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'IS ANYONE WORRIED ABOUT JUDICIAL REVIEW?' ATTITUDES TOWARDS JUDICIAL REVIEW IN AN ERA OF
POLITICAL TURMOIL

By

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ABSTRACT OF THE DISSERTATION

'Is Anyone Worried About Judicial Review?' Attitudes Towards Judicial Review in An Era of Political Turmoil

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I focus on two groups that are potentially thwarted by the Supreme Court's use of judicial review; Members of the House and Senate, and the public. Using an original data set of House and Senate Press releases collected over a three- and half-year period I argue that both Republicans and Democrats are "concerned" about the compatibility of judicial review with democracy, but their concerns stem from different sources. Republicans focus on the classic conception of judicial review being counter-majoritarian where the court is invalidating "the will of the people or voters" while Democrats appear to be more concerned with the use of judicial review to weaken the democratic process by harming access to and participation in the political process. From the public side I analyzed a survey and survey experiment. In the survey I explore how attitudes towards different conceptions of democracy influence attitudes towards judicial legitimacy. I find that among voters who are supportive of the majoritarian elements of democracy there is a decrease in their views of the Court's legitimacy, while those who support civil liberties and civil rights, liberal democracy, view the Court as more legitimate. In the experiment I randomly assigned subjects to a treatment where they read a criticism of the Court based on the language used by Democratic and Republican legislators in their press releases, and the passage was attributed to either a Democratic, Republican, or bipartisan source. I find that responses to the attacks are conditional upon the partisan source cue. However, among those that received a co-partisan source there was some evidence that subjects were more receptive to criticisms that aligned with how those legislators attacked the Court. While the framing of the attacks on the Court may have influenced how responsive voters were to the messages, I find no evidence that these attacks harmed the Court's legitimacy.

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TABLE OF CONTENTS

Contents	
Abstract.....	ii
Acknowledgements:.....	iii
Introduction	1
Chapter 2: Framing the role of the U.S. Supreme Court in American politics and democracy	9
Chapter 3: Friend, Foe, or Punching Bag? Congressional Attitudes Towards the Judiciary and Judicial Review.....	31
Chapter 4: Public Opinion, Experiments, and the Supreme Court	81
Chapter 5: When All Else Fails, Send in The Courts: The relationship between public attitudes towards democracy and judicial legitimacy.....	90
Chapter 6: Who Are You ‘Countering’ And How? Experimentally testing voters’ responsiveness to framing the Supreme Court as anti-democratic	125
Chapter 7: Conclusion	152
Appendix 1: Excluded Elected Officials:	162
Appendix 2: Reprint of Bartels and Johnston (2013, p. 186) Supreme Court Liberalism for all Decisions (A) and Salient Decisions (B), 1953 – 2008 Terms:	167
Appendix 3: Predicted Number of political criticisms by ideology	168
Appendix 4: Distribution of Criticism Frames	169
Appendix 5: Partisan logistic regression and multinomial logistic regression analysis of press releases	171
Appendix 6: “Salient” United States Supreme Court Cases that occurred during the data collection	176
Appendix 8: Measures, scales, and questions used in the analyses:.....	180
Appendix 9: Survey/experiment design considerations	190
Appendix 10: Significant Correlations between demographics and manipulation checks.....	191
Appendix 11: Demographic characteristics of the experiment sample compared to U.S. Census and 2016 American National Election Time Series	192
Appendix 12: Factor analysis of items used to measure democracy.....	193
Appendix 13: Alternative analysis of conceptions of democracy and its impact on evaluations of judicial legitimacy.....	203
Works Cited.....	208

LIST OF TABLES

Table 1: Descriptive of Judicial Press Releases	45
Table 2: Distribution of criticism across party and chamber	58
Table 3: Logistic Regression of Criticism Type	65
Table 4: Negative Binomial Regression Model of Criticism Type	70
Table 5: Negative Binomial Regression Model of Counter-majoritarian criticisms.....	71
Table 6: Negative Binomial Regression Model of Democratic Process criticisms	73
Table 7: Conceptions of Democracy and how they are measured.	94
Table 8: Items used to measure “liberal democracy”	95
Table 9: Items used to measure “electoral democracy”	97
Table 10: Items used to measure “majoritarian democracy”	99
Table 11: Items used to measure “participatory democracy”	101
Table 12: Items used to measure “something else”	103
Table 13: OLS Regression Analysis of Liberal Democracy on Diffuse Support (Judicial Legitimacy)	108
Table 14: OLS Regression Analysis of Electoral Democracy on Diffuse Support (Judicial Legitimacy)	110
Table 15: OLS Regression Analysis of Majoritarian Democracy on Diffuse Support (Judicial Legitimacy).....	111
Table 16: OLS Regression Analysis of Participatory Democracy on Diffuse Support (Judicial Legitimacy)	113
Table 17: OLS Regression Analysis of Full Model (all democracy measures + controls)	115
Table 18: OLS Regression Analysis of Majoritarian Democracy on Diffuse Support (Judicial Legitimacy).....	119
Table 19: OLS Regression Analysis of Electoral Democracy on Diffuse Support (Judicial Legitimacy)	120
Table 20: Experimental Design	126
Table 21: Logistic Regression Models of Criticism Types for Democrats.....	171
Table 22: Logistic Regression Model of Criticism Types for Republicans	172
Table 23: Multinomial Logistic Regression	174
Table 24: List of salient cases.....	176
Table 25: Conceptions of Democracy	179
Table 26: Conceptions of Democracy and how they are measured.....	180
Table 27: Conceptions of democracy, their description, and how they are measured.....	193
Table 28: Component Correlation Matrix.....	194
Table 29: Correlation Matrix.....	196
Table 30: KMO and Bartlett's Test	198
Table 31: Variance Explained and Scree Plot.....	198
Table 32: Factor Loading Analysis with Varimax Rotation for a Four-Factor Solution for Conceptions of Democracy	200
Table 33: Full model of with all conceptions of democracy	202
Table 34: Correlation Matrix of Democracy Measures.....	205
Table 35: OLS Regression Models of democracy measures (narrowed down versus full)	206

LIST OF FIGURES

Figure 1: Coding of press releases	56
Figure 2: Predicted number of counter-majoritarian criticisms	72
Figure 3: Predicted number of democratic process criticisms	74
Figure 4: % of Americans with a great deal or quite a lot of confidence in the branches of government	100
Figure 5: Democratic agreement with passage by source cue	136
Figure 6: Democratic likelihood of donating by source cue	137
Figure 7: Democratic evaluations of passage's credibility by source cue.....	138
Figure 8: Republican agreement with passage by source cue.....	139
Figure 9: Republican likelihood of donating by source cue	140
Figure 10: Republican ratings of the passage's strength by source cue	141
Figure 11: Republican evaluations of the passage's credibility by source cue	142
Figure 12: Democratic subjects, with co-partisan source cue, likelihood of donating by source cue	144
Figure 13: Democratic and Republican subjects, with a counter-partisan source cue, evaluations of judicial legitimacy by criticism frame.....	148
Figure 14: Comparison of included and excluded legislators by ideology.....	166
Figure 15: Predicted number of political criticisms by ideology.....	168
Figure 16: Count of Criticism Frames used by legislators across ideology	170

Introduction

The world has recently seen a wave of populist elections where voters expressed a distrust and even disdain for the established political class and their preferred policies¹. In the United States, President Trump clearly tapped into this anxiety, among other fears, during his 2016 campaign². This populist anti-Washington rhetoric occurred alongside discussion of the fate of the Supreme Court. As many pundits and media talking heads discussed, a key prize in the 2016 Election would be the ability to shape the Supreme Court. With an aging membership and an existing vacancy, the Supreme Court became a hotly debated and discussed topic during the campaign.

This would be a contentious debate during any election, but it became clear from the 2016 cycle that the divisions at all levels of government and politics were widening and would only serve to magnify the intensity of these debates (Lebo & Cassino, 2007; Mason, 2018; N. McCarthy, Poole, & Rosenthal, 2006). As a seat on the Supreme Court sat vacant and the nation became increasingly partisan, the Supreme Court continued to weigh in on some of the most salient and controversial political questions of the day. For example, among a number of other important cases, from 2015 – 2017 the Supreme Court legalized same sex marriage, blocked abortion restrictions, allowed tax credits as part of the Affordable Care Act to remain in place, upheld affirmative action, narrowed the definition of “corruption” allowing a governor convicted of bribery to go free, and allowed the President’s Muslim Ban to move forward.³ While the partisans across the country increasingly viewed “the other side” as

¹ For example, “Brexit” in the United Kingdom which many elites in both the Labour and Conservative Party opposed, in France anti-EU candidate Marine Le Pen received 33.9% in a second round of voting against eventual winner Emmanuel Macron, and in the United States the democratic primary saw Bernie Sanders lead a surprisingly successful liberal populist movement (“General Election 2017: Where UK’s parties stand on Brexit,” 2017; Liasson, 2016; Milne, 2017).

² This rhetoric has been used successfully by the Republican Party and conservative activists for years, most notably the Tea Party movement’s success in the 2010 midterm elections tapped into similar anti-Washington and anti-elite sentiments (Mann & Ornstein, 2016).

³ In order, *Obergefell v. Hodges*, *Whole Woman’s Health v. Hellerstedt*, *King v. Burwell*, *Fisher v. University of Texas*, *McDonnell v. United States*, and *Trump v. International Refugee Assistance Project*.

not only their opponents but as their enemy (Mason, 2018), the Supreme Court not only remained active but appears to have dove head long into that political thicket.

Concurrently, there has been a renewed global discussion over the fate of democracies around the world. Levitsky and Ziblatt (2018) ring the warning bell that not only are democracies in danger around the world, but there even are serious threats to democracy here in the United States. A common theme they find in declining democracies is a lack of judicial independence and more generally attacks on courts who seek to referee the political process. Mason (2018) argues that over the last few decades there has been a shift in politics to where our partisanship is tied up in our identity, and the desire to “win” at all costs has damaged our political process and by extension raises questions about how well our democracy can or will function. This then creates an interesting tension. On one hand, we have a judiciary that continues to engage in some of the most controversial political issues, on another hand; we have an electorate that values their partisan team “winning” above much else, and on another hand;⁴ we have an increasing global hostility towards the judiciary as a check on political power, and this hostility is often a part of a political power grab and a larger decline in commitments to democratic norms and values. Taken all together then, this presents an interesting time to explore the role of the Supreme Court in our political system, especially considering the wealth of scholarly debate over the compatibility, or lack thereof, of a democratic form of government and a Supreme Court with judicial review.⁵

The current political climate presents an opportunity to reassess attitudes towards the judiciary, and more specifically judicial review during this time of political flux. By exploring the existing tensions in the literature, the language used by elites to discuss the Supreme Court and its use of judicial review,

⁴ We are, for the sake of argument, an alien with three hands.

⁵ Specifically, I am interested in how a strong form of judicial review fits into the discussion. Strong judicial review, as Waldron (2006) defines it is similar to the form we have here in the United States in which the Supreme Court is able to invalidate the legislation passed by the elected institutions.

and finally the circumstances under which the public is more or less accepting of judicial review I develop a more complete picture of what role elites and citizens see for the Supreme Court during this unique moment in American politics.

The motivation for this dissertation came from a question asked during a graduate seminar. In a discussion of judicial review one of the participants asked; “does anyone care [about the counter-majoritarian difficulty]? Or is it just about winning and losing?”⁶ My initial response was “of course” people are troubled by judicial review. However, as I answered I realized I was surrounded by coffee drinking and bagel “munching” academics or future academics and that the only time I could remember having these discussions was in an academic setting. Fumbling to come up with a satisfactory answer I ran through readings in my head; we know legislators and activists tolerate and “use” judicial review to advance their agendas (Graber, 1993; Keck, 2004, 2014), but at times there are conflicts between the branches (Clark, 2010; Charles G. Geyh, 2008), and we know that the public views the Supreme Court as legitimate even if they disagree with its decisions (Gibson & Caldeira, 2009; Gibson, Caldeira, & Spence, 2003b), but I did not have an answer as to what the attitudes were towards judicial review. This dissertation then aims to respond to that question by exploring the attitudes of elected officials and the public towards judicial review.

Specifically, this dissertation is broken into three parts. The first brings together two portions of the literature on the role of the Supreme Court in the American democratic system, and the second and third parts applies those literatures to the attitudes of Congress and the public. Earlier works approached the question of the role of judicial review broadly; is judicial review a “deviant institution” (Bickel, 1962), does the Court overturn legislative preferences (Casper, 1976; Dahl, 1957), and under what circumstance is judicial review justifiable (Cox, 1976; Ely, 1980). More recent research has taken a

⁶ I have to thank Lance “The Lawyer” Cassak for asking this question, it sent me down the rabbit hole that became this dissertation.

more narrow approach by examining, for example; if and how Congressional attitudes may shape how the Supreme Court reaches decisions (Segal, Westerland, & Lindquist, 2011), how the Court is used by issue advocates to both advance and stall policy (Keck, 2014), and how specific decisions may or may not hurt public opinion towards the Supreme Court (Gibson & Caldeira, 2009). Examining these different literatures, I realize there has been limited attention to the question of if anyone outside of academia is actually troubled by all this. Specifically, do those affected by judicial review view it as a problem? If we are going to debate the appropriate role for judicial review, we need to understand the attitudes of those affected by it.

To begin to answer these questions, I first focus on the attitudes of elected officials and their views of the Supreme Court and its use of judicial review. By collecting House and Senate press releases relating to the judiciary and conducting a content analysis on that information I hope to better understand if they view judicial review as a threat (i.e.; court's use of judicial review is anti-democratic and undermines the will of the elected branches), as a sometimes inconvenient tool to advance their own policy agendas,⁷ or as a mix of the two. Keck (2014) provides a qualitative analysis of several issues to explain how elected officials and issue advocates have made use of the judiciary to advance policy goals. This research builds on Graber (1993) and others who argued that legislators make strategic use of the court system to resolve policy matters, such as those that they would otherwise like to avoid responsibility for. These works and others provide a rich history and understanding of when elected officials make use of the judiciary and some possible explanations of why they may do so. This chapter takes this in a different more data driven direction and seeks to understand the attitudes of elected officials towards judicial review and in turn what messages are they sending to constituents on this.

⁷ See Graber (1993) and Whittington (2005) for an analysis of how and why the legislature will "punt" issue to the judiciary for a variety of self-serving reasons.

By collecting publicly available press releases from January of 2014 to June 2017 for both the House and Senate⁸ I explore the language used by elected officials to discuss the courts. Specifically, I am interested in looking at criticisms of the judiciary and how those criticisms are framed. I draw a distinction between criticisms that say that the court reached the wrong decision for ideological reasons, that they read the Constitution wrong, or that simply the decision is bad and those that attack the decision for being counter-majoritarian by interfering with the democratic process. Further, I draw a distinction within the latter group as well. In the classic conception of the counter-majoritarian difficulty Bickel raised the concern that judicial review was anti-democratic because it allowed the unelected and political unaccountable Court to overturn the preferences of the people and/or their elected representatives. Drawing heavily on Ely (1980) I argue that this is not the only way that the Court can be harmful to a democracy. I differentiate then between “counter-majoritarian criticisms” like those that Bickel raised, and “democratic process criticisms” that focus on the harm the courts can do to democracy by weakening or hampering participation in the political process.

