.284	.282	-.160	-8.112	.000
Political Acts Beyond Voting (9 pt scale)	.348	.122	.059	2.847	.004
Listening to Political Talk Radio (4 pt scale)	.461	.116	.077	3.969	.000
Seeing Election News on Internet	.701	.321	.046	2.184	.029
External Efficacy (10 pt scale)	7.414E-02	.062	.024	1.193	.233
Interest in Politics (9 pt scale)	1.390	.091	.359	15.362	.000

OLS Regression

N=1349; adjusted R²=0.538

Dependent Variable: Political Knowledge (30 point scale)

For present purposes, however, the most important implication of the regression model is the way in which interest in politics,¹⁸⁵ has a much larger impact on political knowledge than any other variable.

Table 5 dramatically illustrates this contrast:

Table 5
Relative Impact of Changes in Variables on Political Knowledge
2000 NES

Variable	Expected increase in political knowledge score (31 point scale)
Interest in Politics: Moving from lowest to highest level on 9 pt scale	11.1
Education: Dropout in middle school or earlier to graduate degree	7.7
Media Exposure: Lowest to highest level of media exposure ¹⁸⁶	3.8
Income: Under \$5000 annual household income to over \$125,000	3.4
Political Activity Beyond Voting: Lowest (0 acts in last year) to highest level of political activity (8 or more acts) ¹⁸⁷	2.8

Impact of change in each variable measured while holding 15 other control variables constant¹⁸⁸

Holding all other variables constant, a change in interest in politics from the lowest to the highest level on the scale increases political knowledge almost 50% more than the expected difference in

¹⁸⁵ The interest in politics variable is a nine point scale which combines the respondents' self-reported interest in the 2000 campaign, his self-reported interest in campaigns more generally, and the NES interviewers' assessment of the respondents level of interest in the interview. In this way, I am able to include both self-assessment and external assessment of the respondent's interest.

¹⁸⁶ This variable combines the effects of the TV, newspaper, talk radio, and internet variables in Table 4.

¹⁸⁷ This scale measures whether the respondent has engaged in eight different types of political activity within the past year: trying to influence others' votes, putting up a campaign sign or button, going to political meetings, contributing money to a candidate, contributing money to a party, contacting a public official on an issue, attending protest marches.

¹⁸⁸ The control variables are those listed in Table 4.

knowledge between a middle school dropout and a holder of graduate degree. Moreover, this analysis probably understates the true impact of interest in politics because it controls for media exposure to political news, which may itself be in part a function of interest in politics. The overwhelming dominance of political interest over other variables provides some confirmation to the rational ignorance theory.¹⁸⁹ Citizens who acquire political information seem to do so primarily because it is a personal consumption good rather than for the purpose of contributing to the public good of a well-informed electorate. The only variable that seems to have an even remotely comparable effect is level of education. Going from a high middle school drop out level of education to graduate degree level, not surprisingly, leads to a predicted knowledge increase of almost 8 points on the 31 point scale.¹⁹⁰ Unfortunately, however, the failure of the last several decades' increases in education levels to produce even modest increases in political knowledge cast serious doubt on the likelihood that we can expect future increases in knowledge from this source.¹⁹¹ Moreover, even if future increases in education levels have a greater impact on political knowledge than past increases did, we can hardly expect education levels to increase by as much as our stylized middle school dropout/graduate degree comparison implies. A more realistic increase in education, say from high school graduate to college graduate, would raise political knowledge by an average of roughly 1.3 points on the 31 point scale for those individuals enabled to go to college under this scenario.¹⁹² While such an increase would surely be desirable, it seems unlikely that it would have an marked effect on overall political knowledge levels in the electorate.

We cannot, of course, categorically rule out the possibility that some future change in American politics and society will drastically increase aggregate levels of political knowledge. For example, it is possible that some breakthrough in communications technology or advertising technique might make

¹⁸⁹ Previous studies have also emphasized the importance of political interest, though not quite to same extent. *See, e.g.,* DELLI CARPINI & KEETER, *supra* note 11 at 184 (emphasizing importance of interest in politics); Robert C. Luskin, *Explaining Political Sophistication*, 12 POL. BEHAVIOR 331, 344 (1990) (emphasizing that interest has “a huge effect” on political knowledge).

¹⁹⁰ See Table 5.

¹⁹¹ See works cited in note (documenting persistence of political ignorance despite increases in education). See also Nie, et al., *supra* note 179 (arguing that increasing education levels fail to increase political knowledge because political knowledge is a positional good). For a more optimistic view of the potential of education to increase political knowledge, see Galston, *supra* note 115.

¹⁹² Figure calculated from 2000 NES evidence displayed in Table 4.

political information vastly more interesting to most citizens than it is currently. However, the persistence of political ignorance over time and the apparent confirmation of the rational ignorance hypothesis strongly suggest that low levels of political knowledge will be with us for a long time to come. For this reason, it is essential that theories of the countermajoritarian difficulty take account of this deeply rooted aspect of the political landscape.

IV. IMPLICATIONS OF LOW AGGREGATE KNOWLEDGE LEVELS FOR THE COUNTERMAJORITARIAN DIFFICULTY.

As we have seen, political knowledge levels among American citizens are so low that they fail to meet the prerequisites of any of the theories of representation that might underpin the countermajoritarian difficulty.¹⁹³ This state of affairs seems deeply rooted and is likely to persist into the indefinite future.¹⁹⁴ In this Part, I explore the implications of low aggregate levels of political knowledge for the countermajoritarian difficulty. The most radical interpretation of these implications is that the countermajoritarian difficulty should not be weighed at all as a consideration against judicial invalidation of legislative enactments. Although the radical view is not without force, I advocate the more moderate position that countermajoritarian considerations should not be ignored completely but should in most cases be outweighed by other considerations, if the latter counsel in favor of judicial invalidation of a statute. In the last section of the Part, I consider the possibility that judicial invalidation of statutes may sometimes actually *increase* the majoritarianism of the political system by reducing the knowledge burden on voters. While this possibility is highly context-dependent, the very fact that it may hold true in numerous instances should lead us to rethink much of the conventional wisdom on the countermajoritarian nature of judicial review.

A. The Radical Approach.

The radical interpretation of the impact of political ignorance on the countermajoritarian difficulty is that countermajoritarian considerations should not be given any weight in constitutional

¹⁹³ See Section III.A-D of this Article.

¹⁹⁴ See Section III.E.

theory at all. If, as we have seen, most citizens lack even very basic political knowledge, it may be the case that virtually all legislation produced by Congress and state legislatures fails to represent the will of “the people” in any meaningfully majoritarian way.

For most legislation, the vast majority of voters will not even have heard of its existence, much less have an informed opinion on its merits and purpose.¹⁹⁵ Even in the rare cases where legislation is prominent enough to generate widespread citizen awareness, most citizens often have only a vague grasp of what the legislation actually does. A recent study finds that two of the most prominent and controversial domestic policy legislative initiatives of the 1990s – Clinton health care plan and the 1995 Republican Contract With America – were sufficiently poorly understood by the public that politicians in both cases adopted strategies of building public support by manipulating voter ignorance rather than either adjusting their proposals to reflect public opinion more closely or trying to persuade the public that their proposals were right on the merits.¹⁹⁶ In a forthcoming article, I argue that much of the most prominent legislation adopted during the New Deal period, which supposedly represented a period of particularly intense political attentiveness and mobilization, actually also involved manipulation of voter ignorance.¹⁹⁷

If this was the case with some of the most prominent legislation in recent history and with some of the most prominent policy innovations of the New Deal “constitutional moment,”¹⁹⁸ it is difficult to avoid the conclusion that such an outcome is even more likely to occur with run-of-the mill legislation, where political leaders do not even have to make much effort to avoid unwanted majoritarian scrutiny.

¹⁹⁵ See DELLI CARPINI & KEETER, *supra* note 11 at 78-86 (documenting ignorance of numerous public policy issues); R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 70-87, 239-41, 270-72 (1990) (showing that legislators will ignore the views of “inattentive publics” on complex public policy issues where the consequences of their decisions are unknown to most voters); see also Somin, *supra* note at 431-33 (noting that modern government is far too large and complex for rationally ignorant citizens to be aware of more than a small portion of its activities).

¹⁹⁶ JACOBS & SHAPIRO, *supra* note 32 at chs. 3-8; see also Somin, *supra* note (reviewing this book). This work is particularly significant because the authors are two of the most prominent scholars who previously claimed that voter ignorance could be circumvented by information shortcuts and preference aggregation. See JACOBS, *supra* note 32; PAGE & SHAPIRO, *supra* note 166.

¹⁹⁷ Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. (forthcoming Dec. 2003).

¹⁹⁸ The term is of course borrowed from BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); for a detailed assessment of Ackerman’s argument from a voter knowledge perspective, see *id.*

Although this conclusion in many ways follows naturally from what has been said thus far, it is important to understand how much of a break the radical argument makes with the traditional framework of the countermajoritarian difficulty. Not only legal scholars of both the right and the left,¹⁹⁹ but also prominent jurists across the political spectrum have assumed that there is at least some substantial conflict between judicial review and majoritarianism. To cite just a few examples, Franklin Roosevelt's attorney general and future prominent Supreme Court Justice Robert Jackson flatly claimed that "[e]ither democracy must surrender to the judges or the judges must yield to democracy."²⁰⁰ In more recent years, Justice Antonin Scalia, arguably the leading conservative jurist on the Supreme Court, has repeatedly raised the countermajoritarian difficulty in criticizing judicial reversals of legislation, claiming that "the sphere of self-government reserved to the people is progressively narrowed" when the Court overturns legislation.²⁰¹ Similar concerns have been raised by current liberal justices in criticizing decisions they oppose.²⁰² Although such rhetoric may sometimes be disingenuous, the very fact of its recurrent use testifies to the appeal of the countermajoritarian critique of judicial review.

The radical interpretation of the impact of voter ignorance suggests that all such claims should be rejected because political ignorance prevents legislation from truly reflecting the will of the majority. Although the legislation still does, of course, represent the will of the majority of legislators, these officials no more represent the will of the people than judges do.²⁰³ As Barry Friedman puts it, "the countermajoritarian theory rests explicitly on the notion that the other branches of government 'represent'

¹⁹⁹ See works cited in nn. 6-9.

²⁰⁰ *Jackson Calls Court Curb on Democracy; Says Law Reviews Block United Functioning*, N.Y. TIMES, Oct. 13, 1937, at 6; see also ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) (arguing that judicial review is in serious tension with democratic majoritarianism).

²⁰¹ *United States v. Virginia*, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting); see also *Romer v. Evans*, 517 U.S. 620, 636, 653 (1996) (Scalia, J., dissenting) (chastising Court majority for preventing issue of the status of homosexuality from being resolved by "normal democratic means" and for overruling the will of "a majority of Colorodans"); *Planned Parenthood v. Casey*, 505 U.S. 833, 1002 (1992) (criticizing Court for "foreclosing all democratic outlet for the deep passions this issue [abortion] arouses) (Scalia, J., concurring and dissenting); ANTONIN M. SCALIA, *A MATTER OF INTERPRETATION* (1997).

²⁰² See, e.g., cases cited in note 246.

²⁰³ See Friedman, *supra* note 26 at 630 (making strong argument to the effect that there is no countermajoritarian problem with overruling legislation that reflects solely the will of the legislator).

majority will in a way the judiciary does not.”²⁰⁴ If this assumption is falsified by the existence of massive political ignorance, the countermajoritarian difficulty becomes no difficulty at all.

Even the radical approach, of course has limits. It does *not* hold that judges can simply overturn legislation anytime they wish, merely that they should not refuse to overturn it for fear of acting in a countermajoritarian fashion. Thus, judges may still choose to exercise restraint because the judiciary lacks competence to make public policy in a given area,²⁰⁵ because courts lack the power to impose their will on other powerful political actors,²⁰⁶ or because they should hew narrowly to the text and original intent of the Constitution.²⁰⁷ Nonetheless, the radical argument is still radical indeed in so far as it counsels rejection of the single most widely used criticism of judicial review.

B. The (Relatively) Moderate Approach.

Although the radical view is not without its force, it is still inferior to a less sweeping alternative. There are two shortcomings in the radical view that counsel prudence. First, a minority of legislative output possibly does in fact reflect majority will after all. This is true of legislation that is both widely publicized and relatively simple in its effects. Second, even in cases where this is not true, there is always

²⁰⁴ *Id.*

²⁰⁵ See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977) (arguing that courts have done a poor job of managing numerous public policy issues); LINO F. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT'S DECISIONS ON RACE AND THE SCHOOLS* (1976) (arguing that the Supreme Court badly mismanaged the process of school *desegregation*); but cf. MALCOLM FEELEY & EDWARD RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW COURTS REFORMED AMERICA'S PRISONS* (1998) (arguing that courts have performed well in reforming prison conditions).

²⁰⁶ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE* (1991) (making this argument); Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. Pub. Law 279 (1957) (same). However, a substantial literature has Rosenberg and Dahl's thesis into question. See, e.g., DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994) (arguing, contrary to Rosenberg's thesis, that judicial intervention played a decisive role in expanding abortion and privacy rights); R. SHEP MELNICK, *BETWEEN THE LINES* (1993) (arguing that Dahl and Rosenberg underestimated judicial power); David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994) (criticizing Rosenberg's claim that *Brown v. Board of Education* had no significant effect); Ronald Kahn, *The Supreme Court as a (Counter) Majoritarian Institution: Misperceptions of the Warren, Burger, and Rehnquist Courts*, 1994 DET. C.L. REV. 1, 21-58 (analysis by a political scientist making numerous empirical and theoretical criticisms of Dahl and Rosenberg's claims); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10 (1994) (partially rejecting Rosenberg's thesis on *Brown*); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994) (same); For Rosenberg's reply to several of the critics, see Gerald N. Rosenberg, *Brown is Dead! Long Live Brown !: The Endless Attempt to Canonize a Case*, 80 VA. L. REV. 161 (1994).

²⁰⁷ See, e.g., BERGER, *supra* note 7; ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1989); Antonin M. Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

a small chance that the legislation in question has penetrated the barriers of political ignorance despite the odds against such an occurrence. Even if such penetration has not occurred in toto, the public might still have at least a partial understanding of what has happened. Although most legislation will have only a weak relationship to majoritarian will, a weak relationship is not the same as none at all.

As argued above, the main informational barriers to majoritarian control of legislation on specific issues are the fact that most legislation is completely unknown to most citizens and that, even when this is not the case, the effects of the legislation are often sufficiently complex that voters cannot readily tell whether it will advance their values and interests or not.²⁰⁸ A related difficulty is that the majority of citizens often do not know where the opposing parties stand on a given issue and so cannot vote effectively on their issue positions.²⁰⁹

If it is indeed the combination of obscurity and complexity that prevents majoritarian control of most legislation, it follows that legislation that is both simple and highly prominent might be an exceptional case, at least if voters clear the additional information barrier of learning the parties' relative stances on the issue in question. Examples of such legislation do in fact exist. For example, 76 percent of survey respondents were aware of the passage of Medicare legislation when it passed in 1965, though it is less clear that they understood how the legislation actually worked.²¹⁰ Similarly, the majority of respondents were aware of the Supreme Court's 1989-90 decisions holding that flag burning was a protected form of expression under the First Amendment,²¹¹ and most favored attempts to reverse the decision by constitutional amendment.²¹² More so than the Medicare case, the flag burning example is an especially clear case of legislation that truly reflected majoritarian preferences. In addition to being highly

²⁰⁸ See discussion in Section II.C and Subsection III.C.3.

²⁰⁹ *Id.*

²¹⁰ DELLI CARPINI & KEETER, *supra* note 11 at 80.

²¹¹ See *United States v. Eichman*, 496 U.S. 310 (1990) (striking down federal anti-flag burning law); *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down Texas state law).

²¹² Roper Center for Public Opinion Research, http://web.lexis-nexis.com/universe/form/academic/s_roper.html [hereinafter Roper Center, individual surveys identified by accession number], Accession No. 0107208 (July 1990 Times Mirror survey showing that 52 percent of respondents knew that the Supreme Court had held anti-flag burning laws to be unconstitutional); Roper Center, Accession No. 0140144 (June 1990 ABC News survey finding that 58 percent of respondents supported amendment to reverse the Supreme Court's decision).

prominent, it was also – unlike Medicare – extremely simple in its ramifications. This is not to suggest, of course, that the Supreme Court was wrong to decide the flag burning cases as it did. It does, however, show that these decisions represented a clear example of true countermajoritarian judicial review.

Obviously, most legislation does not follow either the flag burning or the Medicare example in terms of public recognition and understanding. Rarely, therefore, will a Supreme Court decision invalidating a statute be as clearly countermajoritarian as in the flag burning cases.²¹³ However, even ordinary legislation might on rare occasions be the subject of unusual public scrutiny. In one survey, 55 percent of respondents were aware of the recent passage of “a proposal to beautify our roads and highways,” though of course the survey did not determine how well the respondents actually understood the law and its effects.²¹⁴ Although this case is unusual and it is far from clear whether it really represented a significant degree of knowledge on the part of the respondents,²¹⁵ it does raise the possibility that specific legislation sometimes reaches the public consciousness even in the face of widespread general political ignorance.

In sum, the radical interpretation of political ignorance and its impact on the countermajoritarian difficulty must be moderated by the recognition that a small number of statutes that are both highly prominent and relatively simple to understand usually really do reflect majoritarian preferences. In addition, the mass of more ordinary legislation also includes a few items that may penetrate the public consciousness and thereby reflect majority will, albeit to a much more limited degree, since mere knowledge of the existence of legislation is not enough to ensure majoritarian control of policy outcomes.²¹⁶

For these reasons, a more moderate approach suggests that the problem of political ignorance does not completely eliminate the countermajoritarian difficulty, but does greatly reduce its significance.

²¹³ See cases cited in note 211.

²¹⁴ Roper Center, Accession No. 0040059 (Gallup survey taken in 1965). It should be noted that the results on this question were possibly influenced by guessing, since respondents needed only to say whether or not they thought the bill to “beautify our roads and highways” had passed. Still, this is a higher rate than one would expect for such relatively minor legislation.

²¹⁵ See discussion in note 214.

²¹⁶ See discussion in Section II.D and Subsection III.C.3.

Although it does not prove that the difficulty will never arise, it does show that most legislation represents majority will only to a very minor degree if at all. Therefore, what we might call the “countermajoritarian cost” of overruling that legislation should be low, even if not always zero.

Figure 1 gives a rough outline of the degree of countermajoritarian cost involved in overruling different types of legislation under the moderate view:

**Figure 1:
Countermajoritarian Cost of Judicial Overruling of Legislation**

Visibility of Legislation	Low- Visibility	Complexity of Legislation	
		Simple	Complex
		Low	None
High- Visibility	High	Low	

Although the moderate view does not wholly discount the countermajoritarian difficulty in the way that the radical approach did, it does conclude that there is little or no countermajoritarian cost to the invalidation of the vast majority of legislation. This conclusion still represents a radical revision of the traditional view of the countermajoritarian difficulty, which posits a constant and high countermajoritarian cost for nearly all judicial review.

The moderate view therefore still has important and potentially sweeping implications for how the judiciary approaches the countermajoritarian difficulty. First, since most legislation has only very limited majoritarian significance if any at all, countermajoritarian concerns should be much more easily outweighed by other considerations than earlier theories suggest. A complete theory of the range of values that should influence constitutional decisionmaking by the judiciary is outside the scope of this Article. For this reason, I limit myself to the conclusion that voter ignorance implies that countermajoritarian

concerns should usually be given comparatively little weight relative to whatever opposing considerations the “correct” theory of constitutional law finds relevant – whether those considerations be fidelity to original intent,²¹⁷ adherence to text,²¹⁸ moral commitments to individual rights,²¹⁹ or some other competing value.

The second implication of the moderate view is to cast doubt on various proposals to use avoidance doctrines such as the political questions doctrine²²⁰ and various forms of “judicial minimalism”²²¹ to avoid making broad constitutional decisions. To the extent that the exercise of what Bickel called “the passive virtues” is motivated by countermajoritarian considerations,²²² their usefulness is greatly overestimated. This is not to say that judicial decisions should always be “maximalist,” but it does suggest that a justification for minimalism and avoidance must be based on something other than the countermajoritarian difficulty.

C. Political Ignorance and Representation-Reinforcement.

1. Judicial Limits on Government Power Strengthen Majoritarian Rule by Easing the Information Burden of Voters.

So far, I have advanced only the negative argument that taking account of political ignorance greatly reduces the extent to which judicial invalidation of statutes should be considered countermajoritarian. In this Section I put forward the affirmative claim that judicial review might sometimes actually *increase* the majoritarianism of the political system by reducing the anti-majoritarian impact of voter ignorance. It is certainly highly implausible to suppose that judicial review can come close to fully eliminating the distortions caused by ignorance. It may, however, be able to reduce them at the margin.

²¹⁷ See, e.g., BORK *supra* note 207; BERGER, *supra* note 7.

²¹⁸ See, e.g., Calabresi, *supra* note 6.

²¹⁹ See, e.g., DWORKIN, *supra* note 6; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); MICHAEL PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

²²⁰ See Barkow, *supra* note 7.

²²¹ See, e.g., SUNSTEIN, *supra* note 7.

²²² See Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (advocating use of avoidance doctrines to minimize countermajoritarian difficulty); see also BICKEL, *supra* note 3 at ch. 4 (same).

The persistence of widespread political ignorance in the face of rising education levels and drastically lower information costs suggests that most citizens are willing to devote only extremely limited amounts of time and effort to acquiring political knowledge.²²³ Thus, it is unlikely that most of them can follow more than a very small number of issues simultaneously.

For this reason, there is an inverse relationship between the size, scope, and complexity of government on the one hand and the ability of voters to have sufficient knowledge to exercise majoritarian control over its operations on the other.²²⁴ Given a relatively constant level of public attention to political issues, the more functions government undertakes, the higher the percentage that will escape the notice of most citizens, and thus the lower the degree of majoritarian control over government.²²⁵ The size and complexity of the modern state is therefore one of the factors that exacerbate the problems caused by political ignorance. In most Western democracies, government spending constitutes some one third to one half of gross domestic product,²²⁶ and almost every conceivable human activity is subject to one or another form of government regulation. In 2001, federal government spending accounted for some 18.6% of gross domestic product,²²⁷ with state and local governments accounting for an additional 12.8%.²²⁸ Obviously, the vast expansion of government expenditures since the 1930s has been accompanied by an at least equally great expansion in the scope of its regulatory activities, which now encompass almost all areas of life.²²⁹ The federal government alone has fourteen cabinet level departments with regulatory authority, as well as 57 independent regulatory agencies.²³⁰ It is highly unlikely that most citizens can even name more than a few of these agencies, much less keep track of their activities.

²²³ See discussion in Part III; see also Somin, *supra* note 11 at 435-38.

²²⁴ This argument was first advanced in Somin, *supra* note at 431-35.

²²⁵ The logic of this argument is more fully developed in *id.*

²²⁶ *Id.* at 431.

²²⁷ COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 2003 370 tbl. B-79 (2003).

²²⁸ Figure calculated from statistics in *id.*, at 276 tbl. B-1, 376 tbl. B-85.

²²⁹ See ROBERT HIGGS, CRISIS AND LEVIATHAN, CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT ch. 2 (1987) (emphasizing the extent of growth in the scope of government and showing that it is as significant as growth in size).

²³⁰ Somin, *supra* note 11 at 431.

Obviously, the problems caused by the combination of a large and complex government and severely limited public knowledge of and attention to its activities cannot be solved by judicial review, nor should the judiciary even try for a comprehensive solution. However, judicial review can sometimes alleviate the problem by limiting the scope of government activity. For example, if judicial review blocks government from undertaking content-based restriction of speech²³¹ or from intervening in the internal affairs of religious groups,²³² this means that voters need not devote time and effort to learning about government activities in these areas and can focus their (severely limited) attention on other issues. At least at the margin, the information burden on voters has been reduced, and their ability to pay adequate attention to the remaining functions of government increased.

What is true for these two well-established and widely accepted judicial restrictions on government power should also hold true for other, more controversial ones. To take an extreme case, the information burden on voters would be vastly reduced and their ability to control remaining functions of government considerably increased in the unlikely event that the Supreme Court were to adopt Richard Epstein's position that most post-New Deal economic legislation is unconstitutional.²³³ More realistically, it is possible that a more modest, but nonetheless noteworthy, reduction in political knowledge burdens would occur if the Supreme Court is able to expand and enforce its efforts to constrain federal regulation of "noneconomic . . . intrastate activity."²³⁴ Depending on how broadly this category is defined, the resulting constraint on the scope of government regulation might potentially have an important impact on the knowledge burden placed on voters.

In this way, judicial restrictions on the scope of government power might not only avoid exacerbating the countermajoritarian difficulty, but could actually strengthen majoritarian control of

²³¹ See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1991) (holding that "[c]ontent-based regulations [of speech] are presumptively invalid" under the First Amendment).

²³² See, e.g., *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728 (1871) (establishing principle that government must not intervene in internal church disputes because "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect").

²³³ RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND EMINENT DOMAIN* (1985). Obviously, these effects would only occur if the Court not only accepted Epstein's position but also had sufficient leverage to force the other branches of government to obey its decision.

²³⁴ *Morrison v. United States*, 529 U.S. 598, 613 (2000).

government. In John Hart Ely’s terminology, they could be “representation-reinforcing.”²³⁵ So long as we accept that majoritarian control of government requires a substantial degree of citizen knowledge of public policy and that citizens have only a severely limited willingness and ability to acquire political information, this conclusion necessarily follows. Empirical evidence on voter participation in government before the vast post-Depression expansion of the state provides some modest support for the proposition that ordinary citizens were able to follow public policy better when there was less public policy to follow,²³⁶ though obviously additional research is necessary.