I argue in the end that these counter-majoritarian and democratic process criticisms are more substantial and potentially damaging to the legitimacy of the Court since they call into question a more fundamental aspect of the judiciary, compared to more partisan or ideological criticisms of decisions. The reasoning behind this conclusion is that we have seen evidence that the framing of the Court and its decisions matters for both acceptance of specific decisions (Baird & Gangl, 2006; Christenson & Glick, 2014) and potentially for the broader legitimacy of the Court itself (Zilis, 2015). As a result, I believe that these criticisms of the courts that question their compatibility with democracy are more significant because they tap into more fundamental values about our nation and democratic form of government, and therefore may send a different message to voters than one that simply says that a court read the

⁸ Analysis here is limited to sitting Senators and Members of the House of Representatives who have been in office since at least January of 2014. Excluded are those that have been elected between 2014 and the present.

constitution wrong. This chapter provides both an analysis of legislative attitudes towards judicial review and a basis upon which to ground the analysis of how the frames used by legislators may impact public opinion.

In the final chapters, I use a survey and experiment to explore how these frames and broader attitudes towards democracy affect public opinion towards the judiciary. This analysis can be broken up into two parts. The first uses a survey experiment to test how the frames found in the analysis of the press releases resonate with the public. Specifically, subjects are randomly assigned to read a passage that contains a criticism and a partisan source cue, and they are then asked a series of questions to gauge their opinions of the statement and the legitimacy of the Court. This allows me to test, among other things, my hypothesis that the frames that attack the Court for being anti-democratic are more damaging to the Court's legitimacy than those that simply attack decisions as "wrong", further by randomizing the partisanship of the criticism this allows me to measure the extent to which partisanship magnifies, or marginalizes, these criticisms.

In the second part of this analysis I analyze the results of a survey focusing on attitudes towards democracy and judicial legitimacy. One of the puzzles that emerged from the literature was a difference between the theory and empirical works. On one hand constitutional theorists and those engaged in the normative debate over judicial review all struggle with the idea that a Supreme Court with the ability to invalidate the decisions of the elected branches is at the very least problematic in a democratic form of government.⁹ On the other hand, there is a body of empirical work that finds a connection between support for democratic institutions and processes and judicial legitimacy (Gibson, 2007).

In the survey I focus on different conceptions of democracy. Building on the literature of comparative scholars (Coppedge et al., 2011; Kiewiet de Jonge, 2016; Schwertheim, 2017) I draw a

⁹ For example, see Waldron (2006), Ely (1980), Tushnet (1999, 2008), and Bickel (1962)

distinction between “liberal democracy” which includes civil liberties and rights, and other conceptions of democracy that are focused on concepts like majority rule, free and fair elections, and participation in the political process more generally. This distinction allows me to test the extent to which judicial legitimacy is associated with a broad, multidimensional, conception of democracy or if a specific conception, such as liberal democracy, is where the Court derives its support. In addition to providing some conceptual clarity to the scholarly debate, this analysis also provides more information for the larger discussion of what role those affected by judicial review see for it in our political process. One hypothesis I test is if those who have little faith in the elected branches are more supportive of the Supreme Court, compared to those with more trust in the elected branches. The idea being that as the elected branches have become increasingly ineffective and distrusted by the public, the Court acts as the venue of last resort; when all else is broken, send in the Justices.

These chapters build upon each other to develop a more complete understanding of the role of the Supreme Court in our democratic system and also of the attitudes towards the Court’s use of judicial review. The existing scholarly literature has raised many questions and proposed many “solutions” to the question of judicial review and its potential to be anti-democratic. However, there is also an important gap between the first wave of literature which looked at the Court and its place in our system from a more macro perspective and the second wave which has taken a more micro perspective. One important unanswered question that comes out of these works is an empirical analysis of attitudes towards the Court’s use of judicial review, which serves as the jumping off point for the second and third chapters of the dissertation.

While some have looked to history and qualitative analysis to understand the relationship between elected officials and the Court’s use of judicial review there has not been a systematic quantitative analysis of just what elected officials think about this. By analyzing press releases of Senators and Members of Congress I can provide an insight into their attitudes towards judicial review.

Further, these press releases are an official communication to both constituents and the broader public which leads into the third chapter where I experimentally test the salience of the frames elected officials use. If scholars fear that the court is anti-democratic through its use of judicial review, we should understand if the public sees this as a problem as well and if under some circumstances the public is more or less concerned about this potentially anti-democratic behavior. There are clearly normative questions to consider about the role of the judiciary in our democratic system, and I am not proposing solutions to those concerns, rather I am providing more empirical evidence to inform those normative discussions. If we are concerned about the anti-democratic nature of judicial review than it makes sense to understand the opinions of those directly affected by it and to use this to guide our further discussions.

Chapter 2: Framing the role of the U.S. Supreme Court in American politics and democracy

Like so many dissertations right now, we can start this story in the wake of the 2016 election. Soon after his inauguration, President Trump announced his nomination of Neil Gorsuch of the 10th Circuit to fill the more than a yearlong vacancy left by the sudden death of Justice Scalia.¹⁰ Gorsuch received broad bipartisan support for his nomination to the 10th Circuit by then President Bush, being confirmed by a unanimous voice vote. His nomination to the Supreme Court however would not be as smooth, nor would it be as bipartisan. Instead his nomination would be emblematic of a larger partisan battle over the Supreme Court and would raise questions about the appropriate role of the Court in the American political process.

Before we dive into the Gorsuch nomination it is worthwhile to take a step back and look at how we got here. On February 13th, 2016 Justice Scalia unexpectedly passed away while on a hunting trip in Texas. Within hours of his death, Republicans started to coalesce around the message that the seat should remain vacant until after the 2016 Presidential Election, allowing the winner of the election to fill the seat. President Obama, with roughly a year left in office, nominated Merrick Garland, of the Court of Appeals for the District of Columbia, to fill the vacancy. In an unprecedented,¹¹ but not entirely

¹⁰ A common refrain over the last few years has been that politics has been happening at somewhere close to the speed of light, with a year's worth of political news happening in a week or less. The news around the Court has not been any different. Between the time I began writing this dissertation and today Anthony Kennedy announced his retirement from the Supreme Court at the end of the 2018 term, President Trump moved quickly to nominate Brett Kavanaugh from the United States Court of Appeals for the District of Columbia. This had set off a new nomination fight and series of debates. Further, this nomination took a sudden turn when a high school classmate of Judge Kavanaugh came forward with credible allegations of sexual assault. As a result, this nomination fight took on elements of the Gorsuch nomination, with concerns about ideology and the interests supporting the nominee, but also mimicked elements of the Thomas confirmation and the allegations from Anita Hill from the 1990's. While this new nomination fight is important and provides its own interesting case study, for the sake of finishing, and my own sanity, I have largely ignored this more recent fight here. Additionally, barring a major shakeup of the Supreme Court or American politics generally, I will not be updating the specific details of the dissertation to reflect each development or political shift that have become the daily hallmark of the chaotic political world in which we find ourselves.

¹¹ Sen. Grassley (R-IA), head of the Senate Judiciary Committee, fiercely disagreed with the claim that this was an unprecedented move by Senate Republicans, putting out frequent press releases arguing against what he called the "Myths and Rumors" around the blocking of the Garland nomination.

unexpected, move Senate Republicans first refused to meet with Judge Garland. Later they agreed to meet with the nominee but refused to hold any votes on the nomination. Democrats responded with calls for the Senate to “do its job” and vote on the nomination. Their message was that the Senate should fulfill its constitutionally required role to provide “advise and consent” on the President’s judicial nominees. On the other side, Republicans embraced the message that they should hold off till after the election, thereby allowing the voters to have a say on who should fill the seat. For example, Sen. Grassly (R-IA) responded to the nomination of Judge Garland by saying “This year is a tremendous opportunity for our country to have a sincere and honest debate about the role of the Supreme Court in our constitutional system of government” (Grassley, 2016) While this move was arguably pure partisan gamesmanship, the framing by Republicans expressed a desire to “give the people a say” in what they viewed the appropriate role of the Court to be. Republicans before and after the Garland nomination stuck to this message of giving the people a say, while Democrats focused instead on a message of “do your job”. Throughout this fiasco, Judge Garland was the proverbial potted plant, he was simply the vehicle for this argument between the parties. Since Republicans had control of the Senate there was no real hope that they would move on the Garland nomination, and thus the seat sat vacant for more than a year.

This brings us to January 31st, 2017, when President Trump nominated Judge Neil Gorsuch to fill the vacancy. While the people, or more accurately the electoral college, may have spoken in the election, the debate over democracy and the courts did not come to an end. Instead this debate took on new dimension. Democrats criticized the “dark money” behind the Gorsuch nomination and continued to raise concerns about his views on issues like campaign finance and the upcoming cases on partisan gerrymandering. Republicans in turn shifted from a mantra of “let the people have a say” to focusing

more on the qualifications of the nominee, and thus, the debate began to resemble a traditional nomination fight (Gibson & Caldeira, 2009).¹²

In the end, to get their nominee confirmed to the arguably undemocratic Supreme Court Republicans took the step of eliminating another arguably anti-democratic process; the filibuster.¹³ It is thus under a variety of democratic issues and concerns, such as; campaign finance, voter fraud and disenfranchisement, concerns over the electoral college, a bipartisan populist resurgence, and broader debates over the limits of majority rule and powers of the elected branches, that Neil Gorsuch was confirmed to the Supreme Court. This deluge raises questions as to what we understand the appropriate role of the Supreme Court to be in our democratic system. In an era where political norms and traditions are thrown aside, and distrust of government and democracy is on the rise, both domestically and internationally, it is necessary to revisit how the judiciary fits into all of this. As Senator Grassley said; “This ... is a tremendous opportunity for our country to have a sincere and honest debate about the role of the Supreme Court in our constitutional system of government”, and for once I am in the odd position of saying I could not agree more with the Senator from Iowa.

Literature and History:

While the role of the judiciary in a democratic system has been well debated and developed a vast literature, a useful starting point would be with the man who coined the idea that would become the “central obsession” of constitutional scholars for decades; Alexander Bickel and the “counter-

¹² This, as we shall see in a later chapter, presents an interesting dichotomy. On one hand, Republicans believed that the people should have a say in who would fill the seat Gorsuch would eventually fill, and at the same time in *Gil v. Whitford* Gorsuch joined fellow conservative Justice Thomas in a decision stating that the Democratic challengers lacked standing. Thus, on one hand, Republicans wanted the people to have a say but at the same time their nominees ruled in a way that, arguably, limits the ability of the voters to have a say in politics. This discussion of the ways in which the Court undermines democratic participation is something I return to in my analysis of Congressional press releases.

¹³ See Mann and Ornstein (2016) for a discussion of how the filibuster has been used as a tool by legislative minorities to obstruct majority rule in recent years.

majoritarian difficulty". Bickel was not the first to struggle with the appropriate role of the judiciary, the founders grappled with it as have Supreme Court Justices. In the intervening decades however, two distinct and important literatures have emerged. On one hand we have the empirical question; does the court in fact use judicial review to act in a counter-majoritarian fashion, and relatedly how do those affected by this "deviant institution" respond? A second branch of the literature is more normative and asks; is judicial review desirable in, or even compatible with, a democratic system of government?¹⁴ These two literatures are obviously related, if the court does not act in a counter-majoritarian fashion that takes some of the teeth away from the concerns that judicial review is anti-democratic, or if we view judicial review as fundamentally incompatible with democracy why do our elected officials tolerate it? However, these literatures have drifted apart. Thus, one goal of this dissertation is to re-connect them, and to use them to inform each other and advance the larger debate over the appropriate role of the Supreme Court in our democratic system.

What Counter-Majoritarian Difficulty?

The first question above is if the Court does in fact behave in a counter-majoritarian fashion. As a starting point it makes sense to see if in fact the concerns about the Court invalidating the will of "the people" has an empirical basis. Dahl's (1957) analysis showed that rather than the Supreme Court overruling the national majority or elected officials, more often than not it was frequently in line with both, which in turn led Dahl to conclude that "the Supreme Court is inevitably part of the dominant national alliance" (1957, 293). However, this view of the Court as in line with the dominant political coalitions and political preferences was challenged by Casper (1976). While Dahl found that at the national level the Supreme Court did not invalidate the preferences of Congress, Casper, by expanding

¹⁴ It is worth clarifying that here I am referring to what Waldron describes as strong judicial review, where courts have "the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of stare decisis and issue preclusion a law that they have refused to apply becomes in effect a dead letter." (Waldron, 2006, p. 1354)

Dahl's methodology and scope to include state and local laws being overturned by the Supreme Court, found that the Court did in fact behave in a counter-majoritarian fashion.¹⁵

Kastellec (2017) complicates things by finding that in some situations the Court's decision to legalize marriage equality nationally by striking down some state level bans, was actually in line with the public opinion in some of those states. This highlights an important tension in the debate over when and to what extent does the judiciary behave in a counter-majoritarian fashion; specifically, are we talking about overturning legislation or are we talking about going against public opinion? While the discussion in these works has focused on judicial review and the potential for counter-majoritarianism from an institutional prospective, we should follow Kastellec's example and also consider the potential for judicial review to be used in a way that is counter-majoritarian against public opinion.

A concern about judicial review is that by overturning the decisions of a legislature the Court is acting against the will of the public and thus the Court is acting anti-democratically. This requires a jump in reasoning; by overturning legislative decisions the Court is by extension overturning the public's will. For a number of reasons, such as; race (Butler & Broockman, 2011; Minta & Sinclair-Chapman, 2012; Tate, 2003), gender (Carroll, 2003; Ditmar, Sanbonmatsu, & Carroll, 2018; Rosenthal, 1998), or class (L. M. Bartels, 2008; Domhoff, 2006; Schattschneider, 1960) we should be skeptical at best that the decisions and preferences of the elected branches represent the will of their constituents or voters more broadly.¹⁶ If the concern about the use of judicial review is that it is anti-democratic then we can get more directly to the point by looking at how the Supreme Court's decisions line up, or not, with

¹⁵ Important as well is that in addition to including a broader scope of cases which could even be considered counter-majoritarian, Casper (1976) included the Warren court and by extension the civil rights era where the Court heard many cases challenging discriminatory state and local laws.

¹⁶ This side steps the more basic question Burke (1774) over delegate versus trustee models of representation. While an important question for studies of representation and democracy, this question is ultimately beyond the scope of this project.

public opinion. This side steps the tricky question of to what extent elected officials' decisions align with the preferences of the public.

Persily, Citrin, and Egan (2008) take a variety of policy questions and look at the longitudinal trend of Supreme Court decisions and related public opinion. While on some issues, such as school desegregation, public opinion has moved more in line with the Court's decision, on other issues like flag burning and school prayer "strong majorities continue to support a position contrary to that of the Court." (Persily et al., 2008, p. 12).¹⁷ Mishler and Sheehan (1993) similarly find a long history of the Court tending to be in line with the long term trends in public opinion but in more recent years the court has remained to the right of where the public has been.¹⁸ McGuire and Stimson (2004) take this in a somewhat different causal direction and focus on how the Supreme Court is responsive to shifts in public opinion. Looking through a strategic lens, they ask if Justices want to see specific policy outcome, how do they achieve that since they lack the "power of the sword or the purse". Broadly then the evidence does appear to be that the Court is at very least aware of public opinion when they make decisions, even if they don't listen all the time. In terms of the question of if the Court is a counter-majoritarian institution, the evidence suggests that it can be. However, much like when we look from an institutional perspective, it is not always counter to the will of voters.

Of course, there are problems with both analyzing the potential for judicial review to be anti-democratic from both the perspective of public opinion and legislation passed by elected officials. Somin argues the public may be ill-informed about a topic and therefore the policy advanced by elected officials may not actually represent the actual will of the people. Therefore, when a court acts against that policy is it really acting in a way that is aligned with the public's preferences (Somin 2013). Kastellec

¹⁷ Persily, Citrin, and Egan(2008) build upon earlier work by Franklin and Kosaki (1989) who studied the Court's decision in *Roe v. Wade* and found that on one hand the decision increased support for abortions broadly while also increasing the polarization towards "discretionary" abortions.

¹⁸ But see Bartels and Johnston (2013) who argue the Court has moved somewhat to the left.

(2017) explores a variant of this argument by recognizing the potential for policy to differ from the public's opinion on that policy. His analysis shows that when the courts engage in judicial review to create a "floor" for a given policy, under which states cannot drop, this, he argues, harms only those in states where they are required to bring their policy up to that floor. States above that floor are not required to change their behavior.¹⁹ He finds that through this model the court's use of judicial review can be "pro-majoritarian" when we account for lagged policy responsiveness within the state and also the presence of externalities such as national opinion and satisfaction with seeing lagging states pulled above the floor. Thus, we are left with a complicated picture of the extent to which the Court's use of judicial review is counter-majoritarian. What this literature does all seem to suggest however is that the Court, to varying degrees, can, has, and/or does use judicial review in a way that is counter to the preferences of the of the public and/or elected officials.

This then begs the question, if judicial review is at the very least problematic, why is it tolerated? For elected officials, the literature suggests that there are strategic incentives for allowing judicial review and an attack on the institution the public trusts most, the Supreme Court, may be politically unwise (Caldeira, 1987). Graber (1993) concludes that for many elected officials the concerns over judicial review may in fact not be concerns at all. He argues that elected officials often make strategic use of the Court, such as using the Court to avoid having to make controversial decisions that may be politically costly. Similarly, Whittington (2005) argues that when confronted with a stalled or otherwise hostile legislative environment, legislators can turn to the court to achieve their policy goals. Therefore, while legislators may be "countered" by the Court's use of judicial review they also stand to benefit from it in another situation. Keck (2014) builds on this strategic argument. He presents evidence

¹⁹ Kastellec (2017) specifically is looking at marriage equality, and that by legalizing marriage equality it only affected states below that floor (those with same sex marriage bans), and left those above the floor (those that allowed same sex marriage) unaffected.

that both elected officials and political activists make use of the judiciary to advance policy goals that lack the political support necessary to otherwise succeed.²⁰ This use of the judiciary can be the sole path taken for policy change, but more frequently is part of a larger policy agenda that involves both legislative and judicial paths. Of course, there are times when the Court does step too far out of line and the elected branches react.

The Congress Strikes Back:

In 2004, at the request of her husband, Terri Schiavo's feeding tube was removed. Ten years earlier, Mrs. Schiavo had suffered severe brain damage, leaving her in a permanent vegetative state. This decision is, to say the least, a difficult personal decision for any individual or family to make, the ensuing legal and political battles however undoubtedly made this all much more difficult.

After Mr. Schiavo's decision, the family of Terri sued to have the feeding tube reinserted. Several lower court decisions upheld the husband's decision to remove her feeding tube, in response the Florida legislature and Governor stepped in on behalf of the family. In response, the state passed "Terri's Law", allowing the governor to intervene and have the feeding tube reinserted. This law was struck down by the Florida Supreme Court and the United States Supreme Court denied an emergency petition to hear an appeal. In response the U.S. House and Senate hastily passed legislation that would have only allowed the parents of Mrs. Schiavo, who wanted the feeding tube to remain in, to sue in federal court. After the law was signed by then President Bush, the parents sued in the Court of Appeals for the 11th Circuit, who were hearing this case for the fourth time. The Court not only ruled against the claims of those seeking to reinsert the feeding tube, but the majority opinion also criticized the legislation as an unconstitutional infringement on the separation of powers by Congress (R. K. Baker, 2007; Charles Gardner Geyh, 2008). The response from elected officials was swift. Rep. King (R-IA)

²⁰ But see Rosenberg (2008) who argues that the Supreme Court is ineffective in advancing liberal social policy.

implied that he would support limiting the judiciary's budget to "get their attention" and Rep. Delay (R-TX) called for congressional investigations into judicial activism (Charles Gardner Geyh, 2008). Clearly, the decisions here touched a nerve.

How legislators respond to decisions they disagree with is important. Do elected officials simply stomp their feet and scold the Court or do they use their constitutional authority and punish the judiciary? Congress can take a number of substantive actions to punish the judiciary, such as; refusing to increase the salaries of the Justices or limit the funding to the judiciary, they can limit the court's jurisdiction to hear specific cases, and at arguably the most extreme they can impeach Judges and Justices or even eliminate whole courts.²¹ While even the threat of impeachment is a rare occurrence (Charles Gardner Geyh, 2008), other forms of court curbing are threatened more frequently. Peabody (2011) shows how there have been several different periods of increased efforts to curb the judiciary. For example, the late 1960's saw an unprecedented level of proposed court curbing legislation, reaching an all-time high in the 91st Congress. This was followed by a period of relative calm before again increasing during the 109th Congress, which was seated just months before the end of Terri Shiavo's life. Important here is that this is proposed, and not enacted, court curbing legislation. Peabody and Geyh both argue that for the most part these court curbing proposals are saber rattling.²² If this is just mere threat, then why bother? On one hand this could be Mayhew-esque (1974) position taking trying to appeal to voters but it also could be sending a signal to the courts that they are treading on thin ice.

Clark (2009) traces the history of court curbing legislation from 1877-2006, and he finds that the Supreme Court does appear to react to proposed court curbing legislation. He finds evidence that the

²¹ Geyh (2008) documents how while available, and threatened, impeachment is an exceedingly uncommon tool of court curbing. Beyond the ambiguous criteria, "high crimes and misdemeanors", he argues that a large part for the absence of impeachment is rooted in Congressional norms and traditions, and in the idea that impeachment would undermine Article III's judicial independence thus violating larger constitutional norms.

²² Also see Devins (2011) who argues that anti-court messaging is not directed at the court, instead it is directed at constituents.

Court responds to court curbing legislation as a signal that the court is in danger of losing the public's support, and the Court appears especially responsive when those signals come from ideological allies. Mark and Zilis (2018) find evidence for this as well through interviews with sitting and former Judges who report that they are attentive to legislative criticism, and especially so when that criticism is linked to court curbing proposals. Clark (2010) also argues that these court curbing efforts serve several goals for elected officials. First, it is elite reaction to public opinion. Often legislators seek to capitalize on public discontent with the judiciary by proposing court curbing legislation. For example, Baker (2007) shows how legislators capitalized on the public outrage over the Terri Schiavo and pushed court curbing legislation to ride the wave of public disapproval. Second, and rather than following public opinion, some argue that this is an elite effort to influence public opinion (Devins, 2011).

Like most things in our current political climate, responses to the criticisms discussed above is influenced by partisanship. Clark and Kastellec (2015) find that partisan source cues are an important heuristic used by voters when evaluating court curbing legislation and judicial legitimacy more broadly.²³ Voters in their study were more receptive to court curbing legislation that came from a co-partisan. Alternatively, when presented with a counter-partisan proposal, subjects came to the defense of the judiciary. This raises the question about how effective court curbing proposals can be and how serious judges should take them. While not often acted upon, there are obviously times when court curbing seems more possible than others. For example Mark and Zilis (2018) find through interviews with sitting Federal Judges that they (the Judges) do in fact pay attention to the language of court curbing that comes from legislators. They also find that the Judges they interviewed were less concerned with specific policy focused efforts and much more concerned with efforts that threaten their formal institutional powers. Devins (2011) argues that it takes a perfect storm to see court curbing really take a

²³ Also see Nelson and Gibson (n.d.).

toll on judicial independence, a storm where the legislature is dominated by one party but is unable to act on their policy goals because of a contrarian court blocking legislative preferences, and the public also needs to be in opposition to the court. A perfect storm then may have been what gave way to the infamous “switch in time”.

Following in the tradition of most judicial scholarship, I would be remiss to not discuss the New Deal Era Supreme Court.²⁴ While there is debate over to what extent the President Roosevelt’s proposal to pack the Court was an effective threat, there does appear to be a consensus as to why the plan failed; the public had significant trust in the judiciary and opposed political intervention there (Caldeira, 1987).²⁵ If the public supported the President and his New Deal policies, it is on its face surprising then that the Court Packing Plan did not enjoy the public’s support. Recent scholarship has helped to explain this by focusing on judicial legitimacy and how the public views the Supreme Court as distinct from regular politics.

Gibson and Caldeira (2009) discuss how through a process of socialization and exposure to symbols of judicial legitimacy, the public has been conditioned to view the Court as legitimate.²⁶ In this line of research legitimacy is built upon Easton’s (1965) idea of diffuse support which Gibson and Caldeira define as “institutional loyalty; it is support that is not contingent upon satisfaction with the immediate outputs of the institution” (2009, p. 39). Loyalty as they, and others, conceive of it is both a trust in the institution but also a resistance to making fundamental changes to how that institution functions. Research continues to show that the public views the Court as legitimate (Gibson, 2007;

²⁴ See Friedman (2000) who traces this history leading up to the infamous confrontation between President Franklin Roosevelt and the Supreme Court over the fate of the President’s New Deal legislation.

²⁵ For example, See Ariens (1994) for a legal account of the “switch” and Cushman (1998) who takes the political view of it.

²⁶ There is a wealth of research from Gibson and his various co-authors exploring these topics, and others, in more detail. For example, see Gibson, Lodge, and Woodson (2014) for experimental evidence on judicial symbols and Gibson and Nelson (2014, 2015) for recent analysis of the survey data around judicial legitimacy.

Gibson, Caldeira, & Spence, 2003a; Gibson & Nelson, 2014) and even when confronted with decisions they disagree with, the Court retains its legitimacy in the eye of the public (Gibson et al., 2003b; Gibson, Caldeira, & Spence, 2005).²⁷ If the public views the court as legitimate then the public opposition to the New Deal court packing plan is less surprising. Gibson, Caldeira, and their various co-authors find that if the Court can continue to look legal rather than political, and remain above the political fray, then the Court can retain a reservoir of good, which can insulate it from decisions the harm that comes from disagreeable decisions. The problem emerges when the Court is unable to do that. Cox (1976) raised the concern, which has been echoed by Justices as well,²⁸ that if the Court continues to get pulled into political fights it could damage how the public views the Court and the deference it is given.²⁹ While the evidence does appear to be that the Court enjoys a reservoir of good will, there is also evidence that the reservoir may be running dangerously low.

Bartels and Johnston (2013) find evidence that the legitimacy of the Court may be declining,³⁰ and Clark and Kestel (2015) find experimental evidence that there is general support for some, limited, court curbing proposals. This of course raises questions about what this means for judicial legitimacy in the age of Trump.³¹ Presidential attacks on the judiciary are nothing new, after all President

²⁷ But see Bartels and Johnston (2013; 2010) who argue that the Court's legitimacy can in fact be damaged by disagreeable decisions, while Baird and Gangl (2006) and Zilis (2015) both show that the framing of Supreme Court decisions can impact acceptance of decisions and potentially the legitimacy of the Court. This is an expanding area of research and in the coming years with the court being drug into increasing numbers of political debates it will without a doubt continue to grow.

²⁸ For example, see Justice Frankfurter's decision in *Baker v. Carr* and *Colegrove v. Green* and his reluctance to get the court involved in the "political thicket". Similarly, Justice Scalia, in his dissenting opinion in *Obergefell v. Hodges* raised concerns about how the court's behavior could damage its legitimacy.

²⁹ The recent decision in *Rucho v. Common Cause* on gerrymandering was an attempt to prevent the Court from getting entangled in the political thicket. Ironically, I argue in the conclusion that this decision did exactly the opposite of that and in the process endangers democracy more so than Bickel's original counter-majoritarian dilemma.

³⁰ Also see McCarthy (2015) who shows that confidence in the Supreme Court, though higher than the other branches of government, has been on a slow decline.

³¹ See Nelson and Gibson (n.d.) for some of the first research on how President Trump's criticisms of the Court resonate with the public and the potential those criticisms have to undermine the Court's legitimacy.

Obama (in)famously criticized the Supreme Court for its Citizens United Decision during his 2010 State of the Union Address. However, President Trump's racially veiled criticism of a "so called Judge" and his criticism of various court decisions against his executive actions restricting immigration to the United States have called into question not just specific decisions but the very legitimacy of the judiciary. These types of criticism have raised the concern of both pundits and scholars and have been considered in relation to a larger trend towards skepticism of democratic norms and institutions (Levitsky & Ziblatt, 2018). Thus, while it is true that the Court, and judiciary more broadly, enjoys a reservoir of good will (B. L. Bartels, Johnston, & Mark, 2015), it is arguable that the current political climate presents a threat that we have not seen before. In this new climate we may need to reexamine how the public views the judiciary, these broader political and social changes may signal that we need to update our understanding of judicial legitimacy and the role of the judiciary more broadly in our political system.

This new era of politics raises important questions about how the court is discussed. Friedman (1998) shows how elite criticisms of the court have embraced different frames though history and recent experimental evidence has shown how framing can impact acceptance of decisions and attitudes towards the court more broadly (Baird & Gangl, 2006; Christenson & Glick, 2014; C. Johnston, Hillygus, & Bartels, 2014; Zilis, 2015). The fact that the public is responsive to elite framing should come as no surprise, while attitudes towards the courts may be rooted in early socialization and beliefs about democracy, the wealth of public opinion literature shows how public opinion is malleable.³²

The literature on American public opinion frequently opines the lack of firm political beliefs (Chong & Druckman, 2007; Delli Carpini & Keeter, 1996; Gibson, 2006).³³ For example, Zaller (1992) argues that most voters lack consistent beliefs and are swayed by the elite framing and messaging

³² Also Mark and Zilis (2018) recount how Judges do express a similar concern that elected officials can shape how the public views the judiciary.