2. Four Caveats to the Representation-Reinforcement Argument.

At this point it is important to emphasize three caveats to the representation-reinforcement argument for judicial power. First and foremost, the argument does not, by itself justify all conceivable judicial limitations on government power. Indeed, by itself, it does not justify *any* such limitations. Whether or not a particular judicial decision is justified does not depend solely on its possible representation-reinforcing effects. It also depends on a wide range of other factors, including adherence to constitutional text, history, and precedent, relevant reliance interests, and numerous other considerations. My argument claims only that, to the extent that the countermajoritarian difficulty is an important issue in constitutional adjudication, we must consider the fact that judicial restraints on government power actually reinforce majoritarianism by reducing voters’ knowledge burdens, rather than undermining it. Previous scholarship on the countermajoritarian difficulty has ignored this possibility.

The second caveat is that my argument applies only to judicial actions that limit the powers of other branches of government over the private sector. Judicial decisions which replace the power of other branches with judicial control would not have such a representation-reinforcing effect, though they may of course be justified for other reasons. Examples of such *power-transferring* rather than *power-limiting*

²³⁵ ELY, *supra* note 18 at ch. 4.

²³⁶ See Somin, *supra* note 11 at 434-35 (discussing this evidence).

decisions include well-known cases in which judges took over the management of public schools²³⁷ and prisons.²³⁸ Power-transferring decisions are more vulnerable to the countermajoritarian criticism than power-limiting ones because they render government decisionmaking less subject to control by elected officials without simultaneously reducing voters' information burdens. In some instances, they may even exacerbate voters' knowledge burdens by introducing new levels of complexity in public policy.²³⁹

Third, in some cases, judicial restriction of government power in one area may create political incentives for more sweeping or more complex government intervention in other areas of society. For example, Professor Adrian Vermeule has argued that moderate judicial limits on federal regulatory power that only forbid regulation of a narrow category of activities might give Congress an incentive to adopt broader regulatory statutes.²⁴⁰ If Vermeule's argument is correct, judicial intervention in this area will only have a representation-reinforcing effect if courts are able to impose more stringent limits on Congress' authority.²⁴¹ More broadly, this consideration points to the need to consider interaction effects between different policies in assessing the possible countermajoritarian and representation-reinforcing effects of judicial decisions. A comprehensive assessment of such interaction effects is beyond the scope of this analysis. However, it is certainly an important issue for future research. At present, the purpose of this Article will have been achieved if it succeeds in showing that there is a substantial class of cases in which judicially imposed limits on government power would have representation-reinforcing effects due to the impact of judicial review on voter knowledge burdens.

Finally, my argument does not provide a generalized theory of how large the scope of government power can be. Many factors other than political ignorance and majoritarian control of

²³⁷ See, e.g., *Missouri v. Jenkins*, 495 U.S. 33 (1990) (partially upholding district court decision that took control of school district away from local government and ordered tax increases for purposes of alleviating school segregation).

²³⁸ See generally FEELEY & RUBIN, *supra* note 205.

²³⁹ See e.g., *Jenkins*, 495 U.S. at 36-45 (describing how district court ordered creation of new tax system and various changes in school district policy).

²⁴⁰ Adrian Vermeule, *Centralization and the Commerce Clause*, 31 ENVTL. L. REPORTER 11334 (2001); Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?* 46 VILL. L. REV. 1325 (2001).

²⁴¹ I do not myself agree with Vermeule's argument, but the issue falls outside the scope of the present Article.

government would have to be considered by such a theory. However, it does provide an important consideration that previous theories have ignored.

It is also worth noting that redistribution to the poor, the most common argument for a large state in modern political philosophy,²⁴² cannot justify the vast majority of the modern state's functions. For example, only about 13% of federal spending goes to all means-tested programs combined,²⁴³ and not all the funds going to these programs actually go to severely impoverished people. Thus, the scope of government could potentially be greatly reduced even if programs intended to benefit the poor are left completely untouched.

V. POLITICAL KNOWLEDGE, THE COUNTERMAJORITARIAN DIFFICULTY, AND JUDICIAL REVIEW OF FEDERALISM.

With the possible exception of *Bush v. Gore*,²⁴⁴ no recent Supreme Court decisions have drawn as much criticism on countermajoritarian grounds as its efforts to reestablish judicial review of federalism constraints on Congressional power. The argument has been repeatedly advanced by both judicial²⁴⁵ and academic²⁴⁶ critics of judicial enforcement of federalism. I do not claim to resolve the broader debate over

²⁴² See, e.g., JOHN ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE (1995) (providing survey of theories of redistribution in modern political philosophy); JOHN RAWLS, A THEORY OF JUSTICE (1971) (best-known modern work of political theory defending redistribution).

²⁴³ Figure is calculated from CONGRESSIONAL BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2002-11 ch. 4 (2001) (noting that in 2000 means-tested programs accounted for 2.4% of GDP) (available online at <http://www.cbo.gov/showdoc.cfm?index=2727&sequence=5>) (visited July 10, 2003); ECONOMIC REPORT OF THE PRESIDENT, supra note 226 at 370 tbl. B-79 (indicating that federal spending as a whole was 18.4% of GDP).

²⁴⁴ 531 U.S. 1046 (2000).

²⁴⁵ See, e.g., *United States v. Morrison*, 529 U.S. 598, 649 (2000) (Souter, J., dissenting) (arguing that federalism issues are best settled by Congress, in part because of its “identity with the people”); *United States v. Lopez*, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (chastising Court majority for ignoring benefits of “Congress’ political accountability” to the people in determining federalism issues).

²⁴⁶ For academic criticism of the Court’s recent federalism decisions on countermajoritarian grounds, see, e.g., Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 127-32 (2001) (arguing that the Rehnquist Court’s federalism decisions improperly undermine “popular constitutionalism” and deny “the people any role in determining the ongoing meaning of their Constitution”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 293 (2000) (attacking recent efforts at judicial enforcement of federalism because “arguments” about the proper scope of Congress’ powers should “be addressed to the people, through politics”)[hereinafter Kramer, *Political Safeguards*]; William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1226-28 (2002) (claiming that the Court’s recent federalism decisions are an example of “countermajoritarian activism”); Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441 (2000) (criticizing the Court’s federalism decisions for reducing Congressional power and democratic policymaking over

the legitimacy and desirability of judicial enforcement of federalism.²⁴⁷ The definitive resolution of these issues depends on a wide range of factors in addition to political ignorance.

I do, however, contend that taking political ignorance into account severely weakens the claim that judicial review of federalism is undemocratic and countermajoritarian. Indeed, I claim that judicial enforcement of federalism-based limits on national power may actually strengthen majoritarianism. It does so by reinforcing citizens' ability to "vote with their feet," leaving states with policies they dislike for those with more favorable ones. This mechanism of popular control of government is less vulnerable to political knowledge problems than traditional voting because it is not subject to rational ignorance. Unlike individual ballot box voters – who have little or no incentive to become informed – individual "foot voters" have every incentive to acquire relevant information about relative conditions in different states because they can use their knowledge to make decisions that have a decisive effect. They are not dependent on millions of others making a similar decision to acquire knowledge.

A. Political Ignorance and the Countermajoritarian Impact of Judicially Enforced Federalism.

Once political ignorance is taken into account, the countermajoritarian cost of judicially enforced federalism is seen to be very low and often nonexistent. This is so for three interrelated reasons.

The first is that most of the advantages of decentralized federalism over centralized control of the federal government have to do with broad structural and ideological theories of intergovernmental

civil rights issues); Peter M. Shane, *Federalism's "Old Deal": What's Right and What's Wrong With Conservative Judicial Activism*, 45 VILL. L. REV. 201, 223-25 (2000) (arguing that judicial enforcement of federalism constitutes "usurpation of the legislative role").

²⁴⁷ The classic arguments against judicial enforcement of federalism are those of Jesse Choper and Herbert Wechsler. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS ch. 4 (1980); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Herbert J. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the Federal Government*, 54 COLUM. L. REV. 543 (1954). For more recent efforts to defend the Choper-Wechsler position, see, e.g., Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Kramer, *Political Safeguards*; and Shane, *supra* note 243. For the most thorough recent attack on the Choper-Wechsler thesis, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); see also Saikrishna Prakash & John Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001). For my own criticisms of Choper-Wechsler, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 494-97 (2002).

relations.²⁴⁸ The most important such advantages, interstate competition for people and goods²⁴⁹ and state responsiveness to diverse local preferences,²⁵⁰ depend on interrelationships between a wide range of policy areas rather than on a small number of discrete, easy to grasp policy decisions.

Unfortunately, research shows that political ignorance is at its highest – or, rather at its lowest depths- in dealing with broad ideological issues and complex interrelationships between policies.²⁵¹ For decades, large majorities of survey respondents have expressed hostility to what they perceive as excessive concentration of power in the federal government, but have lacked the knowledge to link this general perception to specific policy issues, on which majorities almost always favor expanding the federal role.²⁵² Since most citizens do not understand even basic aspects of liberal and conservative ideology,²⁵³ it is unlikely that any substantial number understand the more complex arguments surrounding issues of federalism and decentralization. Because political ignorance prevents voters from understanding the arguments for decentralized federalism – as well as those against it – it is unlikely that legislative policy on federalism reflects informed majoritarian preferences to any noteworthy degree.

This conclusion might not have held true in an era when most federalism issues arose from a single, highly prominent policy dispute such as slavery. But it is surely the case today, when federalism questions cut across a wide range of issues, with no one predominating. And even in those earlier, atypical periods when one issue dominated state-federal relations, the prominence of the issue might have obscured broader federalism questions as much as highlighted them. During the antebellum period, for instance, southern political leaders routinely took an anti-centralization position when such a stance favored slavery and a pro-centralization view when the reverse was true, as in their uncompromising

²⁴⁸ For a useful brief summary of the main advantages claimed for federalism, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493-1500 (1987) (book review).

²⁴⁹ For a summary of the benefits of interstate competition, see THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS ch. 1 (1990); see also Somin, *supra* note 247 at 468-69.

²⁵⁰ The classic work on this point is Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 65 J. POL. ECON. 41 (1956); see also discussion in Somin, *supra* note 247 at 464-65 (briefly summarizing the diversity argument).

²⁵¹ See discussion in Part III; see also CAMPBELL, ET AL., *supra* note 50; NEUMANN, *supra* note 63; Converse, *supra* note 63; Jennings, *supra* note 74; Somin, *supra* note 11 at 417-18.

²⁵² For the most thorough survey, see LINDA BENNETT & STEPHEN BENNETT, *LIVING WITH LEVIATHAN: AMERICANS COMING TO TERMS WITH BIG GOVERNMENT* (1990).

²⁵³ See nn. 75-76 and accompanying text.

insistence on enforcement of the federal Fugitive Slave Law.²⁵⁴ By contrast, northern state governments seeking to protect the rights of fugitive slaves insisted on a narrow construction of federal power.²⁵⁵ Understandably, the overriding importance of the specific issue of slavery prevented consistency on the broader but less immediately significant question of federalism.

The second critical link between judicial review of federalism and political ignorance is the fact that voters seeking to use the political process to promote decentralization must coordinate across a wide range of policies in wholly disparate policy areas. Federal authority impinges on state authority in an almost infinite variety of ways.²⁵⁶ To take just one example, federal grants to state government account for almost thirty percent of all state revenue, and include funds earmarked for a tremendous variety of different programs.²⁵⁷ Just keeping track of these grants, their attached conditions,²⁵⁸ and their impact on state autonomy, interstate competition, and responsiveness to diverse preferences is itself a full-time job for voters.²⁵⁹ And this does not even consider the many other issues involved in the Supreme Court's federalism jurisprudence, such as federal "commandeering" of state governments²⁶⁰ and limits on federal power under the Commerce Clause,²⁶¹ to name just two of the most controversial.

In order to impose majoritarian control over federalism policy, voters would have to keep track of and understand the connections between a vast range of policies. Given the present and likely future state of political knowledge, it does not seem reasonable to suppose that they will actually do so.

Finally, there is an even more basic reason why countermajoritarian theory is not a compelling argument against judicial review of federalism questions. As Steven Calabresi puts it, judicial review of

²⁵⁴ See Robert Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and Freedom*, 45 U. KAN. L. REV. 1015, 1025-40 (1997) (describing this aspect of the Southern position on the Fugitive Slave Clause).

²⁵⁵ *Id.* at 1034-40; see also Somin, *supra* note 247 at 467 n.33 (citing sources discussing the northern position on fugitive slave law).

²⁵⁶ See discussion of the vast scope of the modern state in Section IV.C.

²⁵⁷ Somin, *supra* note 247 at 461-62.

²⁵⁸ Virtually all federal grants to state governments have had attached conditions since the abolition of the General Revenue Sharing program in 1986. *Id.* at 462.

²⁵⁹ For detailed discussion of the federalism issues raised by federal grants to state governments, see generally *id.*; see also Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001) (addressing related issues).