³³ This is further complicated by Mason (2018) who argues that our political preferences have increasingly little to do with actual policy differences, and are instead more similar to blind support for a sports team.

through the “receive-accept-sample” model. While Zaller’s model builds on being able to recall the messages previously received, Lodge, Steenbergen, and Brau (1995) argue that voters forget most of the information they receive. Instead voters update their preferences as information comes in, but they discard the specifics of that information afterwards. In either case, voters are building on the information that they receive from the media and other political elites to form opinions. While there may be a number of beliefs associated with the Court (B. L. Bartels et al., 2015; Gibson et al., 2003a) these must be taken into consideration alongside the messages from elites, such as elected officials and the media, and how they frame the Court.

The framing and political psychology literature provides some more insight into why it matters how elites, like elected officials, talk about the court. Druckman (2001) reviewed the varied terrain of the framing literature and highlights a distinction between “frames in communication” and “frames in thought”. Frames in communication refer to the idea that “[t]he frame that the speaker chooses may reveal what the speaker sees as relevant to the topic at hand” (Druckman, 2001, p. 227). Relatedly are the frames in thought which “refer to an individual’s (cognitive) understanding of a given situation” (Druckman, 2001, p. 228). These ideas are related in that, for example in political science research, the frames in communication are often used by elites to affect the frames in thought of voters. This in turn has the potential to change how voters think about a particular topic or issue, this is known in the literature as the “framing effect”. For the Supreme Court the framing matters a great deal. While most political actors and institutions are active in crafting their message and engage with the larger political and media process, by comparison the Supreme Court is uniquely passive. While Justices have made increasing media appearances in recent years, the Court by in large functions outside of the public’s eye. Without cameras in the courtroom, holding conferences behind closed doors, and writing decisions in a

way that even professional journalists misread them,³⁴ the Supreme Court depends on others to communicate, distribute, translate, and explain its actions. After the Court releases a decision the justices do not appear on the nightly news to discuss the decision, instead the communication of the Court's work falls to elites such as the news media and elected officials.

Zilis (2015) explores this intersection of the framing literature and the Supreme Court.³⁵ His work first finds that when the Supreme Court hands down a decision, the presence of dissenting opinions increases the subsequent media coverage framing the decision as a conflict. This coverage of the decision, framed as a conflict, has an impact both on how that decision is viewed by the public but also has potential implications for the broader support for the Court. Mark and Zilis (2018) build on this line of reasoning through interviews with sitting Judges. One of those interviewed expressed concern that

“What we should really worry about is the public understanding of our role, respecting us, individually and in our role-because then ...politicians will stay fairly close to [that level of respect] and we'll do ok. But, the representatives and senators get to affect how the public views us. If there is a flood of [criticism by members of Congress], that is a signal [of threat]. If they can do that and get elected and push those themes...heaven forbid that would spark a constitutional amendment. That would really do away with judicial independence.” (Mark & Zilis, 2018, p. 346)

Taken all together then, since the public lacks firm opinions, since the public is susceptible to framing effects (especially around the Supreme Court), and since the Court opens itself up to being framed by political actors, we need to better understand how the public and elected officials evaluate the Supreme Court and its use of judicial review. To accomplish this, we first need to understand how elites view the

³⁴ For example, in 2012 both CNN and Fox News announced the verdict in *National Federation of Independent Business v. Sebelius* incorrectly, reporting that based on their initial reading the Court had struck down the Affordable Care Act's individual mandate. The Court had in-fact upheld the mandate as constitutional (Seltzer, 2012).

³⁵ Also see Clawson and Waltenburg (2003), Johnston and Bartels (2010), and Baird and Gangl (2006) who also find similar results relating to media framing and the Supreme Court.

Court and what messages they send to voters, and second, we need to understand how voters respond to these messages and also how they view the Court more broadly.

While there is a rich and diverse empirical literature about the judiciary there is also a key finding that stands in stark contrast to much of the theoretical literature. There is research that continuously shows that a belief in democratic institutions and processes is associated with increased support for the legitimacy of the Supreme Court (Caldeira & Gibson, 1992; Gibson & Nelson, 2014). From the empirical sides of things this is intuitive, considering the literature around the positivity bias and judicial legitimacy (Gibson & Caldeira, 2009), but constitutional scholars on the other hand have grappled with the question of if a Supreme Court with judicial review is even compatible with democracy. This tension provides a useful jumping off point to shift from the empirical analysis of the Court and instead focus on how constitutional scholars and legal philosophers have grappled with the appropriate role of the judiciary in a democratic system.

While Bickel's (1962) "The Least Dangerous Branch" may be credited with starting what has been called "the central obsession of constitutional theory" the debate over the role of the Supreme Court has a long history. For example Friedman (2000) finds that during different eras the counter-majoritarian criticism was more or less salient and finds that concerns about the role of the Court are as old as our country. Hamilton offered an early defense of the Court and its use of judicial review by placing the Court between the people and their elected representatives, that the Court would act as a check on the elected branches, and with their lifetime appointment would act as a "...guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community." (Hamilton, Madison, & Jay, 1790). This view of the Court as a "bulwark" defending principle constitutional and/or democratic values against the whims of popular opinion is a popular, albeit questionable, defense of the Court and judicial review advanced by many scholars.

Fallon (2008) argues that rather than expecting judges to act as a bulwark and “better” than politicians when it comes to questions of rights; we should rather view judicial review as another veto point in the legislative process. One key assumption in his argument is that “[l]egislative action is more likely to violate fundamental rights than legislative inaction.” (Fallon, 2008, p. 1700) and therefore the Court slowing or halting legislative action will generally function to protect rights from legislative encroachment.³⁶ Similarly, Watkins and Lemieux (2015) argue that we can begin to justify judicial review if we view it from the perspective of a legislative veto point and then compare it to the veto points afforded the other branches.³⁷ This defense of judicial review situates the Court as one part within our democratic system and bases the justification upon characteristics of the institution rather than ascribing sage-like status to judges or upon a nebulous conception of what is defined as core/fundamental values. There are those who do advance a version of the line of reason that there is something special about the judiciary and defend judicial review by looking to the Court’s ability to defend abstract principles.

Ely (1980) advances what he calls “heroic” judicial review, where judges act as referees of the political process enforcing and upholding what he calls fundamental American values. Ely further argues that the most basic and fundamental right that the Court should seek to protect is representation and engagement in the political process, and that the Court should act as a referee to “unblock stoppages in the democratic process” (Ely, 1980, p. 117)³⁸. This is in line as well with Bickel (1962) where he also believed that the defense of judicial review, however problematic, lies in the Court’s ability to preserve and defend these more general American values. A core element of Ely’s defense of judicial review is

³⁶ Also see Somin (2013) who takes a libertarian twist on this argument of judicial review protecting against legislative over reach.

³⁷ Also see Chemerinsky (2015) and Millhiser (2016) for a similar, but critical, discussion of the Court as a veto point.

³⁸ Also see Sunstein (1988) for a similar argument that the nation was founded with the goal of political representation and participation in mind.

that instead of solving the questions of substantive rights, the Court should “ensure that the political process – which is where such values are properly identified, weighed, and accommodated – was open to those of all viewpoints on something approaching an equal basis” (1980, p. 74). For this larger analysis of the attitudes towards judicial review, Ely’s defense rooted in access to the democratic process is an important one. Levitsky and Ziblatt (2018) and Mann and Ornstein (2016) argue that there is a concerning trend both domestically and internationally towards democratically elected institutions using their power to enact anti-democratic reforms to maintain their control of government. For the sake of argument, if we accept this line of reasoning as true, then if the court follows Ely’s suggestion we may see the Court, an institution we are concerned about being undemocratic, use its counter-majoritarian power to overturn the decisions of elected branches in a way that actually promotes democracy rather than weakening it. The current Court however, as I argue later in my analysis of Congressional press releases, may not just be failing to live up to what Ely’s vision but instead may actively be undermining access to and participation in the democratic process.

While many scholars have sought to justify judicial review on a variety of grounds there are those who believe that judicial review, as it exists in the United States, is irreconcilable with our democratic values. For example, Tushnet (1999) advocates for populist vision of constitutional law where rather than leaving constitutional interpretation up to the courts via judicial review, we need to have a constitutional dialogue among the voters. Tushnet (2005) also argues that while progressives/liberals are generally welcoming of judicial review, in fact from that ideological perspective they should be hostile to judicial review.³⁹ He further proposes a hypothetical End Judicial Review Amendment (EJRA), which he argues would empower Americans to have a more robust and meaningful

³⁹ Also see Friedman (2000) who argues that the root of the academic concern over judicial review comes from liberals who historically were on the losing side of judicial decisions through the New Deal Era and as a result opposed judicial review. Then in the age of Brown and the Warren Court these same liberals agreed with the decisions and by extension judicial review. This he argues is the root of the concern over judicial review in the academic literature.

debate over the Constitution and its meanings. For this critique of judicial review he draws on the idea of popular constitutionalism, or the idea that in a democracy it should be the people, on their own or through their elected representatives, that give meaning to what the constitution means (Ackerman, 1993; Kramer, 2004).

Similarly, Waldron (2006) presents an argument against what he calls strong judicial review.⁴⁰ Waldron attacks the arguments used to justify judicial review advanced by others and then by argues more broadly that the benefits of judicial review either do not deliver as promised or that the function is performed equally well, if not better, by the legislature. For Waldron a key pre-condition in his criticism of judicial review is that there is a legislature that is “in reasonably good working order” (2006, p. 1361). He argues that if the legislature is functioning reasonably well, then this should be the forum in which the nation debates issues of fundamental rights since this body is accountable to and representative of the population.⁴¹ While his theoretical reasoning for or against judicial review is beyond the scope of this project, Waldron’s condition provides a useful frame for the bigger picture of my dissertation. If we make the reasonable assumption that the public would not view the legislature as being “in reasonably good working order”⁴² how does this then influence what is seen to be the appropriate role for judicial review? Essentially, is the public’s attitude towards judicial review a function of the degree to which they view the legislature as competent and/or functional?

⁴⁰ An example of a system of strong judicial review would be the United States Supreme Court where the court and judicial review “empower[s] the courts to actually strike a piece of legislation out of the statute-book altogether” (Waldron, 2006, p. 1354).

⁴¹ Waldron (2006) sets out four assumptions in his critique of judicial review which he argues when met would render strong judicial review undesirable and/or incompatible with democracy; “(1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions...set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law;(3) a commitment on the part of most members of society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights(i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.” (2006, p. 1360)

⁴² Given that recent sessions of Congress have been some of the least productive (Bump, 2015) and public confidence in Congress is at an all-time low (J. McCarthy, 2015), this assumption seems reasonable.

While Waldron is concerned with the practice of judicial review itself, Hirschl (2008) is concerned about what he calls “the judicialization of mega politics”. Rather than focusing on the use of judicial review alone, he takes a broader approach by examining the rise of seeking legal resolutions to what are ostensibly political questions.⁴³ Hirschl asks what is special about courts that should privilege their decision making over the elected branches? While he is asking this from a rhetorical point, the question of why trust the courts is important. Rosenberg (2008) presents a strong case that while we may privilege Court up as a defender of the rights of minority groups, in fact the court is not a useful vehicle for this type of social change.⁴⁴ Thus, if for the sake of argument we accept Rosenberg’s argument, Hirschl continues to press us on why we then continue to turn to the Courts. It may be that rather than the court’s being more effective or apt to deal with these matters, it is that the other branches are just less effective or willing to deal with them. “The more dysfunctional or deadlocked the political system and its decision-making institutions are in a rule of law polity, the greater the likelihood of expansive judicial power. Greater fragmentation of power among political branches reduces their ability to rein in courts and correspondingly increases the likelihood of courts asserting themselves.” (Hirschl, 2008, pp. 24–25). Hirschl’s concern then has several layers, first if the political system is dysfunctional this means that political actors will turn to the courts more for resolution;⁴⁵ second that if the climate is such that condition one happens then the elected branches of government may not even be functional enough to agree to rein in the judiciary, and then finally if the judiciary sees such an environment it may step in to resolve the issues put before it.

For Waldron, Hirschl, and Tushnet a key to their arguments is that when politics is “well-functioning” we should prefer the elected branches of government over the unelected judiciary. This

⁴³ See Keck (2004, 2014) and Teles (2008) for an empirical analysis of this phenomena in the American Context.

⁴⁴ But see Keck (2014) and Teles (2008) who present compelling evidence that the Court can be a powerful vehicle for policy change.

⁴⁵ Something backed up by Keck (2014).

provides a means by which we can begin to connect the theoretical and the empirical literatures. More specifically, what happens when, by most accounts, the political world is not functioning well? For example, Congress is among one of the institutions least trusted by Americans, with levels of support close to that of cockroaches (Jensen, 2013). The criticisms of judicial review then may be missing the mark by asking Americans to limit the institution they trust in favor of one that is almost universally disliked.

Further, while Tushnet said that “[f]ormal exclusions from the vote are unusual in today’s society” (1999, p. 158) and that minority groups can engage in strategic bargaining with majority groups to get their concerns addressed, we have reason to question both of these assumptions. We have seen an increase legislative efforts to reduce the ability of voters to participate in the political process, and Frymer (2007) explains, due to group capture minority groups are often unable to effectively bargain within or between the two parties. This tension then between the idealized circumstances under which we may not want or need judicial review and the reality of the current political climate provides a motivation for reexamining the attitudes towards judicial review, especially as we have seen the gulph between theory and practice grow over the last decade.⁴⁶

Finally, both literatures miss one key question, namely what do those who are potentially “countered” by the Supreme Court’s use of judicial review think about this? This does not mean that the Court/Congress dynamics have been unstudied. Some have approached this from a strategic perspective, for example; Graber (1993) and Whittington (2005). Others, such as; Clark (2010) and Geyh (2008) analyze what happens when there is conflict between the Courts and Congress. Missing however is a systematic analysis of what legislators think about judicial review. Is their strategic tolerance

⁴⁶ See Mann and Ornstein (2016) on how the formal and informal structures of the American democratic system have been weakened in recent years and Levitsky and Ziblatt (2018) on how we have seen a global erosion of commitment to democratic norms and practices.

begrudging or enthusiastic, do they lament judicial review as an infringement on the will of the people or merely as a potential political setback? On the public side of this there is a wealth of research on if, how, and/or when the Court's decisions are in line with public opinion (Franklin & Kosaki, 1989; Hanley, Salamone, & Wright, 2012; Kastellec, 2017; Persily et al., 2008) but there has not been any analysis of if and/or under what conditions the public is more or less supportive of judicial review. By better understanding the attitudes of those who stand to be thwarted by judicial review we can better inform both the empirical and normative debates. By better understanding attitudes towards judicial review we can further refine our understanding of interbranch conflicts and public attitudes towards the judiciary. Also, we can improve our normative conceptions of how the Supreme Court and judicial review should, or should not, fit into our political system. If, potentially, the public is ambivalent or even welcoming of judicial review, this has the potential to alter how we view the concerns around the counter-majoritarian dilemma.

The benefit then is that the current political climate allows us to test previous theories and as necessary update them to reflect a new political reality. As the Court appears to be on the verge of making a series highly significant decisions and as talk of the 2020 General Election heat up the Court is going to be in the middle of these discussions. With this heightened salience of the Court and politics more generally it is a great time to better explore the attitudes of the public and elected officials towards judicial review.

Chapter 3: Friend, Foe, or Punching Bag? Congressional Attitudes Towards the Judiciary and Judicial Review

Alexander Bickel introduced the “counter-majoritarian difficulty (or dilemma)” to the debate over judicial review in the early 1960’s. Since then scholars have debated if the Court behaves in a counter-majoritarian fashion or not (Casper, 1976; Dahl, 1957; Kestelec, 2017); when we can justify judicial review (2008); and when we cannot (Waldron, 2006); how legislators can make strategic use of the judiciary (Graber, 1993, 2008; Whittington, 2005); and how the relationship between the branches has evolved over our nation’s history (Geyh 2008). In this wealth of research one question has remained unanswered; are those outside of academia concerned about this “difficulty”? More specifically, what do legislators, one of those potentially being “countered” by the counter-majoritarian dilemma, think of judicial review, and are they as concerned about this as many scholars appear to be? To begin to answer this question, I collected and analyzed an original data set of all House and Senate press releases from January of 2014 through June of 2017 (n=172,646).

This chapter of the dissertation has two related goals; first, to analyze the language used by legislators when they discuss the judiciary. Specifically, my research focuses on negative reactions and how elected officials respond when they disapprove of the Court and/or its decisions. Second, based on my data, what can we say about legislative attitudes towards judicial review-- are legislators in fact troubled by the counter-majoritarian dilemma? In the end, I find that concerns about the compatibility of judicial review with a democratic form of government are bipartisan in the broadest sense and yet distinctly partisan in the specifics. Based on these findings, I additionally propose a new conception of the counter-majoritarian difficulty which reflects both the new judicial and political environments.

A key assumption I make in my analysis is that contrary to what some in the current political climate may say; language matters. In the language used by elected officials to praise or criticize a

decision we can start to sketch out what they think about the case. Obviously, we can easily determine if they are pleased or displeased with an outcome, but of more interest, is what do they say when they disapprove of a decision? A careful analysis of this language allows us to explore the nature of that disapproval. In particular, I am interested in the “why” behind those who are displeased. There is a difference between being displeased with an outcome because one thinks the Court read the Constitution wrong, and being displeased with the same outcome because one believes the Court should not be deciding that issue in the first place.⁴⁷ This focus on the “why” behind negative reactions allows me to explore some of the age-old questions about judicial review and to revisit some of those discussions in light of the new political climate in which we find ourselves.

The chapter proceeds as follows. First, I situate the argument in relation to the previous work done on the relationship between Congress and the Judiciary. The argument builds on the public law literature looking at Court/Congress relations, the normative literature about the appropriate role of judicial review, and the American Political Development literature, but takes the argument in a more quantitative and data driven direction. Second, I explain the methodology behind the data collection and coding of the press releases. Third, I present the descriptive data and quantitative analysis. Finally, I conclude with a big picture analysis, and discuss how these results fit within the broader empirical and theoretical literature.

Literature/Theory: The Courts and Congress: A love/hate relationship

While this study employs a novel way to investigate legislative attitudes towards the judiciary, the study of the relationship between Congress and the judiciary has produced volumes of scholarly research. Specific to this project there are several areas of the literature that are important for framing

⁴⁷ In some ways this distinction bears similarity to the distinction between specific and diffuse support. See Easton (1965) and Gibson, Caldeira, and Spence (2003a) for more on this difference in relation to legitimacy.

my project and situating it within the larger academic discussion. These literatures provide both theoretical and methodological starting points, while also highlighting gaps in the literature that the project aims to address.

Often the discussion of the relationship between Congress and the Judiciary focuses on conflict and court curbing legislation. For example, Geyh (2008) traces the history of this tension and shows historically that when Congress and the courts drift ideologically apart there is a rise in the hostility between the branches.⁴⁸ Clark (2009, 2010) provides quantitative evidence that supports Geyh's findings. Specifically, he finds that when the Court's decisions drift away from the preferences of Congress and voters there is a subsequent rise in proposed court curbing legislation. Clark goes further and finds that the Court is responsive to court curbing legislation, by limiting its use of judicial review, and also by deferring more to Congress and the elected branches.⁴⁹

While the court curbing legislation is important to the discussion, this project moves in a different direction. Rather than looking at how Congress responds to voters reactions to the Court and its decisions (Clark & Kastellec, 2015; Charles Gardner Geyh, 2008) or how the judiciary responds to Congress and potential court curbing legislation (Clark, 2009, 2010; Keck, 2007), I analyze specifically what legislators have to say about judicial review. I too examine Congressional disagreement with the judiciary but attempt to look deeper and ask if this disagreement simply reflects disappointment with a decision or a more fundamental concern about judicial review itself.

Court curbing is a common and useful metric for when court/Congress relations have deteriorated, but as previous research has mentioned, this is a high bar to cross.⁵⁰ Things have to

⁴⁸ Also see Baker (2007) who specifically focuses on this tension between the Congress and the Courts through the lens of religious freedom and the showdown between the branches over *Employment Division, Department of Human Resources of Oregon v. Smith*, *City of Boerne v. Flores*, and the Religious Freedom Restoration Act.

⁴⁹ But see Clark and Kastellec (Clark & Kastellec, 2015) who do call into question this conclusion to some extent.

⁵⁰ Additionally, there are institutional constraints on the ability of a legislator to meaningfully advance court curbing legislation. By comparison, there are far fewer constraints on the ability of a legislator to publish a critical

deteriorate fairly substantially to lead to court curbing bills. This focus can miss the buildup prior to that point,⁵¹ and obscure more subtle means of criticism. For example, Geyh (2011) gives examples of different levels of tools available for Congress to control the courts. At the highest level are making good on threats of court curbing such as impeachment, disestablishment of lower courts, court packing, and limits to jurisdiction. Below that are equally important actions Congress can take such as critical commentary, or threats of impeachment or court packing. This project seeks to examine these lower levels of control. These lower levels of control are interesting since they can serve a number of potential purposes. They may send a signal to the judiciary when elected officials feel the judiciary is stepping out of line (Clark, 2009, 2010; Charles G. Geyh, 2011; Mark & Zilis, 2018); they also may signal to constituents where the legislator stands on the issue (Mayhew, 1974); and they may enable elected officials to shape how constituents think about the issue (Grimmer, Westwood, & Messing, 2014). Freed from various institutional constraints, these lower level forms of criticism may be a better tool for understanding legislative attitudes compared to more demanding and direct act of court curbing.⁵²

The scholarly literature has focused on the tensions between the judiciary and Congress, and there is ample evidence that the branches do come into conflict at times. However, the conflict is more often than not rhetorical and mere puffery, rather than substantive. For example, Baker (2007) outlined how during the debate over the fate of Terri Schaivo both the elected branches and the judiciary took every opportunity to scold the other, but none of the more serious threats from Congress were ever

commentary on their website compared with introducing court curbing legislation. Additionally, Geyh (2011) discusses how court curbing legislation is often symbolic in nature as opposed to being a meaningful effort to curtail the judiciary.

⁵¹ Since the judiciary continues to have high levels of public support, at least compared to the other branches of government, there are risks to elected officials in proposing court curbing legislation as well. For example, FDR's proposed Court Packing Plan was met with wide spread public disapproval and it cost him political capital (Caldeira, 1987).

⁵² Also see Mark and Zilis (2018) who also advocate looking at the more subtle "microlevel" mechanisms within court curbing proposals. Similar to this project, they build on the idea that language matters and that the parties involved are both attuned and responsive to differences in language.

acted upon. This of course then begs the question, why do the branches tolerate each other? Given that Article III is rather short and limited in its scope, Congress could, theoretically, rein in a judiciary that they disapprove of. Similarly, given the power of judicial review, the Supreme Court could push the envelope and overrule Congress quite easily and frequently.

We may find an explanation for why Congress tolerates the meddlesome judiciary in what motivates elected officials. Mayhew (1974) famously said that members of Congress are “single minded seekers of reelection”. To this end elected officials primarily engage in three different behaviors: advertising, credit claiming, and position taking. To the extent that Mayhew is correct; the Court’s use of judicial review does not pose much of a threat, in fact the judiciary can be a useful foil for legislators to engage in Mayhew’s three behaviors (Peabody & Morgan, 2013). Fenno (1978) gives more substance to this focus on reelection by examining the relationship between candidates and their differing constituencies. Of particular importance here is Fenno’s (1977) “issue-orientated style”, this Congressperson builds their reelection constituency based on issue advocacy and advancing policy goals. While judicial review may not be a threat to an elected official that focuses on constituent services or personal connections, for those elected officials that focus on “the issues” the Court can be a formidable friend or foe.⁵³ If one is only interested in policy the courts can be a dangerous wild card that could in an instant thwart legislation that took years to craft, alternatively if one is interested in credit claiming and advertising the courts can take issues off the political agenda or reframe them in a way the legislator would not prefer.⁵⁴⁵⁵

⁵³ Keck (2014) in particular follows the legal and political developments of issues like abortion and gay rights. In his analysis he documents how the judiciary has been active on both sides of these issues.

⁵⁴ See Keck (2014) for how the judiciary played an active role in reframing issues or even taking them off the political agenda entirely.

⁵⁵ This is not to say that the courts can only be negative on this front. For example, the decision in *Citizens United v. F.E.C.* brought forward the issue of campaign finance and has become a key part of the platform of many high-profile Democratic candidates.

If courts pose a threat to the goals of elected officials, why does Congress tolerate their use of judicial review? Graber (1993) and Whittington (2005) argue that there is a strategic reason explaining the relationship between the branches. Graber argues that legislators can “punt” issues to the courts that they would not like to otherwise handle, or they can use the courts to resolve issues that arose during the drafting of legislation. Whittington builds on this to argue that when legislators are confronted with a hostile or unproductive legislative environment, they can turn to the judiciary to advance policy goals (also see Keck 2014).

While the courts can be an ally at times it can also be a formidable foe as well. This is why examining the lower levels of criticism is so important. A focus on court curbing legislation may miss either the buildup of disapproval that eventually manifests in court curbing or underlying tensions that none the less never lead to court curbing.⁵⁶ Much is happening under the surface that can shed important light on the attitudes of elected officials towards the judiciary that may be obscured or unrecognized when we focus only on the court curbing legislation.

Therefore, my analysis of the language in legislative press releases offers a distinct way to evaluate the attitudes of elected officials towards judicial review. While these releases may not have the flash or severity of court curbing legislation, they do offer a unique way to explore what is happening under the surface.

Methodology and Data:

To collect a range of opinions over a politically diverse period of time I collected and coded all publicly available press releases from January of 2014 through June of 2017. For continuity, I limited my collection to those elected officials who were in office prior to January 1st, 2014 and remained in office

⁵⁶ Additionally, as Tushnet (1999, p. 175) points out; “[s]elective ‘court-stripping’ laws are transparent attempts to achieve particular substantive goals rather than serious efforts to rethink the role of the courts in society”.

till the end of the data collection period. As a result, my data set includes 79 Senators and 293 Members of Congress, rather than the full 100 and 435 respectively⁵⁷. The partisan breakdown for Senators ended up being 40 Democrats, 37 Republicans, and 2 Independents⁵⁸ and in the House there were 144 Democrats and 149 Republicans, this sample compares well to the current partisanship in both the House and Senate, though slightly over sampling Democratic Senators.⁵⁹⁶⁰ I was forced to exclude some elected officials who had websites which were unable to be scraped for technical reasons or were otherwise unavailable.⁶¹

An additional benefit of this time frame allows a comparison between the end of the Obama administration and the beginning of the Trump administration. This means the time frame includes the death of Justice Scalia, Obama's nomination and subsequent Republican stonewalling of Merrick Garland, and finally the use of the "Nuclear Option"⁶² by Senate Republicans to confirm President Trump's nominee; Neil Gorsuch. This period, then, is of particular interest due to the protracted nomination fight and the change to Senate rules. The fight, and its resolution, raise important questions

⁵⁷ For a more complete breakdown of those included/excluded and explanations of why see Appendix 1. Some Members of Congress who were elected prior to 2014 were excluded due to issues with their websites or because they did not provide press releases on their office websites. I also tested to see if there was a difference in terms of ideology between the included and excluded legislators. I find no statistically significant differences, in terms of the DW-Nominate ideology scores, between the legislators that were included and excluded.

⁵⁸ King (I-ME) and Sanders (I-VT) both are Independents but caucus with the Democrats and for quantitative analysis will be coded as Democrats.

⁵⁹ As of the time of writing the current partisan alignment in the Senate was 47 Democrats, 51 Republicans, and 2 Independents and in the House it is currently 235 Republicans and 193 Democrats.

⁶⁰ This conveniently, yet unintentionally, leaves me with an equal number of Democrats and Republicans in the entire sample, 186 of each.

⁶¹ See Appendix 1 for a full explanation of who was excluded and why.

⁶² The Nuclear Option was the oft-threatened change to Senate Rules that would eliminate the filibuster for Judicial Nominees by reducing the votes required from 60 to 51 to confirm a nominee. Democrats under the Obama Administration in 2013 used the Nuclear Option to reduce the votes required to confirm Federal Judges, except for Supreme Court Nominees and in 2017 Senate Republicans used it to change the rules for Supreme Court Nominees as well (Seitz-Wald, 2017).

for democracy, representative government, and the judiciary.⁶³ On one hand by reducing the number of votes to confirm a nominee, as Mann and Ornstein (2016) argue, allows the majority to govern by preventing the minority party from acting as obstructionists. On the other hand, lowering the threshold excludes the minority party from the process, thus reducing the incentives for bipartisanship or compromise.⁶⁴ It is none the less ironic then that this change, for better or worse, was in service of the arguably least democratic branch.

This period also includes a number of landmark decisions on a range of politically charged topics. See appendix 6 for a list of “salient cases” during this time period, and an analysis of their role in how legislators responded to the Court. In 2014, the Court legalized same-sex marriage nationally in *Obergefell v. Hodges* and upheld tax credits that were part of the Affordable Care Act in *King v. Burwell*. In 2015, Texas appeared to be on the Court’s radar as they decided *Whole Woman’s Health v. Hellerstedt* which struck down Texas’s restrictions on access to abortion and *Fisher v. University of Texas* which upheld race conscious admissions policies. In the 2016 term the Court decided *Trinity Lutheran Church of Columbia, Inc. v. Comer* which expanded access of religious organizations to government aid, and at the end of the 2016 term, during the beginning of the Trump administration, the Court agreed to hear a challenge to the President’s controversial “Muslim Ban”. The Court decided many other controversial issues and other less salient but equally important topics as well. This provided elected officials on both sides of the aisle decisions to both praise and condemn. For my analysis, the diverse

⁶³ While this fight is important and consumed much of the political oxygen of the time, for the sake of the analysis I do remove this fight from my analysis. See the discussion of the data coding for a more thorough discussion of why I made this decision.