²⁶⁰ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

²⁶¹ See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

federalism involves not a rejection of majoritarianism per se but “choosing which majority should govern on which issue.”²⁶² If federal power is blocked, then the decision will be made by state-level majorities and vice versa. Almost by definition, it is impossible to have majoritarian control over the question of who counts as part of the relevant group that gets to vote. The question of who gets to participate in democracy cannot itself be decided democratically because the institution of any majority vote procedure requires prior resolution of this problem.²⁶³ To the extent that judicial review of federalism is limited to deciding the question of which majority controls, it cannot be countermajoritarian, since that question is by definition one that cannot be decided in a majoritarian fashion. To be sure, this argument does not apply to all judicial review of federalism. For example, it may be that some policies, if they are to function at all, can only be adopted at a national level because a single holdout state could otherwise block their implementation.²⁶⁴ Judicial invalidation of federal policy in such cases would preclude most state-level variation as well. However, there is no reason to believe that this state of affairs holds true for the vast majority of public policy issues.

The choice of majorities point is not, of course, directly related to political ignorance. It is, however, tangentially connected because the prior decision on which majorities control which issues also determines what issues a given set of voters need to be informed on. If the Supreme Court’s federalism jurisprudence can provide a clear dividing line between federal and national authority – something that it is of course far from doing at present – it could limit the knowledge burden on voters by allowing them to ignore issues left to the discretion of neighboring state governments.²⁶⁵

B. The Informational Benefits of Voting With Your Feet: How Judicially Enforced Federalism Can Reinforce Majority Rule.²⁶⁶

²⁶² Calabresi, *supra* note 6 at 1382-83; *cf.* Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 HARV. J.L. & PUB. POL’Y 3, 6-8 (1998) (making similar argument in the separation of powers context).

²⁶³ See Robert A. DAHL, *DEMOCRACY AND ITS CRITICS* 119-22 (1989).

²⁶⁴ See, e.g., Richard A. Epstein, *Exit Rights Under Federalism*, LAW & CONTEMP. PROBS. 147, 154-59 (1992) (explaining how certain “network industries” must be regulated at a national level if at all, because even a single holdout state can prevent the industry from operating effectively).

²⁶⁵ See Section III.C (arguing that restricting the range of issues voters need follow strengthens majoritarian rule).

²⁶⁶ The argument of this Section is briefly prefigured in Somin, *supra* note 21 at 796. However, that earlier version did not link the issue to judicial review of federalism.

1. Voting With Your Feet as an Argument for Judicial Restraints on Federal Power.

a. “Foot Voting” Versus Ballot Box Voting as Incentives for Information Acquisition.

To this point, I have argued only that judicially enforced federalism does not undermine majoritarianism, at least not to a substantial degree. However, political ignorance points out an important way in which judicially imposed limits on federal power might actually strengthen majoritarian control of government. When information problems are taken into account, voting with your feet in a relatively decentralized federal system may lead to greater majoritarian control of government than ballot box voting in a more centralized system under conditions of widespread political ignorance.

As already noted, one of the main causes of political ignorance is the fact that it is “rational.”²⁶⁷ Because even an extremely well-informed voter has virtually no chance of actually influencing electoral outcomes, he or she has little incentive to become informed in the first place, at least if the only purpose of doing so is to cast a “correct” vote.²⁶⁸ By contrast, a person “voting with her feet” by choosing which state or locality to live in is in a wholly different situation from the ballot box voter. If a “foot voter” can acquire information about superior economic conditions, public policies or other advantages in another state, he or she can move to that state and take advantage of them even if all other citizens do nothing.

This creates a much stronger incentive for foot voters to acquire relevant information about conditions in different jurisdictions than for ballot box voters to acquire information about public policy. Since states and localities seek to attract new residents and businesses as sources of tax revenue, this gives state and local governments strong incentive to establish policies that will appeal to potential immigrants and convince current residents to stay.²⁶⁹ The power of the competitive pressure comes from governments’ constant need to attract additional revenue to finance expenditures that can pay off key

²⁶⁷ See discussion in Section III.E.

²⁶⁸ For more detailed discussion of rational voter ignorance, see *id.*; DOWNS, *supra* note 16 at ch. 13; Caplan, *supra* note 156; Somin, *supra* note 11 at 435-38.

²⁶⁹ See the more extensive discussions in DYE, *supra* note 247 at ch. 1; Somin, *supra* note 247 at 468-71.

interest groups and increase political leaders' reelection chances. Interstate and interlocality competition for residents facilitates the creation of public policies that advance the interests of the majority, even in the absence of informed ballot box voting. In this way, voting with your feet becomes a powerful and in many ways superior alternative to ballot box voting as a mechanism of majority rule.

To my knowledge, there has not yet been a study that precisely measures the informational advantages of voting with your feet over ballot box voting. Nevertheless, there is reason to believe that these advantages are quite large. Anecdotal evidence and ordinary life experience suggest that most citizens put far more effort into deciding where to live than into acquiring political information.

Perhaps more telling is historical evidence of the power of voting with your feet even under extremely adverse circumstances. In the Jim Crow-era South of the late 19th and early 20th centuries, African-American southerners, most of them poorly educated and many illiterate, were still able to learn enough information about the existence of relatively better conditions in other states to set off a massive migration.²⁷⁰ Southern black workers relied on information provided by relatives in other jurisdictions and by agents of businesses seeking to recruit African-American workers.²⁷¹ The resulting migration not only benefited the migrants themselves but also forced racist southern state government to “grant . . . African-Americans greater educational opportunities and greater protection in their property and person” in an effort to get them to stay and continue to provide labor for southern white-owned farms and businesses.²⁷² In a related dramatic example, interjurisdictional competition for the labor of migrating black coal miners led to successful lobbying by coal companies for a reduction in school segregation in early 1900s West Virginia.²⁷³ Obviously, the ability of southern blacks to vote with their feet did not come close to fully

²⁷⁰ See WILLIAM COHEN, *AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915* (1991); FLORETTE HENRI, *BLACK MIGRATION* (1975); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 *TEX. L. REV.* 781, 782-85 (1998).

²⁷¹ For a detailed account of these “emigrant agents” and their role in providing information to southern blacks, see Bernstein, *supra* note 270 at 782-83, 792-802.

²⁷² *Id.* at 784; see also Henri, *supra* note 270 at 75; ROBERT HIGGS, *COMPETITION AND COERCION: BLACKS IN THE AMERICAN ECONOMY 1865-1914* at 29-32, 59, 119-20, 152-53 (1977).

²⁷³ Price V. Fishback, *Can Competition Among Employers Reduce Governmental Discrimination? Coal Companies and Segregated Schools in West Virginia in the Early 1900s*, 32 *J.L. & ECON.* 324 (1989); see also Robert A. Margo,

mitigating the baneful effects of Jim Crow.²⁷⁴ It did, however, provide important informational benefits and political empowerment to a widely despised and poorly educated minority. Although exact comparisons are difficult, it seems likely that potential southern black migrants of the Jim Crow era were able to learn considerably more about relative conditions in different jurisdictions than most modern voters have learned about the basics of our political system.²⁷⁵ At the very least, large numbers of poor and ill-educated southern blacks learned enough to understand that relatively more favorable employment opportunities and public policies awaited them in other jurisdictions, a realization that contrasts with the inability of most modern citizens to acquire sufficient knowledge to engage in effective retrospective voting.²⁷⁶ Obviously, if voting with your feet could provide powerful informational advantages in the exceptionally disadvantageous conditions of the Jim Crow-era South, there is strong reason to expect that it is much more effective under modern conditions, where education levels are much higher, information costs are lower, and – arguably – no large group is so thoroughly disadvantaged as were poor southern blacks a century ago.

b. The Role of Judicial Review in Facilitating Foot Voting.

A substantial degree of interjurisdictional competition can, of course, exist even in the complete absence of judicial review of federalism. However, a system of judicial review that puts substantial constraints on federal government power could facilitate foot voting in several important ways. First, a federal government with unconstrained authority can be used by state governments to suppress competition among themselves by, in effect, forming cartels and using the federal government as an

Segregated Schools and the Mobility Hypothesis: A Model of Local Government Discrimination, 106 Q.J. ECON. 61 (1991) (providing more general analysis of the effects of black mobility on school segregation).

²⁷⁴ It should, however, be noted that its failure to do so was partly attributable to southern state governments partially successful efforts to reduce black mobility. See COHEN, *supra* note 270; Bernstein, *supra* note 270 at 810-27. Unfortunately, the Supreme Court upheld southern state laws passed to restrict the activities of emigration agents providing necessary information to potential black migrants. See *Williams v. Fears*, 179 U.S. 270 (1900) (upholding Georgia licensing fee on interstate emigration agents enacted to inhibit black emigration from the state); for a detailed discussion of *Williams*, see generally Bernstein, *supra* note 270.

²⁷⁵ Compare the analysis of modern political knowledge in Part III, *infra*, with Bernstein, *supra* note 270 at 802-25 and sources cited there (providing extensive evidence of information acquisition by African-Americans); HIGGS, *supra* note 271 at 74-75 (noting that knowledge of relative treatment of black workers in different localities spread quickly).

²⁷⁶ See discussion in Section II.A and Subsection III.C.1.

enforcer.²⁷⁷ For example, states seeking to establish a tax cartel could lobby for a federal law establishing minimum tax levels. States have, in fact, sought to use the federally enforced Multistate Tax Compact (MTC) “to achieve tax harmonization, while suppressing (locational) tax competition.”²⁷⁸ Alternatively, states seeking to avoid competition between alternatively regulatory regimes could obtain passage of legislation mandating a single uniform regime. For example, the congressionally approved Interstate Compact to Conserve Oil and Gas functioned for many years as an effective cartel measure to raise oil prices for the benefit of oil-producing states that were members of the compact.²⁷⁹ At its peak in post-World War II era, this cartel functioned as a kind of “domestic OPEC” working to restrain interstate competition in energy prices.²⁸⁰ Note that such competition-suppressing measures need not have the support of all state governments to be adopted, just that of enough to force the bill through Congress.²⁸¹ Once established, federal power can be used to prevent defections from the cartel.

A second means by which federal power undermines interstate competition is by diminishing the incentive for states to seek new revenue by attracting migrants and deterring emigration by current residents. Under today’s system of virtually unconstrained federal power to grant money to states,²⁸² states receive almost thirty percent of their total revenue from federal grants.²⁸³ The availability of this “free” federal money significantly eases fiscal pressures that would otherwise force states to compete for interstate migrants more vigorously.²⁸⁴

To this point, the Supreme Court has done little to prevent federal suppression of interjurisdictional competition, though it has historically played a much greater role in constraining *state*

²⁷⁷ GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* 182-83 (1980); Somin, *supra* note 247 at 470-71.

²⁷⁸ Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 *MO. L. REV.* 285, 335 (2003). The constitutionality of the MTC was upheld by the Supreme Court in *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978).

²⁷⁹ WELDON V. BARTON, *INTERSTATE COMPACTS IN THE POLITICAL PROCESS* 12-17 (1965); Greve, *supra* note at 328-32.

²⁸⁰ Greve, *supra* note 278.

²⁸¹ *Cf.* Baker & Young, *supra* note 247 at 117-29 (discussing how coalitions of states can use federal power as a means of “horizontal aggrandizement” at the expense of other states).

²⁸² *See* *South Dakota v. Dole*, 483 U.S. 203 (1987) (setting very high standards for judicial intervention to block conditional federal grants to states).

²⁸³ Somin, *supra* note 247 at 461.

²⁸⁴ For a more complete analysis, see *id.* at 469-70.

government efforts to prevent interstate movement and competition.²⁸⁵ As even vehement critics of the recent “federalism revival” concede, the Court has “confin[ed] its activities to the peripheries of congressional power.”²⁸⁶ However, as some hope and others fear, it is possible that the Court’s revival of federalism will become “much more radical and far ranging.”²⁸⁷ If so, the imposition of truly significant limits on federal power might well reinforce the power citizens wield over state and local governments by voting with their feet.

Such a development might occur in two ways. If the Court extends the limitations on federal regulatory power in *Morrison* and *Lopez*, it is possible that states will find it more difficult to use Congressional authority to restrain competition among themselves. Moreover, the mere fact that fewer aspects of social life will be subject to centralized federal control would open up a wider arena for interjurisdictional competition among states and localities.²⁸⁸

²⁸⁵ The Court has done so through its Dormant Commerce Clause, right to travel, and Thirteenth Amendment jurisprudence. The seminal Dormant Commerce Clause case is of course *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (striking down state law creating a monopoly over an interstate shipping route). For a general discussion of the role of Dormant Commerce Clause jurisprudence in limiting state efforts to suppress competition, see Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 248-70 (1999) (showing how dormant Commerce Clause suits brought by state and local governments are effective in undermining efforts by other states to restrict competition). The Supreme Court’s right to travel jurisprudence has also limited state efforts to restrict citizen mobility. See *Saenz v. Roe*, 526 U.S. 489 (1999) (striking down time-based restrictions on welfare payments to new residents that awarded them lower payments than those enjoyed by other “bona fide residents”); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (striking down state laws requiring one year of residency prior to receipt of any welfare payments). For a recent defense and analysis of these decisions, see Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States’ Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277. During the Jim Crow era, the Supreme Court played an important role in limiting state efforts to restrict African-American mobility by striking down “peonage” laws which prevented southern blacks from leaving white employers. See *United States v. Reynolds*, 235 U.S. 133 (1914) (upholding federal anti-peonage statute); *Bailey v. Alabama*, 219 U.S. 219 (1911) (striking down Alabama peonage law). For a detailed discussion of the peonage cases and their historical importance, see Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era, Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646 (1982). Schmidt describes the peonage decisions as “the most lasting of the White Court’s contributions to justice for black people.” *Id.* at 646.

²⁸⁶ Kramer, *Political Safeguards* at 293; see also, e.g., Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1057 (2001) (noting limited impact of *Lopez* and *Morrison*).

²⁸⁷ Balkin & Levinson, *supra* note 284 at 1057.

²⁸⁸ For an argument that this is one of the main objectives of the Rehnquist Court’s revival of judicially enforced federalism, see John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 508-22 (2002). However, McGinnis, like the Court’s liberal critics concedes that its movement towards limiting federal power has so far been extremely limited. *Id.* at 516-17.

Second, and more speculatively, it is possible that the Court will revisit the highly permissive doctrine of *South Dakota v. Dole*²⁸⁹ and begin to set limits on federal grants to state governments.²⁹⁰ As noted above, and as I have argued at much greater length elsewhere, judicial abolition or restriction of federal grants to state governments would be a major step towards reinvigorating interstate competition and thus a major aid to citizens' efforts to vote with their feet.²⁹¹

A final point in favor of judicial intervention to facilitate foot voting is that this is one area where the so-called "political safeguards of federalism" touted by many opponents of judicial review are unlikely to work.²⁹² To the extent that political safeguards rely on active efforts by voters to punish public officials for undermining federalism, the evidence presented here strongly suggests that most voters lack the necessary knowledge. To the extent that the argument relies on the political power of state governments, it actually undermines itself because state governments often use their power to restrict interstate mobility and competition rather than further it.²⁹³ As Justice Sandra Day O'Connor explained in her opinion for the Court in *New York v. United States*, state governments cannot always be relied on to protect federalism because "powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests."²⁹⁴ Properly understood, judicial review of federalism is meant to restrain the abuses of state governments as much as those of Congress.

2. Limitations of the Argument.

The case for the ability of judicial federalism to offset political ignorance is, I believe, a strong one. However, it is important to note its limitations. These limits do not invalidate the idea, but they do provide reason to avoid overselling it.

²⁸⁹ 483 U.S. 203 (1987)

²⁹⁰ See Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 102-103 (1998) (presenting evidence that a majority of the current justices may have doubts about *Dole*).

²⁹¹ Somin, *supra* note 247 at 468-71.

²⁹² For advocacy of the political safeguards argument, see works by Choper, Clark, Wechsler, and Kramer cited in note.

²⁹³ See nn. and accompanying text; see also Somin, *supra* note at 495-97 (arguing that state governments have used their political power to undermine interstate competition through the use of federal grants). There is a longstanding history of state government efforts to restrict interstate mobility. See works cited in note.

²⁹⁴ *New York v. United States*, 505 U.S. 144, 182 (1992).

The first limitation is that interjurisdictional competition and foot voting cannot completely substitute for political knowledge. There are several limitations to their ability to do so. As Charles Tiebout pointed out in the seminal article that began the debate over interjurisdictional competition, perfect competition between jurisdictions can only occur if citizens have complete information and moving between jurisdictions is costless.²⁹⁵ These constraints are far from debilitating, however, since extensive and effective competition can still occur so long as substantial numbers of firms and individuals at the margin are willing and able to move to jurisdictions with superior policies.²⁹⁶

A related difficulty is that some individuals are either relatively immobile themselves or own important immobile assets. Such people cannot effectively vote with their feet, and so are more likely to be victimized by adverse policies put in place by state and local governments.²⁹⁷ This is indeed an important limitation on the power of foot voting, but its significance should not be overemphasized. In modern American society, the cost of moving is sufficiently low that it is extremely widespread. Between 1999 and 2000, the most recent period for which Census Bureau statistics are available, some 15 percent of all Americans aged fifteen and over changed residences, including 3 percent who made interstate moves.²⁹⁸ Moreover, contrary to possible claims that mobility is less available to the poor, households with less than \$5000 annual income made interstate moves at a rate double the national average.²⁹⁹ Overall, about 32 percent of native-born Americans live in a state different from that in which they were born.³⁰⁰ Obviously, for every household that actually does make an interstate move, it is reasonable to assume that there were many others that could have done so had they seen a need.

²⁹⁵ Tiebout, *supra* note 250 at 418.

²⁹⁶ For a good explanation see DYE, *supra* note 247 at 16.

²⁹⁷ Epstein, *supra* note 261 at 154-59.

²⁹⁸ U.S. CENSUS BUREAU, DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002 at 30 tbl. 26 (2002).

²⁹⁹ *Id.*

³⁰⁰ Percentage calculated from figures U.S. Census Bureau, Census 2000 Supplementary Survey Summary Tables, tbl. QT-02 (2003). This data is available at the Census Bureau website: http://factfinder.census.gov/servlet/QTTable?ds_name=D&geo_id=D&qr_name=ACS_C2SS_EST_G00_QT02&lang=en (visited June 28, 2003).

While not all citizens can effectively vote with their feet, the proportion who can do so is quite high. Even the immobile minority can to some degree benefit from competition generated by the mobility of others to the extent that members of the immobile group have similar preferences in public services.

An additional complication is that foot voting is usually effective only for those citizens who pay taxes to state and local governments and thereby provide them with a fiscal incentive to try to attract them. However, as Michael McConnell points out, “since most people are taxpayers, [interstate competition] means that there is a powerful incentive for decentralized governments to make things better for most people.”³⁰¹ Moreover, states may be motivated to attract migrants who are not themselves taxpayers if doing so attracts others who are.³⁰² For example, improved public schools for children (who of course don’t pay taxes) may motivate in-migration by parents (who do). Some evidence even suggests that states have political incentives to raise welfare benefits in order to attract new welfare recipients.³⁰³ There is no doubt that foot voting cannot provide complete majoritarian control over state governments. However, foot voting can provide more such control than ordinary ballot box voting in a centralized system characterized by widespread political ignorance.

The final limitation on the foot voting argument is perhaps the most important: the argument does not by itself provide a justification for stringent judicial review of federalism. Such a justification would require taking adequate account of all the other considerations both in favor and against such review.³⁰⁴ This I have not even attempted to do in the present Article.³⁰⁵ What I *have* tried to show, however, is that voting with your feet provides an important point against the claim that judicial review of federalism is countermajoritarian. Instead, such review might actually reinforce popular control of government by providing a mechanism of constraint that is not subject to the same severe information problems as those

³⁰¹McConnell, *supra* note 247 at 1499-1500.

³⁰²I first noted this point in Somin, *supra* note 247 at 468.

³⁰³See Frank H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141 (1997) (presenting evidence that states may raise welfare spending in order to attract new migrants, possibly for the purpose of adding new voters to locally dominant political coalitions).

³⁰⁴For arguments against, see, e.g., CHOPER, *supra* note 247; Choper, *supra* note 247; Wechsler, *supra* note 247; Kramer, *supra* note. For arguments in favor, see e.g., Baker & Young, *supra* note 247; Prakash & Yoo, *supra* note 247; Somin, *supra* note 247.

³⁰⁵*But cf.* Somin, *supra* note 247 (arguing for judicial review of federalism in the area of federal grants to state governments).

that afflict ballot box voting. Although we might still conclude that judicial review of federalism is undesirable for any number of other reasons, we can no longer condemn it out of hand as countermajoritarian.

VI. REPRESENTATION-REINFORCEMENT, THE COUNTERMAJORITARIAN DIFFICULTY AND INTERGROUP DIFFERENCES IN POLITICAL KNOWLEDGE.

Parts IV and V of this Article have considered the implications of low aggregate levels of political knowledge for the countermajoritarian difficulty. In this Part, I consider the implications of vast intergroup differences in political knowledge, particularly those between men and women, and whites and blacks. I contend that these differences justify tighter judicial scrutiny of legislation discriminating against women and blacks than that imposed on legislation disadvantaging men and whites. Intergroup differences in political knowledge should be considered an important part of the reason why judicial intervention on behalf of some groups can be justified on “representation-reinforcement” grounds.³⁰⁶

A. *Carolene Products* and the Debate over Representation-Reinforcement.

Theorists of the countermajoritarian difficulty have long struggled with the apparent contradiction between the norm of judicial deference to majoritarian political processes and the felt need for judicial intervention on behalf of groups unjustly disadvantaged by those processes. In the famous “Footnote Four” of *United States v. Carolene Products*, the Supreme Court suggested that judicial intervention should be reserved for combatting “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which calls for a correspondingly more searching judicial inquiry.”³⁰⁷ Although taken up and extended in John Hart Ely’s famous work,³⁰⁸ the *Carolene Products* “discrete and insular minorities”

³⁰⁶ ELY, *supra* note 18 at ch. 4.

³⁰⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

³⁰⁸ ELY, *supra* note 18, at 75-80, chs. 5-6.

formulation has not proven to be a very effective means of distinguishing those minorities which deserve heightened judicial protection from those that do not.³⁰⁹

In and of itself, being “discrete and insular” actually strengthens a group’s position in the political process because small, distinct groups are easier to mobilize for political action than large, diffuse ones.³¹⁰ In addition, the “discrete and insular” formula fails to explain judicial solicitude for the interests of apparently disadvantaged groups that are either not insular (such as women),³¹¹ not discrete³¹² (homosexuals),³¹³ or neither. Although few scholars categorically reject Ely’s claim that some groups may deserve special “representation-reinforcing” protection from the judiciary because of the disadvantages they suffer in the political process, we still do not have a compelling theory that enables us to separate these groups from ordinary political “losers” who do not deserve any special judicial solicitude.

I do not propose any definitive resolution of the longstanding debate over *Carolene Products* and representation-reinforcement. I do, however, argue that large differences in political knowledge levels between groups justify representation-reinforcing judicial intervention for the benefit of the low-knowledge group, at least in cases where the low-knowledge group has historically been discriminated against and subjugated by the high-knowledge one. The two groups I focus on are African-Americans and women. In this Article, I suggest only that this intervention should take the form of tighter scrutiny of laws deliberately intended to discriminate against the low-knowledge groups, whether such intent is manifest on the face of the statute or not. I neither endorse nor condemn the possibility that even more aggressive forms of intervention might be justified by the existence of knowledge disparities. This possibility is an important subject for future research.

B. Assessing Intergroup Differences in Political Knowledge.

³⁰⁹ For a strong critique, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

³¹⁰ See *id.* at 724-31 (showing that discreteness and insularity are actually political “assets”); cf. Olson, *supra* note (showing that small groups have systematic political advantages over large ones).

³¹¹ See *Craig v. Boren*, 429 U.S. 190 (1976) (establishing heightened “intermediate” scrutiny of classifications discriminating on the basis of sex).

³¹² In the sense of easy to distinguish from others, rather than in the pejorative sense of lacking in discretion.

³¹³ See *Romer v. Evans*, 517 U.S. 620 (1996) (arguably increasing judicial scrutiny of classifications discriminating against homosexuals).

1. The Size and Impact of Group Differences.

There can be little doubt that large intergroup differences in political knowledge exist in the United States today. Table 6 presents the relative knowledge levels of men, women, whites, African-Americans, and Hispanics, as revealed in the 2000 National Election Studies data.³¹⁴ The data represent the average scores of respondents from each group on the thirty-one question political knowledge scale I extrapolated from the NES data.³¹⁵

³¹⁴ For a discussion of the 2000 NES data, see nn. 63-65 and accompanying text and Subsection III.B.1.

³¹⁵ The scale is described in more detail in Section III.A. For a list of the individual questions, see Table 1, *infra*.

Table 6
Political Knowledge Scores Divided by Gender and Race
2000 NES

Group (number of respondents)	Average Number of Correct Answers (31 point knowledge Scale)	% “Know-Nothing” Respondents ³¹⁶	% of Group Scoring in Top 5% of all Respondents (26.5 or more correct answers) ³¹⁷
Men (670)	16.7	17	10
Women (873)	12.7	31	2
Whites (1231)	15.0	23	6
White Males (540)	17.3	16	11
African-Americans (159)	11.5	39	1
Hispanics ³¹⁸ (68)	11.7	37	0

All percentages rounded to whole numbers

The male-female and black-white differences in political knowledge are extremely large. To give some idea of their magnitude, it is helpful to convert them into education equivalents. Thus, the four point average difference between men (average score of 16.7 correct) and women (12.7) is roughly equal to that between a high school dropout and a community or junior college graduate.³¹⁹ The 3.5 point gap

³¹⁶“Know-nothings” are defined as those respondents who scored no more correct answers than they would have been likely to achieve by random guessing. The definition is the same as that used in Section III. B. See nn. and accompanying text.