⁶⁴ This question takes on heightened significance in the wake of the 2016 Election where Hillary Clinton won the popular vote but lost the electoral college and nationally senate Democrats received roughly 45.2 million votes compared to only 39.3 for Republicans (Singer, 2016)

docket allowed me to test to what extent different criticisms can be attributed to the types of cases decided by the Court as compared to demographic and ideological differences among legislators.

Additionally, this period marks an era of transition for the Court ideologically. Beyond the death of Justice Scalia, and the subsequent nomination fight, scholars have noted a change in the ideological direction of the Court's decisions.⁶⁵ Bartels and Johnson (2013) find that when analyzing all of the Court's decisions (since the end of the Warren Court) the ideology has tended to lean slightly conservative. However, when analyzing those decisions coded as "salient"⁶⁶ the Court's ideology tends to lean slightly liberal, with the percentage of liberal decisions during some years of the Rehnquist and Roberts Courts being equal to the percentage during the Warren Court;⁶⁷ "[d]uring the last eight terms of the Rehnquist Court, the Court's liberal rating was 64%" (B. L. Bartels & Johnston, 2013, p. 186), which is relatively more liberal than the Warren Court during certain periods. See appendix 2 for a reprint of the Bartels and Johnston graph of the Supreme Court's ideology from the 1950's the 2000's. Thus, there are Court decisions that both please and anger both sides of the political spectrum, which allows for a comparison across both parties in the language that they use to discuss the Court.

This period then may make sense, but the question remains as to why focus the analysis on press releases instead of other forms of communication from elected officials. Press releases are useful since they represent official communications with constituents and can also reflect broader shifts in the political landscape. For example, Grimmer, Westwood, and Messing (2014) use press releases to

⁶⁵ It should be noted that the replacement of Scalia by Gorsuch did not appear to shift the ideological balance of the Court since by most accounts Gorsuch is in many ways Scalia's ideological "heir apparent" (Alderman & Pickard, 2017).

⁶⁶ Bartels and Johnson(2013) follow the methodology of Epstein and Segal (2000) where they coded salient decisions as those that were covered on the front page of the New York Times.

⁶⁷ Additionally, according to the Spaeth Supreme Court Database the Court's decisions from 2013-2017 have leaned liberal but in recent years the gap has narrowed. For example, their coding reported 31 conservative decisions and 40 liberal decision in 2015 but by 2017 they reported 30 conservative ones and only 33 liberal ones.

document the spread of budget and spending concerns during the rise of the Tea Party movement. Further, the Grimmer et al. analysis showed a dynamic relationship between legislative press releases and voters, with the language of press releases reflecting changes in voter opinions and voter opinions being influenced by the language of press releases.

In this project the press releases allow me to focus on the lower levels of criticism that Geyh outlines. Focusing on press releases allows me to look at how individual legislators frame criticisms of the courts and what cases are associated with those attacks. Further, the nearly instantaneous nature of press releases allows me to capture opinions almost immediately after a decision is released. More formal statements, such as floor statements, or court curbing bills are necessarily delayed. Further, for court curbing legislation it may be hard to isolate the decision that lead to the proposal and in crafting the bill the language may be altered or reflect the opinions of different authors. Therefore, while a legislator may sign on or vote for the legislation, it is more difficult to connect them to specific language of the bill. Press releases also allow me to look at the potential build up to court curbing legislation. In Geyh's conception of legislative attacks on the courts, the second level of attack may include threats of court curbing, but it is important to also understand what leads to that point and how legislators frame the buildup leading to an attack on the courts. Finally, framing and language matters. The choices in language made by legislators says something about what they think but also in what they want to communicate to their constituents.

Press releases, then, reflect a novel way to analyze legislative attitudes toward the Judiciary. However, this does not mean there are not drawbacks. On one hand, the instant nature of online press releases published on the websites of elected officials is an official statement that is free of the constraints that may be associated with a floor statement. On the other hand, legislators publish multiple press releases each day, sometimes recycling language from previous statements, and as a

result these statements may lack the gravitas that may accompany a floor speech or appearance on the news. Therefore, while press releases are a unique way to analyze legislative attitudes, they are not the only method and they, like all approaches, have their own strengths and weaknesses.

Data Collection:

To collect these data, I have employed a web scraping Google Chrome Extension conveniently called “Web Scraper”⁶⁸. From the official government webpage for each elected official⁶⁹ I created a unique scraping script for each Senator and Member of Congress that began collecting press releases starting January 1st, 2014 and ended on June 30th, 2017.⁷⁰ For each press release the software collected the unique url, the title of the press release, the date the release was published online,⁷¹ and the full text of the release. This information was then double checked to ensure that the date ranges were correct and that there were no missing fields that should have been completed. This process resulted in an original data set of around 170,000 House and Senate press releases published over the roughly three-and-a-half-year period.

Of the approximately 170,000 press releases this number was narrowed down to only those press releases that concerned the judiciary. Using an identification script and coding scheme, I identified all the press releases in the data set that mentioned “court”, “Supreme Court”, “judge”, or “Justice”.⁷²

⁶⁸ <http://webscraper.io/>

⁶⁹ Official webpage is denoted by a “.gov” domain extension in the web address and were also accessed from the Official House of Representatives and Senate directories (<https://www.house.gov/representatives/> and https://www.senate.gov/general/contact_information/senators_cfm.cfm respectively)

⁷⁰ Excluding those, as previously mentioned, that took office after 2014.

⁷¹ The only exception was John Sarbanes, Democratic representative from Maryland. The software was unable to pull the data for his press releases. In this case I manually compared the releases that the software pulled to his website and eliminated those that were outside of the date range. His releases do not have dates, though they are only those released during the relevant time frame.

⁷² “Justice” was included to capture mentions of Justices on the Supreme Court but did result in a number of false positives which required hand coding. “Court” also generated many false positives for things like “Basketball court” and “food court”, and any releases published by or mentioning Rep. Joe Courtney (D-CT).

This captured the various ways that one could refer to the different levels of the judiciary from the highest levels to the lowest. After narrowing down the number of press releases, I was left with 5,576 from the House and 5,924 from the Senate, for a total of 11,500 press releases that concerned the judiciary in some way. See Figure 1 below for a chart of the narrowing down and coding sequence.

The next step was to code the “tone” of the press release. Releases were coded as either positive, negative, mixed, neutral, or other/unclear. Specifically, I was interested in the tone toward the court, rather than the overall tone of the press release itself. For example, Yvette Clark, Democratic Representative from New York, released a statement after the Second District Court ruled against President Trump’s Muslim Ban/Immigration Order;

“I applaud Judge Watson’s order blocking Donald Trump’s illegal, immoral, and unconstitutional Muslim ban from becoming the policy of the United States. Any attempt to divide us based on religion threatens our nation’s commitment to equality under the law and violates the First Amendment. Simply put, these efforts to divide and demean us will not win. I will continue to stand with my Muslim sisters and brothers against Donald Trump and his fundamentally anti-American policies.” (Clarke, 2017)

In this example while Rep. Clark clearly expressed her negative opinion towards President Trump’s policy, at the same time she was praising the Court’s decision. Since I am interested in attitudes towards the judiciary, a release like this would be coded as positive.

To clarify the coding of the tone further, I employed the following logic when reading the press releases. Positive reactions were those that included language such as, but not limited to, “pleased”, “welcome(s/d)”, “approves of”, and/or “supports”, to name a few of the words linked to positive views. Press releases that praised the outcome of a decision were coded as “positive”. For example, in reaction to *King v. Burwell* Democrats expressed relief that the Court supported the Affordable Care Act; this was coded as a positive reaction. Also, in the positive category were press releases that releases that discussed creating new courts, such as drug courts or veterans’ courts, and press releases that

supported greater access to the court system. In both these instances the desire to expand the role or scope of the judiciary implies a positive view of the judiciary. Finally, press releases that discussed submitting an amicus brief were coded as positive. In this situation by signing onto, or even authoring, an amicus brief the legislator's decision to engage with the judiciary expresses an implicit support of the judicial process.⁷³ In a similar vein to amicus briefs I have coded "wish casting", where a legislator 'wishes' or otherwise hopes a court decides one way (Morgan & Peabody, 2014), as positive.

On the negative side I flagged words such as, but not limited to, "disappointed", "disapproves", "outraged", "upset with[by]", and "angered with[by]". Similar to expressing support for positive outcomes, press releases that highlighted the negative results of a decision were coded as negative. For example, Democrats like Sen. Leahy (D-VT) discussed the "tidal wave of dark money unleashed by the Court's decisions [in *Citizens United* and *McCutcheon v. FEC*]" (Leahy, 2015) this is clearly expressing disapproval with those decisions. In discussing *Roe v. Wade* Rep. Hensarling (R-TX) says "remember the millions of unique and precious human lives ended by the unspeakable tragedy of abortion" (Hensarling, 2014). In both of these examples while the release may not use any of the mentioned negative words, the tone is undeniably negative. Finally, press releases that were critical of a case being appealed or a case being heard by a court were coded as negative. These comments expressed an opposition to the judicial process taking its course, compared to positive acts like signing onto an amicus brief or wish casting.

⁷³ There are situations where press releases that mentioned an amicus brief could also be coded as "mixed". For example, a legislator may be signing onto an amicus brief encouraging the Supreme Court to hear an appeal (positive reaction) of a lower court decision that they may disagree with (negative reaction). An example of this would be the lead up to *National Federation of Independent Business v. Sebelius*. Legislators from both parties leading up to the Supreme Court's decision criticized lower court decisions that they disagreed with, but also signed onto amicus briefs encouraging the Court to hear these cases and decide these appeals in one direction or another. See Peabody and Morgan (2013) for a more detailed discussion of how legislators approached the ACA decisions.

Next, mixed statements were those that offered both praise and criticism of a court in the same press release. Frequently this took the form of conflicting decisions between lower level courts or criticizing a lower court decision but encouraging the Supreme Court to hear, and often overturn, the decision. For example Sen. Bennet (D-CO) in a release concerning the court cases around DACA said, “Citing the substantial legal precedent that supports issuing rational enforcement practices like DAPA and expanded DACA, and outlining why the President's actions fall within the Takings Care clause of the Constitution, the members urge the Court to reverse the decision in the 5th Circuit Court of Appeals and vacate the preliminary injunction blocking the programs from being implemented .” (Bennet, 2016)

Since this release included criticism as well as praise, it was coded as mixed. Finally, there were press releases that were either neutral or otherwise unclear in their tone. Neutral releases included mentions of court decisions without any clear position included. Generally, these were statements of fact to simply provide information to constituents. For example, Sen. Bennet (D-CO) in discussing President Trump’s decision to shrink Bear Ears National Monument said “According to the Congressional Research Service, ‘No President has ever abolished or revoked a national monument proclamation, so the existence or scope of any such authority has not been tested in courts’” (Bennet, 2017). Releases like this do not have a clear tone or direction to them, instead they are simply providing information. Since neutral or unclear releases, do not provide any direction were coded but not included in the analysis.

Thankfully, while the stereotype of politicians often includes the use of frustratingly opaque and noncommittal language, when discussing the judiciary press releases were more often than not clear in their tone/attitude. As seen in Table 1 below, in both the House and Senate, 50.8 percent could be coded as positive, 21.1 percent were explicitly negative. 4.6 percent were mixed, 14.3 percent were neutral or unclear, and 9.2 percent concerned Scalia, Garland, and or Gorsuch. The reason for isolating Scalia, Garland, and Gorsuch related comments will be explained more fully later in the paper.

Table 1: Descriptive of Judicial Press Releases

Type of press release	Count	% of total
House positive press releases	3,090	27%
Senate positive press releases	2,751	24%
House unclear/neutral press releases	321	3%
Senate unclear/neutral press releases	1,120	10%
House on Scalia/Garland/Gorsuch	287	3%
Senate on Scalia/Garland/Gorsuch	768	7%
House negative/mixed press releases	1,678	15%
Senate negative/negative press releases	1,285	11%
 Total critical press releases on the judiciary	 2,963	 26%
Total press releases on the judiciary	11,300	
 Total House press releases on the judiciary	 5,376	 48%
Total Senate press releases on the judiciary	5,924	52%

To check the reliability of the coding up to this point I hired two graduate students to help with inter-coder reliability. After training both coders on the project and my methodology they were given samples of the data set and asked to code the tone of those press releases. Overall the results were encouragingly positive. Coder #1 and I had a 76% match on the tone of the press releases. The agreement increases to 88% when I included only significant differences, such as disagreement over positive/negative tone and disagreements that would impact the subsequent coding of the negative/mixed reactions. Similarly, for Coder #2 there was a 64% match on the tone of the press

releases, which increased to 74% when looking only at significant differences.⁷⁴ While these numbers may be lower than desired in some cases, the levels of agreement do meet the standards in the literature (Lavrakas, 2008), and the differences are frequently ones that would not substantially alter the nature of the data or analysis.

For example, there were situations where I classified a press release as negative in my original coding and then one, or both, of the coders would rate that same press release as mixed. In this example the press release would still have been included in the analysis since both mixed and negative releases were included. For example, in the following press release from Rep. Veasey (D-TX) the coders were split on the tone. Two of the coders classified it as negative and another classified it as mixed. Clearly all the coders picked up on the criticism of the 5th Circuit's decision, the bolded text, but I speculate that it have been that the third coder also viewed the statement about the possibility of the Supreme Court reviewing this case as a positive, the bolded and italicized text. In any case, this press release was included in the analysis as it was classified as either mixed or neutral. This provides a perfect example of a situation where the coders may have disagreed, but that disagreement was not significant enough to influence the inclusion of the press release.

“WASHINGTON, D.C. – Congressman Marc Veasey, TX-33, released the following statement regarding the U.S. Court of Appeals for the Fifth Circuit decision to maintain an injunction on the Deferred Action for Parents of Americans and the expanded Deferred Action for Childhood Arrivals program: **“The Fifth Circuit’s misguided decision has delivered another blow to the millions of immigrant families that continue to live in uncertainty due to our country’s broken immigration system.** Last night’s decision comes on the heels of the one-year anniversary of President Obama’s 2014 executive action announcement that promised a glimmer of hope for millions of families through the expansion of the DACA (Deferred Action for Childhood Arrivals) and the creation of the DAPA (Deferred Action for Parental Accountability) programs... ***I still carry that hope; should the Supreme Court review this case I believe they will find what we all know: President Obama’s actions were within the clear legal authority of his office*** and the well-established precedents that have been set by both Republican and Democratic presidents in the past century. I urge my Republican colleagues to take today’s 5th Circuit Court decision as a challenge to act on the delayed promise of comprehensive immigration reform...”[emphasis added] (Veasey, 2015)

⁷⁴ The coders and I agreed completely on 60 percent of the press releases, and on 80 percent I agreed with at least one coder. When I account for significant differences only, the level of agreement between myself and at least one coder rises to 94 percent.

The crux of this project though was to look beyond positive or negative reactions. I am interested in how elected officials framed their criticisms of the judiciary. Therefore, I coded the releases with a negative or mixed tone based on the type of criticism used in the press release. Building off Friedman's series of law review articles on the history of the counter-majoritarian dilemma (1998, 2000, 2001, 2002), I coded each press release based on the type(s) of criticism present in each release. Specifically, I coded for the presence of three different frames; "regular", "counter-majoritarian", or "democratic process" criticisms. These democratic process criticisms are explained in more detail below, but here I want to emphasize that this is a new and more nuanced conception of the counter-majoritarian difficulty. It is also important to note that press releases could be coded as containing multiple types of criticisms, but often times they involved only one type.

According to Friedman, "[c]ountermajoritarian criticism, as used here, refers to a challenge to legitimacy or propriety of judicial review on the grounds that it is inconsistent with the will of the people, or a majority of the people whose will, it is implied should be sovereign in a democracy. Therefore, the countermajoritarian criticism embraces any criticism of the courts interfering with the will of a popular majority" (1998, p. 354). Expanding upon this reasoning, in the press releases I look for language that highlights courts going against "public opinion", "the will of people or [voters]", "the people's elected representatives" or otherwise interfering with the preferences of the majority. For example, Sen. Lee (R-UT) released a statement after the Supreme Court refused to hear an appeal of a lower court ruling allowing marriage equality;

"The Supreme Court's decision to not review the Tenth Circuit's ruling in *Kitchen v Herbert* is disappointing. Nothing in the Constitution forbids a state from retaining the traditional definition of marriage as a union between a man and a woman. ***Whether to change that definition is a decision best left to the people of each state — not to unelected, politically unaccountable judges. The Supreme Court owes it to the people of those states, whose democratic choices are being invalidated,*** to review the question soon and reaffirm that states do have that right "[emphasis added] (Lee, 2014)

This criticism focuses on attacking the 10th Circuit for ruling in favor of expanding marriage equality and on the Supreme Court for not hearing the appeal. The importance here though is in how Sen. Lee attacks the decisions. He offers a legal criticism, that marriage is not defined in the Constitution, but continues by attacking “unelected...unaccountable Judges” and that voters “democratic choices” are being invalidated. Similarly, Rep. Chabot (R-OH) published this press release;

“To say that I am disappointed in today’s decision by the Supreme Court to overturn Texas’ law establishing health and safety standards for abortion clinics would be a considerable understatement. ***Today, five members of the Court decided that they know better than doctors, health care officials and the people of Texas how to best protect the health of women*** who find themselves at the mercy of abortionists in the State of Texas. “This is yet another decision by a Court that is becoming more activist by the day, and one that underscores just how important the election this November is. We need a President who will appoint judges at every level willing to stand up for the Constitution and the rule of law. If not, ***I fear the Court will continue on its current path of legislating from the bench and substituting its will for the will of the American people.***” [emphasis added] (Chabot, 2016)

In both of these press releases, there are clear counter-majoritarian overtones to the criticisms. Sen. Lee highlights the “unelected, politically unaccountable judges” while Rep. Chabot criticizes the Court for “substituting its will for the will of the American people”. Both clearly disagree with the decision but important here is how they frame their criticisms. Rather than just saying that these are bad decisions or that the Court read the constitution wrong, both of these examples criticize the Court for being anti-democratic, a criticism that has the potential to cut deeper as it calls into question the very legitimacy of the Court’s action (Gibson et al., 2003a).⁷⁵

Building further on Friedman, “political or regular criticisms” are a “catch all” for those that criticize the decision on its merits, are purely partisan criticisms, evoke “states’ rights” claims, or are institutionalist/separation of powers criticisms (Friedman, 1998, pp. 348, 354–355). For example, Rep.

⁷⁵ Also see Mark and Zilis (2018) who suggest that Federal Judges may also be more concerned and attentive to this type of language.

Olson (R-TX) also criticized the decision in Obergefell, but his criticism focused on the Court overstepping its constitutional boundaries, rather than the Court interfering with the will of voters;

“In granting a new federal civil right of same sex marriage, *the Court also violated the 10th Amendment to the Constitution by usurping state’s rights to determine their own destiny* on the issue of marriage. *The United States Constitution has been violated by an activist court that chose to issue a new civil right that was not granted by our forefathers or properly added to the Constitution through the amendment process.*”[emphasis added] (Olson, 2015).

In this example the criticism was on the merits, creating a new civil right, and on the interpretation of the Constitution, but he does not use language suggesting that counter-majoritarianism was at the root of his concern. Additionally, this example from Olson is useful since he includes a criticism of the Court as “activist”. The term “activist” as an attack on the judiciary can take on a number of different meanings (Canon, 1983), but in this example it seems like Rep. Olson is using it to suggest that the Court has overstepped its Constitutional and institutional boundaries, rather than suggesting that the Court is acting against the will of the people. Therefore, while activist is a useful term to key in on in the press releases for figuring out the criticism frame they employ, it is not dispositive on its own.

The institutionalist idea needs further explanation since it may seem like concerns about courts stepping on the toes of the elected branches would be counter-majoritarian. I draw a distinction between purely separation of powers criticisms and separation of powers criticisms that reference the elected branches as being the representatives of the people. The first type of criticism was coded as a political criticism. This institutionalist focus is a “checks and balances” concern, is in essence a Constitutional criticism. In these cases, the legislator is saying that the Court is overstepping its Constitutional boundaries and infringing upon the duties of Congress. Therefore, since this criticism is at its core that the Court is reading the constitution wrong, checks and balances type criticisms are considered “political criticisms”.

On the other hand, there are some institutional criticisms that include an element of the will of the people/voters. In these criticisms the legislator is criticizing the court for overstepping its bounds, but in these examples, a part of the reason this is a problem is because these issues should be decided by the people's elected representatives. By including the element of the will of the people these criticisms move from simply a political criticism into the realm of a counter-majoritarian criticism.

For example, in response to decision in *King v. Burwell*, Rep. Buschon (R-IN) released a statement that said, in part;

“The Court’s decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. *That philosophy ignores the American people’s decision to give Congress ‘[a]ll legislative Powers’ enumerated in the Constitution. Art. I, §1. They made Congress, not this Court, responsible for both making laws and mending them.*” [emphasis added] (Buchson 2015)

Compare the language there to this release from Rep. Scalise (R-LA) on the same decision;

“*This week’s Supreme Court rulings represent a dangerous display of judicial activism, with the majority of the court’s justices clearly creating new law where it does not exist in statute or the Constitution.* These rulings on Obamacare and marriage further underscore how important it is to properly vet and appoint Supreme Court justices who will strictly interpret the Constitution and laws rather than use their exclusive perches to write their own personal versions of what that historic document establishes. *“Justice Scalia’s scathing criticism of the Supreme Court’s majority in these two shocking rulings accurately sums up the breach between the separation of powers, as unelected judges took it upon themselves to rewrite the laws to their own personal liking.”*” [emphasis added] (Scalise 2015)

Both Representatives were responding to the same decision and framed their criticisms in an institutional way. However, in the first statement Rep. Buchson rooted the separation of powers in the “American people” and that they, the people, have entrusted Congress with this authority, not the courts. Rep. Scalise criticizes the Court for overstepping its boundaries into what he believes should be the constitutionally delegated realm of Congress. I recognize this distinction is slight, however by using language that invokes the will of the people this comes closer to what is arguably the spirit of the counter-majoritarian difficulty. Institutional criticisms that lack this “will of the people” element is a step

too far removed from the concerns raised by the literature on the counter-majoritarian difficulty.⁷⁶

Similarly, for states' rights criticisms, if the release focused on the rights of voters in a state then this would be a counter-majoritarian frame; as seen in Sen Lee's (R-UT) criticism below:

“The Supreme Court’s decision to not review the Tenth Circuit’s ruling in *Kitchen v Herbert* is disappointing. Nothing in the Constitution forbids a state from retaining the traditional definition of marriage as a union between a man and a woman. ***Whether to change that definition is a decision best left to the people of each state — not to unelected, politically unaccountable judges. The Supreme Court owes it to the people of those states, whose democratic choices are being invalidated,*** to review the question soon and reaffirm that states do have that right”[emphasis added] (Lee, 2014)

This statement invokes an element of the state’s rights idea, but it is rooted in the will of the people.

This, being rooted in the will of the people, is the key criteria for a criticism being considered counter-majoritarian or not.

Some releases used multiple frames in their criticisms. For example, elected officials sometimes criticized a decision on the merits but also used counter-majoritarian language as well. Rep. Culberson(R-TX) released this statement following the decision in *Obergefell v. Hodges*;

“Congressman John Culberson (TX-07) issued the following statement after the Supreme Court trampled on States’ rights to oversee marriage in *Obergefell v. Hodges*: “I’m disappointed that the Court chose to override the will of Texans who define marriage as being between a man and a woman. As the dissent noted, the Court also overrode the will of the people in more than half of the other States. The 10th Amendment guarantees States the primary responsibility of providing for public safety, public health and public morality. Chief Justice Roberts correctly stated that marriage ‘has formed the basis of human society for millennia’ and it is my firm belief that States – not the federal government – have the Constitutional right to define marriage.” (Culberson, 2015)

This statement begins by criticizing the Court for “trampling State’s rights” and concludes by criticizing the Court for ignoring the 10th amendment. However, in between those criticisms he also attacks the Court for “overriding the will of Texans” and “the will of the people in more than half of the other

⁷⁶ This distinction is based on the conception of the counter-majoritarian difficulty I use here that focuses on the will of the people. I do recognize that an argument could be made that these checks and balances or separation of powers criticisms are in fact counter-majoritarian in nature.

states". Thus, this press release would be coded as including both a political and a counter-majoritarian criticism. It is worth noting that most of the overlap between criticisms, unsurprisingly, came from pairing a regular criticism with one of the other types.

Finally, after an initial examination of the data, it became clear that a new conception of the counter-majoritarian difficulty needed to be developed. As I began to explore the data, I had collected I began to notice a trend in how some legislators framed their criticisms of the Court. These legislators were invoking the will of the people but did so in a way distinct from the examples given above. What I saw was a line of criticism that was focused less on countering the will of the people outright, what we could consider classic counter-majoritarianism, and instead concerned itself more with preventing the will of the people from being expressed or acted upon.

If at its heart the counter-majoritarian dilemma is about representation and the will of the voters, how then do we understand criticisms that focus on the damage the Court's decisions have done to democracy? For example, many Democrats in the wake of *Citizens United* and *McCutcheon* attacked the Court for these decisions citing their harm to democracy and how they limited the power of people in favor of monied interests. For example, this is how Sen. Brown (D-OH) responded to the decision in *McCutcheon v. F.E.C* using first a political criticism and then a democratic process criticism.;

"Powerful special interests should not have a louder voice in our elections than working and middle-class Ohioans. Today's Supreme Court decision rolls back bipartisan campaign finance reform efforts and extends the assault on our democracy started by *Citizens United*. Congress must reassert its authority to ensure that elections cannot be bought by a bunch of billionaires." (Brown, 2014).

These types of criticisms get at the spirit of the counter-majoritarian difficulty, but they are not exactly what Bickel or Friedman would have in mind. Instead, they draw heavily on Ely's (1980) defense of judicial review. Here the Court isn't as much overturning the will of the majority, instead it is allowing a "powerful special interest" to diminish the ability of the people to express their will in the first place.

These criticisms are therefore acting counter to the role of judicial review that Ely advocated. Ely believed that the Supreme Court should act as a defender of democratic access and participation, using judicial review to thwart blockages to these fundamental rights. Therefore, these democratic process criticisms are not that the Court is failing to act as Ely envisioned, but in fact they are acting counter to his vision.

Another way to conceive of this would be as pre-emptive-counter-majoritarianism. If the classic conception of the counter-majoritarian difficulty is that the Court is retroactively undoing or overriding the will of the people, my new conception of this concern focuses instead on the Court hindering the ability of the people to express their will through the democratic process in the first place.

Similar to the response to campaign finance, some members of Congress also attacked the Court for the decisions weakening voting rights. In this release from Rep. Butterfield (D-NC) we see a similar message that gets at the spirit of the counter-majoritarian difficulty but is different in some important ways;

“Following the Supreme Court’s 2013 *Shelby v. Holder* decision, which dismantled key provisions of the original Voting Rights Act of 1965, 33 states have implemented laws that again make it difficult for traditionally disenfranchised communities to exercise their right to vote. I will do everything in my power to stop the aggressive efforts to disenfranchise voters that we have seen in North Carolina and in other states across the country. That is why I joined the Congressional Voting Rights Caucus...because as a nation we must not and we will not tolerate any voting discrimination in our democracy.” (Butterfield, 2016)

In the campaign finance reactions, the connection to the counter-majoritarian difficulty was in the Court shifting the balance of power in our elections away from voters to unelected special interests. In the voting rights examples, the argument is that the Court, by not protecting voting rights, is preventing a majority from forming in the first place. The Court here isn’t so much invalidating the will of the people, instead it is preventing the people from even expressing their will in the voting booth. I argue that these criticisms are something unique. They embrace some of the themes of the counter-majoritarian

difficulty, such as that in a democracy power should lie with voters or “the people”, but they are not attacking the Court for directly invalidating voters’ preferences, instead they are attacking the Court for handing power over to other unelected interests or for otherwise diminishing the power of voters to have their voices heard. While the criticisms around campaign finance are something relatively new, the concerns over voting rights and voter suppression are decades old, especially racial discrimination and disenfranchisement. This “democratic process” form of counter-majoritarianism thus blends old issues with new ones to offer a new vision of the counter-majoritarian difficulty that reflects both a changing nation and a changing judiciary.

Thus, if the counter-majoritarian dilemma is at the end of the day about representation (Kastellec, 2017), or the lack thereof, we need to consider how the courts’ decisions can also affect the quality of the relationship between representatives and those they represented. Court decisions then can be framed as counter-majoritarian in effect, overruling the majority’s expressed or implied will, or they can be counter-majoritarian in process by harming access to the democratic process and weakening the quality of representation. Both concerns are valid and raise their own sets of problems for how judicial review fits within our system.⁷⁷

Returning now to the data collection, I recruited the same graduate students to code a sample of the criticisms to verify my own coding. For both Coder #1 and Coder #2, respectively, we agreed upon the coding of political criticisms 83 and 88 percent of the time, on 89 and 92 percent of the counter-majoritarian criticisms, and finally 91 and 92 percent of the democratic process criticisms. This level of intercoder reliability passes the acceptable levels discussed in the literature (Lavrakas, 2008).

⁷⁷ Mark and Zilis (2018) provide more evidence for drawing a distinction similar to what I have done. In their study they found that judges expressed concern over congressional criticism of specific decisions, but they expressed more concern over criticisms that called into question their institutional legitimacy and court curbing efforts that limit judicial independence. In this project then I argue that there is a heightened significance behind counter-majoritarian and democratic process criticisms. These types criticisms, according to the judges interviewed by Mark and Zilis, are of a greater concern due to their implied significance and the message that they send to the public as well.