³¹⁷ In actuality, slightly more than 5% of respondents scored 26.5 correct answers or more. I used the 26.5 point cutoff for convenience and because the alternative available cutoffs would have been further from the 5% mark.

³¹⁸ The term “Hispanic” is used in preference to “Latino” because that is the term used by the NES itself in requesting respondents to self-identify themselves.

³¹⁹ Education equivalents are based on data for the education variable in Table 4. The education variable is extracted from variable 913 on the 2000 NES.

between whites (15.0) and blacks (11.5) is almost equally great. As already discussed,³²⁰ political knowledge is an essential prerequisite of effective voting and political participation. The data show that whites and men on the one hand, possess this prerequisite at a much higher rate than women and African-Americans on the other. My findings from the 2000 NES are consistent with earlier political science studies showing lower average political knowledge levels among women and blacks, though these studies relied on older data.³²¹

What previous studies have not generally considered is the fact that group inequalities in political knowledge go beyond differences in average knowledge levels.³²² Table 6 notes that 31 percent of women and 39 percent of African-Americans can be categorized as political information “know-nothings,” that is they possess little or no usable political knowledge at all.³²³ This compares with a 17 percent “know-nothing” rate among men and 23 percent among whites.³²⁴ Thus, women and African-Americans are almost twice as likely as whites and men respectively to suffer from a near-total absence of political knowledge. Since a total lack of political knowledge almost completely eliminates one’s ability to participate in the political process in an informed manner, this is a very substantial difference. A recent study finds that equal information levels between men and women might lead to a considerably different distribution of public opinion on numerous policy issues than that which currently exists, with women diverging from men more than they currently do on many issues.³²⁵ The high overrepresentation of women among those almost completely lacking in political knowledge may be a major part of the reason why.

³²⁰ See generally, discussion in Parts II and III; *see also* DELLI CARPINI & KEETER, *supra* note 11 at 255-75 (showing importance of voter knowledge to effective political participation); Somin, *supra* note 11 at 419-35 (arguing that political knowledge cannot be replaced with information shortcuts).

³²¹ See works cited in note 23; *See also* Michael X. Delli Carpini & Scott Keeter, *Gender and Political Knowledge*, in GENDER AND AMERICAN POLITICS: WOMEN, MEN, AND THE POLITICAL PROCESS 21 (Jyl Josephson & Sue Tolleson-Rinehart, eds. 2000) (showing higher political knowledge levels among men than women using data sets collected during the 1989-96 period).

³²² For a partial exception see DELLI CARPINI & KEETER, *supra* note 11 at 173 tbl. 4.10 (showing gender and race composition of top 20% and bottom 20% political knowledge groups). However, their table does not focus on “know-nothings” or on those few knowledgeable enough to be effective political activists.

³²³ See the discussion and definition of political “know-nothingism” in nn. 88-98 and accompanying text.

³²⁴ See Table 6.

³²⁵ Delli Carpini & Keeter, *supra* note 321 at 40-43.

Intergroup differences in knowledge are even more dramatic at the opposite end of the knowledge spectrum from that occupied by “know-nothings.” Table 6 shows that only 2 percent of women and 1 percent of African-Americans fall within the top 5 percent of all citizens on the political knowledge scale, compared with 10 percent of men and 6 percent of whites. The top 5 percent were those who scored 26.5 or more correct answers out of the 31 knowledge questions on the 2000 NES. This figure is significant because professional political activists and interest group leaders are usually drawn from society’s knowledge elite. Recall that the 31 questions are almost entirely made up of very basic items of political knowledge.³²⁶ Effective political activists are likely to require and possess enough political knowledge to answer the vast majority of these questions correctly.³²⁷ Thus, the very low representation of women and African-Americans within the highest knowledge group is evidence of a substantial disadvantage in the political process.³²⁸

Obviously, women and blacks need not rely solely on leaders and activists from their respective groups to advance their interests in the political system.³²⁹ However, a relative paucity of in-group leaders may make it difficult for members of the group to pursue interests that diverge from those of other groups.³³⁰ Moreover, even if it is not necessary for women and blacks to have strong descriptive representation at the highest levels of the political hierarchy,³³¹ the fact that they have a much smaller

³²⁶ See nn. 84-87 and accompanying text.

³²⁷ Cf. NEUMANN, *supra* note 63 (showing that political elites are mostly drawn from the highest-knowledge subset of the population); SIDNEY VERBA, ET AL., *VOICE AND EQUALITY* chs. 9-16 (1995) (showing that political activists are drawn primarily from a small, high-knowledge elite); Jane Junn, *Participation and Political Knowledge*, in *POLITICAL PARTICIPATION AND AMERICAN DEMOCRACY* 193, 203-209 (William Crotty ed. 1991) (providing evidence that political knowledge is a particularly strong predictor of virtually all forms of political participation after controlling for other relevant variables).

³²⁸ Although the 5 percent cutoff is arbitrary, changing it to 6 or 7 or 8 percent thus not significantly alter the results. Changing the cutoff to a figure below 5 percent reduces relative black and female representation still further. More detailed breakdowns of the data are available from the author.

³²⁹ See, e.g., CAROL SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN-AMERICANS IN CONGRESS* (1995) (presenting evidence that white members of Congress representing districts with large African-American populations can effectively represent the interests of black constituents)

³³⁰ Cf. Jane J. Mansbridge, *Should Blacks Represent Blacks and Women Represent Women?* 61 *J. Pol.* 628 (1999) (arguing that members of a group often have a comparative advantage in represent that group).

³³¹ See, e.g., SWAIN, *supra* note 329 (arguing that blacks do not need to have significant numbers of black members of Congress in order for their interests to be represented effectively there).

pool of lower-level political activists to promote their causes make it likely that their needs and interests will not be communicated as often or as effectively to political leaders as those of whites and males are.³³²

There is an unfortunate interaction between the small size of the available pool of black and female political leaders and the low political knowledge levels of their in-group constituents. The former arguably reduces the amount of competition for group leadership, while the latter reduces the ability of followers to effectively monitor leaders' performance. As a result, the ability of low-knowledge groups to choose a leadership that represents them effectively may be lower than that of high-knowledge groups. This dynamic may partially explain the recent upsurge of claims that African-American political leaders are not representing their constituents effectively, and often sacrifice their interests to the leaders' own.³³³ Intergroup differences in political knowledge have not previously received much emphasis in the political science literature as an explanation for differences in those groups' political efficacy. However, there is every reason to reconsider this omission.

The intergroup knowledge differences presented in Table 6 are of course raw differences that do not control for intergroup differences on other variables that effect political knowledge levels, including education, income, and interest in politics.³³⁴ When fifteen other relevant variables are controlled for, the male-female difference in political knowledge scores on the 31 point scale is reduced to about 2.3 correct answers and the white-black difference to about 1.5.³³⁵ These differences are still very large and still statistically significant. The difference of 2.3 points is similar to that between a high school graduate and a middle school dropout; the 1.5 point difference between whites and blacks is similar to that between a high school graduate and a high school dropout.³³⁶ It is possible, however, that these differences would be smaller if the education variable in the NES could control for quality of education as well as quantity.

³³² See generally VERBA, ET AL., *supra* note 327, at ch. 16 (presenting evidence that groups with few political activists cannot convey their interests as effectively to political leaders).

³³³ See, e.g., SWAIN, *supra* note 329 at 193-225 (arguing that African-American politicians have connived with Republicans to create majority-black districts that maximize their electoral chances, but simultaneously reduce the chances of enacting policies that actually benefit African-Americans).

³³⁴ See Table 5.

³³⁵ Differences calculated from data in Table 4, *infra*.

³³⁶ Differences calculated using the coefficient for education from Table 4.

In any event, from a representation-reinforcement standpoint, the raw differences between groups are more significant than the smaller (though still large) differences that remain after controlling for other variables. Even if race or gender is not the only “cause”³³⁷ of the difference between the two groups’ raw scores, the fact that the resulting differences break down along race and gender lines still impact the two groups’ relative political efficacy just as much. To take an extreme hypothetical example, let us assume that the black-white knowledge gap is completely attributable to a correlation between race and some variable X that is the “true” cause of the gap. Let us further assume that the correlation between race and X is itself the result of purely random chance. The resulting racial political knowledge gap would have just as much of an impact on the two groups’ relative political power as would be the case if race itself were the cause.³³⁸

In reality, of course, there is no reason to believe that race and gender are true “causes” of intergroup differences in political knowledge in the sense that they directly affect how much any given individual knows. They are, however, historically correlated with social practices that *do* lead to large intergroup differences in knowledge.

2. A Closer Look at Specific Differences.

Although the general magnitude and direction of intergroup differences in political knowledge is evident from the data presented in Table 6, it is worth taking a closer and more specific look at male-female and black-white differences. I also include a brief discussion of Hispanic political knowledge levels, a subject that cannot be fully addressed because of a paucity of data.

a. Male-Female Differences.

Table 7 presents a more detailed breakdown of male-female differences in political knowledge in the 2000 NES, giving the percentage of correct answers among both men and women to all thirty-one of

³³⁷ Obviously, it is important to remember that race and gender probably have a causal relationship to some of our control variables, including education and income differences.

³³⁸ For the sake of clarity, it should be noted that I do not intend to suggest that either the male-female or black-white knowledge gaps are caused by genetic differences between the groups in question. There is no evidence in the political knowledge literature to support such a theory.

the political knowledge items in the survey. The most striking result is the extreme consistency of the knowledge gap between men and women. Men had a higher rate of correct answers on all thirty-one items, and on thirty of the thirty-one the difference between the two is statistically significant. Even on the two questions that might be considered of special interest to women: the identification of the position held by Attorney Janet Reno, the most prominent female member of the Clinton administration and the correct relative placement of George W. Bush's and Al Gore's positions on abortion, more men than women were able to provide the correct answer and the differences are statistically significant.

This across-the-board-knowledge advantage for men is consistent with previous studies, although some of the latter find that male-female knowledge differences are smaller on questions directly relevant to gender issues.³³⁹ The only exception seems to be that women may know more than men do about some aspects of local government, particular public schools.³⁴⁰ Most previous studies, however, relied on older data with fewer knowledge questions.³⁴¹

In addition to the depth and breadth of the male advantage the most interesting finding of the 2000 NES evidence is that the male-female knowledge gap does not seem to be shrinking over time. The knowledge gap observed in the 2000 NES is equivalent to that created by some three to four years of formal education.³⁴² This is very similar to the 2.75 year gap observed in an earlier study using 1989 data.³⁴³ Although the knowledge items in the two surveys are somewhat different, the similarity between the male-female gaps in them suggests that the difference is at the very least not shrinking

³³⁹ See Delli Carpini & Keeter, *supra* note 321 at 23-35 (finding across the board differences but also noting smaller size of differences on "gender-relevant" knowledge items); cf. Verba, et al., *supra* note 23 at 1054 (finding that men outscored women on nine of ten knowledge items in their study). The relatively small 49-44 gap in favor of men on the abortion item provides support for the claim of a narrower knowledge gap on gender issue.

³⁴⁰ DELLI CARPINI & KEETER, *supra* note 11 at 207-208; Delli Carpini & Keeter, *supra* note 321 at 36-38; Verba, et al., *supra* note 23 at 1054.

³⁴¹ See, e.g., Verba, et al., *supra* note 23 (relying on 1989 survey with ten knowledge items); *but see* Delli Carpini & Keeter, *supra* note 321 (relying on 16 knowledge items from 1996 NES and 51 questions from a 1989 survey they commissioned themselves).

³⁴² See nn. 319, 336 and accompanying text.

³⁴³ Verba, et al., *supra* note 23 at 1054.

Table 7
Political Knowledge Items by Gender, 2000 NES

Item	% Correct Answers	
	Men	Women
Identify Texas as home state of George W. Bush***	94	86
Know Bill Clinton is moderate or liberal*	83	79
Al Gore favors higher level of government spending on services than George W. Bush***	80	68
Democratic vice presidential candidate Joe Lieberman is Jewish***	74	66
Identify Tennessee as home state of Al Gore	76	61
Federal budget deficit decreased, 1992-2000***	63	54
Gore more liberal than Bush***	62	53
Democrats favor higher level of government spending on services than Republicans***	64	52
Identify position held by Attorney General Janet Reno***	67	47
Republicans controlled House of Representatives before election***	66	46
Gore more supportive of gun control than Bush***	63	43
Republicans controlled Senate before election***	60	39
Democrats more supportive of government guarantee of jobs/standard of living than Republicans***	58	42
Know George W. Bush is conservative***	51	44
Gore more supportive of abortion rights than Bush*	49	44
Gore more supportive of government guarantee of jobs/standard of living than Bush***	54	39
Democrats favor higher level of government aid to blacks than Republicans***	55	38
Gore more supportive of environmental regulation than Bush***	57	35
Bush more likely to favor jobs over environment than Gore***	51	32
Know presidential candidate Pat Buchanan is conservative***	51	32
Gore favors higher level of government aid to blacks than Bush***	48	33
Know Al Gore is liberal***	42	35
Know federal spending on the poor increased, 1992-2000	37 (37.3)	37 (37.0)
Know crime decreased, 1992-2000***	45	30
Identify position held by British Prime Minister Tony Blair***	41	29
Identify Wyoming as home state of Republican vice-presidential candidate Dick Cheney***	25	14
Correctly name at least one candidate for House of Representatives in respondent's district***	20	12
Identify position held by Supreme Court Chief Justice William Rehnquist***	18	5
Identify position held by Senate Majority Leader Trent Lott***	14	5
Correctly name second candidate for House of Representatives in district***	7	3

All percentages rounded to whole numbers.

*difference statistically significant at .05 level; ** significant at .01 level; ***significant at .001 level (Pearson chi-square test)

and may even have grown slightly.³⁴⁴ In sum, the political knowledge gap between men and women is large, applicable to nearly all aspects of political knowledge, and does not seem to be declining over time.

b. Black-White Differences.

The data on black-white differences in political knowledge is similar to that on male-female differences in the sense that there is a large overall gap, but is considerably different when broken down by specific questions. The average 3.5 question difference between whites and blacks on the 2000 NES is similar in magnitude to the 4.0 point difference between men and women. However, as Table 8 shows, blacks actually outscored whites on five of thirty-one information items, although only on one question, knowing that federal spending on the poor increased between 1992 and 2000, was the difference statistically significant. On three other questions, the white advantage was small enough to be statistically insignificant.³⁴⁵ These eight items are noteworthy because all relate to issues that are of special interest to African-Americans. Two of the eight directly address black interests, asking for the relative positions of the parties and presidential candidates on government assistance to blacks. Four others relate to relative support for government spending on social services and government guarantees of jobs and standards of living, issues of special concern to African-Americans because of their disproportionately high poverty rate. The same point applies to the item regarding the increases in federal spending on the poor. Finally, the item asking respondents whether crime had decreased between 1992 and 2000 is of obvious special interest to blacks because of their disproportionately high victimization by crime.³⁴⁶

Given African-Americans' lower levels of education, income, and interest in politics as compared to whites, blacks are actually much *more* likely than whites to know the correct answers to these eight questions when other variables are controlled for. On a knowledge scale composed of these items alone,

³⁴⁴ *But cf.* Delli Carpini & Keeter, *supra* note 321 at 27-29 (showing that male-female knowledge differences on five items declined modestly between 1940s and 1989, while increasing on three others).

³⁴⁵ The eight items on which blacks outscored whites or achieved a statistical tie are highlighted in bold in Table 8.

³⁴⁶ *See* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* ch. 2 (1997).

Table 8
Political Knowledge Items by Race, 2000 NES

Item	% Correct Answers	
	Whites	African-Americans
Identify Texas as home state of George W. Bush***	91	78
Know Bill Clinton is moderate or liberal***	83	64
Al Gore favors higher level of government spending on services than George W. Bush	73 (73.0)	73 (73.1)
Democratic vice presidential candidate Joe Lieberman is Jewish***	75	41
Identify Tennessee as home state of Al Gore***	71	48
Federal budget deficit decreased, 1992-2000***	61	46
Gore more liberal than Bush***	60	40
Democrats favor higher level of government spending on services than Republicans	58	60
Identify position held by Attorney General Janet Reno***	59	34
Republicans controlled House of Representatives before election***	57	42
Gore more supportive of gun control than Bush***	54	40
Republicans controlled Senate before election***	52	35
Democrats more supportive of government guarantee of jobs/standard of living than Republicans	50	48
Know George W. Bush is conservative***	49	34
Gore more supportive of abortion rights than Bush***	50	31
Gore more supportive of government guarantee of jobs/standard of living than Bush	46	45
Democrats favor higher level of government aid to blacks than Republicans	45	50
Gore more supportive of environmental regulation than Bush***	47	29
Bush more likely to favor jobs over environment than Gore***	44	23
Know presidential candidate Pat Buchanan is conservative***	44	27
Gore favors higher level of government aid to blacks than Bush	40	43
Know Al Gore is liberal***	41	24
Know federal spending on the poor increased, 1992-2000*	36	45
Know crime decreased, 1992-2000	36	34
Identify position held by British Prime Minister Tony Blair***	39	11
Identify Connecticut as home state of Democratic vice presidential candidate Joe Lieberman***	33	19
Identify Wyoming as home state of Republican vice-presidential candidate Dick Cheney***	20	10
Correctly name one candidate for House of Representatives in respondent's district***	17	6
Identify position held by Supreme Court Chief Justice William Rehnquist**	11	5
Identify position held by Senate Majority Leader Trent Lott**	10	3
Correctly name second candidate for House of Representatives in district*	5	2

*difference statistically significant at .05 level; ** significant at .01 level; ***significant at .001 level (Pearson chi-square test)

black respondents on average got 0.6 more correct answers than whites.³⁴⁷ This difference was equivalent to that between a high school graduate and a respondent who had dropped out in eighth grade or earlier.³⁴⁸

African-Americans may be an exception to the well-established research finding that “knowledge about national politics is a relatively undifferentiated and unidimensional phenomenon.”³⁴⁹ Clearly, blacks seem to know more about those knowledge items that seem most relevant to their specific interests than about other matters.

The significance of this knowledge specialization should not be overestimated, however. Many of the issues on which African-American political knowledge fell short of that of whites are also specially relevant to blacks, just in less obvious ways. For example, blacks are differentially impacted by public policy on pollution and abortion, yet their knowledge scores on these items fell far short of those of white respondents.³⁵⁰ This suggests that blacks may not be attuned to public policy issues that disproportionately impact them if the nature of the disproportionate impact is indirect and therefore harder to identify without a strong prior base of political knowledge. Moreover, many issues on the survey, while not perhaps of special concern to blacks, have at least as much impact on them as on other citizens. For example, many fewer blacks than whites achieved correct answers on knowledge items related to gun control (54 percent versus 40 percent) and the budget deficit (61 versus 46).³⁵¹ To the extent that blacks have relatively less knowledge of these issues, their ability to impact them will be less than that of whites and others.

Finally, even on those issues on which African-Americans have as much or more knowledge than whites do, they may find it difficult to exploit this advantage because issue-specific knowledge is hard to

³⁴⁷ OLS regression was used. The control variables were the same as those used in Table 4, *infra*.

³⁴⁸ Difference calculated from regression coefficient for education. Complete results from this regression are available from the author.

³⁴⁹ Delli Carpini & Keeter, *supra* note 321 at 47 n.5; *see also id.* (citing studies supporting this conclusion).

³⁵⁰ See environment and abortion knowledge items in Table 8.

³⁵¹ See Table 8.

apply without having basic knowledge of the broader political system and its functioning.³⁵² Knowledge of a few specific issues is not an adequate substitute for general political knowledge.

c. A Brief Note on Hispanic Political Knowledge.

The subject of Hispanic political knowledge has, as far as I can tell, been completely ignored in the literature on political information. Nonetheless, this should be an important focus of research as the political significance of the Hispanic vote continues to increase, and Hispanics replace African-Americans as the nation's largest minority group.³⁵³ The data from the 2000 NES show that self-identified Hispanic respondents have knowledge levels similar to those of African Americans, scoring an average of 11.7 correct answers out of 31 knowledge items, compared to 11.5 for blacks and 15.0 for whites.³⁵⁴ While this result suggests the existence of a large and troubling knowledge deficit, it should be interpreted with caution. The figure is based on data from only sixty-eight Hispanic respondents.³⁵⁵ Moreover, the NES data does not enable us to separate out the impact of Hispanic status from that of recent immigrant status, a serious problem given that a high proportion of Hispanics also fall within the latter category.³⁵⁶ All that can be said here is that there is some evidence of a large political knowledge deficit among Hispanics and that the subject deserves greater attention from both social scientists and legal scholars.

Overall, there can be little doubt that intergroup differences in political knowledge impose large disadvantages on African-Americans and women in the political process. Whether and to what extent these differences may justify judicial intervention is the next point to consider.

C. Implications for the Countermajoritarian Difficulty and the Role of Judicial Review.

1. Heightened Scrutiny for Laws Intended to Disadvantage Women and

³⁵² See discussion of this point in Somin, *supra* note 11 at 428-29.

³⁵³ See D'Vera Cohn, *Hispanics Are Nation's Largest Minority: Census Shows Hispanics Eclipse African Americans*, WASH. POST, June 18, 2003 at A1.

³⁵⁴ See Table 6.

³⁵⁵ The low number of Hispanic respondents on a nationally representative survey (68 Hispanics compared with blacks even though the two groups are of roughly equal size) may be due to the fact that race and ethnicity variables on the survey were based on self-identification. Many Hispanics self-identify as "white" on surveys. See PETER H. SCHUCK, *DIVERSITY IN AMERICA* 144-45 (2003). Moreover, one third of Hispanics are under the age of 18, which would have excluded them from the NES survey. The NES only covers only adults. See Cohn, *supra* note 353.

³⁵⁶ See *id.* (noting that sixty percent of Hispanics were born outside the United States).

African-Americans.

The existence of large political knowledge gaps between whites and blacks and men and women provides justification for heightened judicial scrutiny of legislation intended to disadvantage the low-knowledge groups. Obviously, there already exists a large literature providing an assortment of justifications for heightened judicial scrutiny of legislation disadvantaging women and blacks, as compared to legislation intended to benefit these groups.³⁵⁷ I do not here attempt to evaluate the arguments presented in this literature. I do, however, add another potential justification for such heightened scrutiny: the fact that women and blacks are disadvantaged in the political process by disproportionately low levels of political knowledge. The importance of this factor has been ignored even by those scholars who have criticized traditional countermajoritarian theory on the grounds that it neglects

³⁵⁷ See, e.g., *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 242 (1995) (Stevens, J., dissenting) (arguing that courts should distinguish “between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority” and that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 535 (1989) (Marshall, J., dissenting) (arguing that “race-conscious classifications designed to further remedial goals” should receive lower scrutiny than those intended to perpetuate subordination of blacks); ELY, *supra* note 18 at chs. 5-6 (arguing that legislation discriminating against women and blacks deserves heightened scrutiny); CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 40-45 (1987) (arguing that classifications intended to benefit women and racial minorities should be permitted by the judiciary); Jack Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313 (1997) (same); Paul R. Dimond, *The Anti-Caste Principle--Toward a Constitutional Standard for Review of Race Cases*, 30 *WAYNE L. REV.* 1, 3 (1983) (arguing for heightened judicial scrutiny of governmental actions that perpetuate subjugation of traditionally oppressed groups); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107 (1976) (same); Christine Littleton, *Reconstructing Sexual Equality*, 75 *CAL. L. REV.* 1279 (1986) (arguing that courts should give heightened scrutiny to legislation disadvantaging women in order to promote gender equality); Jed Rubinfeld, *Affirmative Action*, 107 *YALE L.J.* 427 (1997) (arguing that affirmative action programs should receive more favorable judicial scrutiny than programs intended to disadvantage minorities); Cass R. Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410, 2442-55 (1994) (arguing that constitutional law should follow an “anticaste principle” under which classifications intended to benefit traditionally subordinated groups should receive lower scrutiny than those intended to harm them); Richard Wasserstrom, *Racism, Sexism, and Preferential Treatment*, 24 *U.C.L.A. L. REV.* 581 (1977) (arguing that racial and gender classifications that benefit women and disadvantaged racial groups should be given more lenient judicial scrutiny than those intended to perpetuate their subordination). While most of the above-cited works specifically address the debate over affirmative action, the arguments they make apply more generally to legislation intended to disadvantage blacks or women as opposed to white males.

the special concerns of women and African-American-Americans.³⁵⁸ It has also been ignored by those conservative critics of heightened scrutiny who have denounced it on countermajoritarian grounds.³⁵⁹

In *Democracy and Distrust*, John Hart Ely, noted that viewing women as a disadvantaged group in the political process is problematic in view of the fact that “women have about half the votes, apparently more.”³⁶⁰ Although he ultimately concludes that “there remains something that seems right in the claim that women have been operating at an unfair disadvantage in the political process,” he concedes that “it’s tricky pinning down just what gives rise to that intuition.”³⁶¹

Political knowledge provides an important part of the grounding for Ely’s intuition. If women voters had perfect information about legislation and the political process, they could easily use their majority status to punish elected officials who sought to adopt discriminatory policies or even ones that merely disadvantaged women unintentionally. This remains true even if groups opposed to women’s interests had superior financial and other resources. As long as women were sufficiently well-informed to cast their votes against political leaders who sought to undermine their interests and to punish office-holders who reneged on promises to protect women’s interests, the resource advantages of opponents, such as higher campaign spending, would be irrelevant.³⁶² Obviously, even relatively well-informed voters might disagree among themselves as to whether a given policy really were harmful to women as a class, but these are the sorts of purely policy disagreements that few would argue should be left to judicial discretion. However, if the level of political knowledge among women is low, and considerably lower than that of men, the optimistic scenario of the perfect information world no longer hold true. Legislators might successfully adopt discriminatory legislation, especially if the discrimination is not blatantly obvious, simply because most women voters (and many male voters) do not have sufficient political

³⁵⁸ See, e.g., Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997) (arguing that traditional countermajoritarian theory should be modified to reflect feminist concerns).

³⁵⁹ See, e.g., BERGER, *supra* note 7; Lino Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB POL’Y 165, 175-76 (2000) (criticizing decisions invalidating sex discrimination and requiring busing for integrated schooling for undermining majority rule).

³⁶⁰ ELY, *supra* note 18 at 164.

³⁶¹ *Id.*

³⁶² See Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 900-905 (1998) (showing that disparities in campaign resources matter only with relatively uninformed voters).

information to understand what has happened. Moreover, the knowledge advantage of men over women might enable political leaders to appeal to special interests of men antithetical to those of women, confident that many of the latter will fail to realize what is happening.

A similar point applies to the situation of African-Americans. Legislation with a discriminatory impact on this group might not be effectively opposed by it if most group members do not know about it, and this is especially likely if the discrimination is relatively subtle in nature. Many scholars have argued that, despite major declines in racism in recent years, some white political leaders are able to appeal to racist sentiments among white voters by resorting to racial “code words” that tap anti-black sentiment without engaging in openly racist statements.³⁶³ We should be cautious about attributing the policy stances of voters to racism, especially in cases where those positions are defensible on other, more legitimate grounds.³⁶⁴ But to the extent that such hidden racial appeals do work, they rely on a political knowledge deficit among African-Americans. Politicians who resort to such tactics implicitly assume that the white voters they seek to appeal to will understand what they “really” mean, while most black voters will not and therefore will not successfully mobilize to defeat them. This assumption, in turn, relies on the existence of a political knowledge gap between the two groups. Unfortunately, as we have seen, such a large gap does in fact exist.

Obviously, one could argue that the political disadvantages created by knowledge deficits among African-Americans and women are “their own fault” and therefore are not deserving of remedial judicial scrutiny. This position ignores the fact that political knowledge acquisition is a collective action problem.³⁶⁵ There is no incentive for any individual woman or African-American to acquire political knowledge solely for the purpose of eliminating her group’s knowledge disadvantage because any one vote is almost completely insignificant. Moreover, it is likely that at least some substantial part of the

³⁶³ See, e.g., TALI MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* (2001); THOMAS BYRNE EDSALL & MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS* (1991).

³⁶⁴ See, e.g., PAUL SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993) (criticizing research attributing voter opposition to welfare and affirmative action to latent racism); PAUL SNIDERMAN & EDWARD CARMINES, *REACHING BEYOND RACE* (1997) (same).

³⁶⁵ See nn. 176-82 and accompanying text.

knowledge deficit among blacks and women is a residual effect of their longtime systematic exclusion from politics.³⁶⁶ In the case of African-Americans, past oppression also lowers their political knowledge levels by diminishing their educational attainment levels and incomes, two other factors closely associated with political knowledge.³⁶⁷

The fact that women and African-Americans are two groups that have been long-time victims of discrimination and exclusion also suggest that their political knowledge deficits present a stronger case for judicial scrutiny than those of other possible low-knowledge groups. If, for example, we were to find that short people on average have lower political knowledge than tall people, we would not conclude that this constituted a political disadvantage worthy of special judicial consideration because height is not an important political dividing line in our society. For reasons too obvious to belabor at great length, race and gender are different.

Overall, the political knowledge deficits suffered by women and African-Americans provide justification for heightened scrutiny of legislation intended to discriminate against them. They also serve to counter the claim that such heightened scrutiny is countermajoritarian. In the case of women, heightened scrutiny partially offsets a political disadvantage that diminishes the political leverage of a group that actually constitutes a majority of voters. In the case of African-Americans, the countermajoritarian calculus is more complex because they are, of course, a minority. However, to the extent that majoritarianism entails meaningful opportunity for political participation by all groups,³⁶⁸ judicial intervention to offset their knowledge deficit is also not countermajoritarian.

2. Heightened Scrutiny of Facially Neutral Legislation Enacted for Discriminatory Purposes.

In addition to providing an argument for heightened scrutiny of legislation discriminating against women and African-Americans, the political knowledge deficits of these two groups may justify

³⁶⁶ See BURNS, ET AL., *supra* note 23 at ch. 8 (presenting evidence that women's lower interest in politics as compared to men is in large part a result of socialization and traditional attitudes defining politics as a male sphere).

³⁶⁷ Education is probably not a major factor in explaining women's political knowledge deficit because men and women now have relatively similar educational attainment levels. BURNS, ET AL, *supra* note 23 at 247. The male-female income gap is also smaller than the black-white income gap.

³⁶⁸ See, e.g, ELY, *supra* note 18 at chs. 5-6 (defending such a claim).

rethinking current doctrine on facially neutral statutes that may be animated by a discriminatory purpose. Under present Supreme Court doctrine, legislation cannot be invalidated under the Equal Protection Clause solely because it has a disproportionate impact on women or minorities, but only if it has a discriminatory purpose.³⁶⁹ The Court recognizes that, even in the case of a facially neutral classification, “[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified.”³⁷⁰ However, it sets up a very stringent test for proving the existence of discriminatory purpose in such cases. Except in cases where there is an unusually “stark” pattern of discriminatory impact which makes an inference of discriminatory motive unavoidable,³⁷¹ the leading recent cases in this area requires proof that discrimination was either the “predominant” motive of legislators,³⁷² or that it was a but-for cause of the legislation.³⁷³

The political knowledge deficit of African-Americans and women exposes a potential pitfall in the Court’s approach. Given these differential levels of political knowledge, policymakers seeking to discriminate against these groups while still escaping political retribution from them would rationally seek to cloak their actions in a veneer of nondiscriminatory rationales. Requiring proof that discriminatory intent was the “predominant factor” or “but for cause” might enable discriminatory policies to escape invalidation so long as the policymakers in question could advance enough alternative

³⁶⁹ See *Washington v. Davis*, 426 U.S. 229 (1976) (establishing this principle for racial discrimination) and *Personnel Admin. v. Feeney*, 442 U.S. 256 (1979) (extending this principle to sex discrimination).

³⁷⁰ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)

³⁷¹ *Id.* at 266; several cases from the era of massive Jim Crow discrimination against blacks and similar discrimination against Asian-Americans struck down facially neutral legislation based on extreme disproportionate impact or unequal enforcement. See, e.g., *Gaston County v. United States*, 395 U.S. 285 (1969); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

³⁷² *Miller v. Johnson*, 515 U.S. 900, 916 (1995); See also Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 296-324 (1997) (surveying the case law in detail and concluding that the Court will only invalidate facially neutral legislation “when the only plausible conclusion is that discrimination caused the result that is in question”); Brian Fitzpatrick, *Strict Scrutiny of Facially Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 309-12 (2001) (surveying case law and concluding that it requires proof of either “but-for” causation by a discriminatory motive or proof that discrimination was the “predominant” factor).

³⁷³ See *Arlington Heights*, 429 U.S. at 270 n.21 (noting that “[p]roof that [a] decision . . . was motivated in part by a racially discriminatory purpose would not have necessarily required invalidation of the challenged decision. Such proof would, however, have shifted to the [government] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.”); see also Fitzpatrick, *supra* note 372 at 311-12 (interpreting *Arlington Heights* and later cases as requiring proof of “but for” causation).

rationales to make it seem as if discrimination was merely one among many motives. To use Justice Scalia's formulation from another context, the "predominant factor" test reduces to a test of whether the policymakers in question have a "stupid staff."³⁷⁴ If the staff is not stupid, they should be able to create a paper trail filled with alternative rationales that make it seem as if discrimination was not the "predominant" motive but just one consideration among many. Moreover, this same paper trail and its accompanying public statements would be exactly what rational politicians would do if they hoped to use voter ignorance to hide their actual motives.

Unfortunately, the problem of group differences in political knowledge does not in and of itself tell us what the standard of proof in cases challenging facially neutral statutes should be. Such a standard could only be developed after taking into account other relevant factors, including the well-known difficulties involved in proving legislative intent on any policy.³⁷⁵ However, I tentatively suggest that the "predominant factor" and "but for cause" test should be replaced with one that invalidates legislation in any case where discriminatory intent was a significant motivating factor. Although necessarily vague, this approach avoids the danger of invalidating legislation for which discriminatory intent was an extremely minor factor, while also preventing legislators from getting away with discriminatory simply by creating a paper trail of alternative motivations intended to exploit voter ignorance.

3. Limitations of the Group Knowledge Disparity Argument.

To avoid confusion, it is important to note the limited scope of the group political knowledge argument I have advanced. First, the argument only provides a rationale for heightened scrutiny of legislation intended to disadvantage African-Americans and women. It does not address the more general question of what the precise level of scrutiny challenged legislation should receive is. Nor does it consider the level of scrutiny due to legislation intentionally disadvantaging whites and men. If we accept the claims of those who argue that virtually all racial and gender classifications should be invalidated

³⁷⁴ *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1025 n.12 (1992) (Scalia, J.).

³⁷⁵ See David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 965-68 (1989) (arguing that the Court's jurisprudence on racial discrimination fails to adequately grapple with these problems).

regardless of their intent,³⁷⁶ then my argument becomes superfluous. Under this world-view, all such classifications would be invalidated for reasons largely unrelated to political knowledge. The Court's recent decision upholding the University of Michigan Law School affirmative program makes clear, however, that current doctrine repudiates that conclusion,³⁷⁷ and is likely to do so for some time to come.³⁷⁸ Until that point, the political knowledge argument for heightened scrutiny of legislation disadvantaging African-Americans and women remains relevant.

A further limitation of my argument is that it is limited to intentional discrimination. Although some commentators have argued that subconscious and unintended discrimination should also be invalidated as unconstitutional,³⁷⁹ I do not consider this issue here. To the extent that illicit discrimination is subconscious, it does not seem to interact with differences in political knowledge in the same way as conscious, but covert discrimination might. In any event, the issue of possible interactions between political knowledge and unconscious discrimination by policymakers is one that is not addressed here.

Finally, this Article does not consider applications to groups other than African-Americans and women. The possible extension of my analysis to other groups, particularly Hispanics,³⁸⁰ is an important potential topic for future research. The same holds true for other possible low-knowledge groups, such as the poor.

VII. CONCLUSION.

In this Article, I have contended that the low levels of political knowledge among American voters and citizens should lead us to rethink the countermajoritarian difficulty in a variety of major ways. Both the low aggregate levels of knowledge within the electorate as a whole and large differences in

³⁷⁶ See, e.g., *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (arguing that “under our Constitution, the government may not make distinctions on the basis of race”); *TERRY EASTLAND, ENDING AFFIRMATIVE ACTION* 95-96 (1996) (arguing that virtually all racial classifications constitute invidious racial discrimination that courts should invalidate).

³⁷⁷ *Grutter v. Bollinger*, 2003 WL 21433492 (U.S. June 23, 2003).

³⁷⁸ See *id.* at *23 (suggesting that affirmative action for the purpose of enhancing “diversity” may continue for up to “25 years”).

³⁷⁹ See, e.g., Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that courts should invalidate decisions motivated by unconscious prejudice).

³⁸⁰ See discussion in Subsection VI.B.2.c *infra*.

knowledge levels between particular groups have major, previously ignored, implications for constitutional theory. The problem of political knowledge also has important relevance for at least two major current debates in constitutional law: the desirability of judicial review of federalism issues, and the appropriate level of scrutiny that should be given to legislation challenged on grounds of racial or gender discrimination.

Political science research on voter knowledge has a long history,³⁸¹ and the low level of political knowledge among American citizens is one of the best established findings in all social science. The failure of legal scholars to address the important implications of this finding during the previous forty years of scholarship on the countermajoritarian difficulty since Alexander Bickel's seminal 1962 book,³⁸² is a striking example of the costs to constitutional theory of neglecting relevant political science research.³⁸³ At the same time, it is only fair to note that political scientists have also failed to address the implications of their findings on political knowledge for judicial review.

This Article begins the process of closing the gap between the two fields. Future research can and should address the implications of widespread political ignorance for other issues in constitutional law, including campaign finance regulation,³⁸⁴ and voting rights. Obviously, there is also room for extensive additional research on the implications of group differences in political knowledge, including those that apply to groups not analyzed here.³⁸⁵ This Article, at the very least, shows that political knowledge is an important neglected issue that theories of the countermajoritarian difficulty must take into account. The same is also likely true of constitutional theory more generally.

³⁸¹ See works cited in nn. 10-11.

³⁸² BICKEL, *supra* note 3.

³⁸³ See Mark Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 313-17 (2002) (criticizing constitutional theorists in legal academia for ignoring relevant political science research).

³⁸⁴ See, e.g., Ortiz, *supra* note 362 (arguing that low levels of political knowledge justify tighter regulation of campaign finance).

³⁸⁵ As noted above, these additional groups might include Hispanics, the poor, and others.