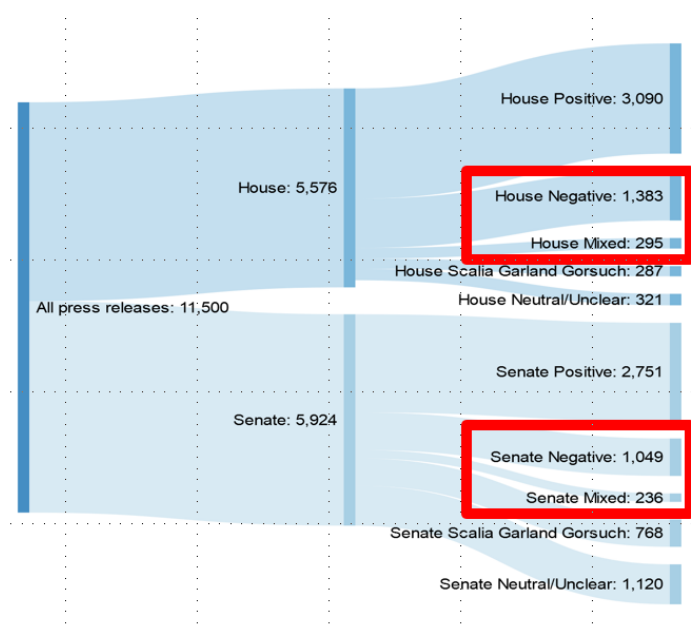
Additionally, I reviewed the results of the intercoder reliability testing to analyze where we disagreed and if the coding could be improved. Upon reviewing the cases where we disagreed, or diverged, I found that in about 1/3rd of the cases we all agreed that a press release fell within one category, however one of the coders or I believed the press release also exhibited another one of the frames. For example, all three of us would agree that a press release contained a political criticism but one of the coders also felt there was another frame, such as a democratic process criticism, was also present. In these cases, I deferred to what we agreed upon and coded the press release as such. In other cases where the coding disagreed, I looked for agreement between two coders as guidance for how to code these press releases. As a result, when necessary I adjusted my own coding to reflect the agreement between the coders. Finally, upon review it was encouraging that there was no substantial level of disagreement where the codes completely disagreed. In all of the testing there was at least agreement between two of the three coders, thus on the surface level it is encouraging that the coders were able to, more or less, clearly differentiate between the frames.

Finally, I turn to why the comments on Scalia, Garland, and Gorsuch are removed from this analysis. In these releases the officials engaged in a different type of conversation. Frequently, these press release focused on the nomination but also was a vehicle for one side to launch into a tirade about how the other party is causing dysfunction. While critical to our understanding of the appropriate role of the Supreme Court, including the confirmation debates would push this discussion into a totally different direction and unnecessarily complicate the analysis.

Figure 1 below shows the coding process and the count of press releases at each stage. After identifying only those that were relevant to the judiciary, those press releases were coded based on their tone. The positive, neutral/unclear, and “kerfuffle” press releases received no further coding. Those that were identified as either negative or mixed (containing both criticism and praise) received

further coding. These releases were coded based on the type of criticism used; specifically did the press release use one of the three frames previously discussed? Note also that the number of criticism frames adds up to greater than the number of total critical press releases since one press release could have multiple frames within it.

Figure 1: Coding of press releases



Analysis:

Moving into the analysis, it bears repeating where we've come from and where I go from here. While I have collected all available press releases from 2014 – July of 2017, the analysis below focuses on press releases that concerned the judiciary. Further, of those comments on the judiciary I am interested in the negative comments. Specifically, I focus on when legislators are critical of the judiciary, what frames do they employ in their criticisms? There are obvious limits to this approach, and another project may explore if legislators express concerns similar to Cox (1976) where they approve of an

outcome but are concerned none the less about the court making such a decision.⁷⁸ However, if we are interested in legislative attitudes towards judicial review an obvious starting point is when they disagree with a decision. We are more likely to find clear opinions expressed when a legislator is on the losing side of a decision, rather than looking for more nuanced arguments such as Cox expressed.

With that being said, the analysis will proceed as follows. I begin with the descriptive statistics. This serves simply as a proof of concept and provides some additional hypotheses to test in the subsequent quantitative analyses. Following the initial descriptive results, I move onto the quantitative analyses, where I first explore the extent to which the Supreme Court's docket potentially explains the criticisms used and second where I explore the extent to which we can attribute the types of criticisms used to differences between individual legislators, finally I conclude by connecting these two analyses together and situating them within my larger argument.

Before moving into the analysis, it is worth restating how the criticism frames were categorized. Press releases were counted as containing counter-majoritarian criticisms when the release mentioned the court "countering" or otherwise overriding the will of the people or voters. On the other hand, when a press release criticized the court for hampering access to, participation in, or the quality of democracy these were coded as containing a democratic process criticism. Finally, when a press release criticized the court for a decision the legislator didn't like, reading the constitution wrong, or making a decision that had a "bad" outcome these were coded as employed a "political/regular" criticism frame. Again, this category is in essence a "catch all", if the press release had a criticism that did not fall into either of the other two categories it was coded as a "political/regular" criticism. It also bears repeating that each

⁷⁸ Friedman (1998) traces the interest among liberal academics in the counter-majoritarian difficulty to just this type of tension. He argues that after decades of a hostile Court, as the Warren Court began to advance liberal social policy this presented a struggle for liberals who had previously been critical of the Court and judicial review. Now faced with a "friendly" Court, they struggled to reconcile their newfound approval with a history of skepticism and hostility.

press release could contain multiple frames. Frequently, press releases employed a political/regular criticism with one of the other frames.

At first glance, the data reveal a few interesting trends. As one can see in Table 2, there is an overwhelming preference for both Republicans and Democrats in both chambers for political criticisms, with approximately 72% of all press releases included a political criticism.⁷⁹ This shouldn't be surprising since this category acted as a catch all for many different ways of expressing disapproval of a decision that were not counter-majoritarian or democratic process. Beyond this similarity, important differences begin to emerge when we look at the partisan and chamber breakdown of the other forms of criticism.

Table 2: Distribution of criticism across party and chamber

	Counter-Majoritarian Criticisms	Political/Regular Criticisms	Democratic Process Criticisms	Total
House Democrats	45 (4.07%)	692 (62.6%)	368 (33.3%)	1,105 (100%)
House Republicans	88 (14%)	524 (83.44%)	16 (2.55%)	628 (100%)
Senate Democrats*	54 (5.78%)	654 (70%)	226 (24.2%)	934 (100%)
Senate Republicans	50 (11.79%)	369 (87.03%)	5 (1.18%)	424 (100%)
Total	237	2,239	615	3,091 ⁸⁰

*1*Note this includes Sen. Sanders (I-VT) and Sen. King (I-ME), who caucus with the Democrats*

Taken together, concerns about the courts behaving in an anti-democratic fashion (counter-majoritarian and democratic process criticisms combined) were present in 27 percent of all the releases. Thus, concerns about the compatibility of the judiciary and our democratic system were not absent from the discussion. What emerges is a stark difference between the parties in how they view the judiciary.

⁷⁹ For House Democrats, approximately 63% of their press releases contained a political criticism, while for their Republican peers in the House, approximately 83% of their press releases contained political criticisms. In the Senate, approximately 70% of Democratic press releases and approximately 87% of Republican press releases contained political criticisms.

⁸⁰ Note the 3,091 is higher than the total number of negative/mixed press releases since some press releases had multiple frames used in them. The percentages also may not total to 100% due to rounding.

Republican's provided 58 percent of all the counter-majoritarian criticisms, with those in the house alone providing about 38 percent. Even more stark is the difference in democratic process criticisms, where the House and Senate democrats combined provided more than 95 percent of those criticisms. These differences hold up also when account for the size differences between the parties and the chambers. For example, Senate Republicans and Senate Democrats may have released roughly the same number of counter-majoritarian criticisms, but when we consider that in as a percentage of all their press releases, we see that Republicans use counter-majoritarian language at a higher rate. At first glance this suggests that there is broadly a concern about the democratic implications of the judiciaries' work, but there are important ideological differences in the details. Further, this and the initial examination of the data suggests that the distribution of criticisms may not be evenly distributed within the parties, it seems that elected officials of different parties prefer to use different frames when discussing the court, something I explore in more detail later in the analysis.

Republicans overall appear more willing to use counter-majoritarian language compared to their Democratic colleagues. This may have to do with the decisions that came down during the time frame included here, such as the legalization of gay marriage in *Obergefell v. Hodges* which was an arguably counter-majoritarian decision,⁸¹ as it both struck down bans on gay marriage enacted by both legislation

⁸¹ I refer to the same sex marriage decisions, such as *Obergefell*, as potentially counter-majoritarian for several reasons. We can think of when the Court behaves in a counter-majoritarian fashion in two different ways; simply in terms of legislation being overturned or more complicatedly in terms of public opinion. To further complicate this, we also have within both we have a state versus federal divide. One simple way to say if a decision is counter-majoritarian is to say that when the Court overturns legislation enacted by a democratically elected body, the Court is acting counter-majoritarian. On this basis, the Court's decisions in favor of marriage equality were counter-majoritarian as they overturned legislative and ballot initiative bans on same sex marriage. However, this is complicated as we know that legislatures at times do not reflect the will of the voters accurately, and in turn this is where we can bring in the question of public opinion. For the public opinion consideration, the idea here is that when the Court uses judicial review to make a decision that is counter to the majority of what the public wants then the Court is arguably behaving in a counter-majoritarian fashion (Persily et al., 2008). However, are we referring to national, state, or even local public opinion? The same sex marriage decisions almost perfectly illustrate this complexity. At the time of the *Obergefell* decision, there was a national majority that was in favor of same sex marriage, and even in several of the states where same sex marriage bans were struck down there was a majority in favor of marriage equality (The Pew Research Center, 2014). However, in some of the states that had

and some enacted by ballot initiatives, and provided plenty of ideological fodder for the Republicans to criticize. However, other (arguably) counter-majoritarian decisions⁸² like *Whole Woman's Health v. Hellerstedt* which struck down HB-2, a Texas law that placed restrictions on facilities that provided abortion, were often framed as attacking the decision on the merits. For example, take the reaction from Sen. Hatch (R-UT) to the *Whole Woman's Health* decision; "I am deeply disappointed in the Court's decision. Today's ruling only further complicates the Court's already muddled abortion jurisprudence and inhibits states' legitimate efforts to protect the lives and health of women and children. I remain committed to fighting judicial activism and protecting all human life" (Hatch, 2016). There were some representatives that used counter-majoritarian language, such as Rep. Chabot (R-OH) reacting to the same decision, who said "[t]oday, five members of the Court decided that they know better than doctors, health care officials and the people of Texas how to best protect the health of women ... I fear the Court will continue ...substituting its will for the will of the American people" (Chabot, 2016). This difference in rhetoric is interesting and merits more investigation.

Democrats were not totally without counter-majoritarian language frames in their critiques of the judiciary. In a true blast from the past, Rep. Nadler (D-NC) in a discussion of voting rights and the potential changes to the Electoral College in the wake of the several Supreme Court decisions on voting rights and redistricting mentioned; "[i]n the year 2000, Vice President Al Gore won the popular vote by

their same sex marriage bans struck down there was a majority of voters opposed to marriage equality. Thus, we are left with a very complicated picture of if the marriage equality decisions were counter-majoritarian or not in terms of public opinion since nationally and in many states there were majorities in favor of marriage equality while other states there were majorities opposed. Therefore, depending on how we conceptualize counter-majoritarian behavior, in terms of legislation and/or public opinion and at what level, these decisions are *arguably* counter-majoritarian, even if they were otherwise important and correct decisions. Also see Kastellec (2017) for more discussion of the extent to which the marriage equality decisions were counter-majoritarian, or conversely as he argues even pro-majoritarian.

⁸² In this regard I am using counter-majoritarian to describe the court overturning the preferences of the elected representatives in Texas, not the court going against public opinion of citizens in the state. For a more detailed analysis of counter-majoritarianism being from either the legislative versus public opinion side see Kastellec (2017).

half a million votes (about 540,000), but lost in the Electoral College after the Supreme Court stopped the recount in Florida thereby awarding Florida's electoral votes to then-Governor George W. Bush" (Nadler, 2016) Another area where Democrats used counter-majoritarian language was oddly enough on sports betting. For example, Rep. Pallone (D-NJ) was critical of a 3rd Circuit Decision that overturned a sports betting law that "...Citizens of New Jersey passed [via] a constitutional amendment by referendum" (Pallone, 2015). Democrats use counter-majoritarian language was frequently used in conjunction with issues of voting rights and broader democratic values. As seen in this statement from Sen. Tester (D-MT);

"What makes America great is the belief that everyone has a say in the decisions we make. That each of us, from the richest to the poorest, has an equal stake in electing our leaders," Tester said before today's vote. *'But the Supreme Court can't seem to figure that out. It's time to overturn Citizens United. It's time to put people and their ideas back in charge of our elections.'* ...The measure responds to Supreme Court rulings, such as 2010's Citizens United, that have overturned laws that kept wealthy groups and individuals from spending unlimited amounts of money to influence elections. Another ruling, this year's McCutcheon decision, invalidated a 40-year-old law that limits the total amount of money an individual can contribute to campaigns each cycle ... Tester highlighted Montana's long history of fighting the corruptive influence of wealthy individuals and corporations in elections. *In 1912, Montana voters passed an initiative limiting corporate influence - a law recently upheld by Montana's Supreme Court, but overturned by the U.S. Supreme Court. In response to that decision and the Citizens United decision, Tester last year introduced his own Constitutional Amendment clarifying that corporations are not people, restoring the right of Congress to limit corporate influence in elections'* (Tester 2014, emphasis added)

Here Sen. Tester uses both counter-majoritarian language, criticizing ruling against campaign finance restrictions passed by "Montana voters" while also using democratic process criticisms by highlighting how the Court's decisions have necessitated that we put "the people ... back in charge of our elections". This press release was emblematic of how Democrats reacted to the Court broadly. While they did use some counter-majoritarian language the majority of their criticisms focused on how the Court and its decisions have weakened the ability of voters to have a say in elections and the democratic process. Interestingly though, Democrats appear less concerned with courts outright undoing the will of voters, more frequently criticizing the courts for handing power to other unelected and largely unaccountable interests.

So then, what explains the rhetorical differences both within and between the parties? Between the parties it seems to be a mix of issues and the “party line”, with Democrats focusing on the democratic process implications of decisions like *Citizens United* and *Shelby County*. This also fits with the messaging of the Democratic party during this time. In the wake of *Citizens United* it has become a key talking point of many Democrats to attack the decision, and others, as having harmed democracy. Therefore, it should not be surprising that they highlight this in their press releases as well⁸³. On the other side, for Republicans we see a similar combination of the party line and the issues given to them through the Court’s docket. In the end it should not be much of a surprise that between the parties there are rhetorical differences that stem from their own brand of messaging and the decisions to which they are reacting.

The differences within the party, however, may provide more interesting material. There are a number of potential hypotheses that may explain the differences between the rhetorical choices individual legislators make. We can divide the potential explanations into two broad categories; first looking at the cases mentioned and second at the specific legislators.

I begin the analysis with the press releases themselves. In this analysis I include only those press releases that were negative or mixed in their tone. For each press release I ran a series of searches on the text to identify and count the names of key cases and topics. For example, in each press release I counted the occurrences of the words “*Obergefell*”, “*Hodges*”, and “*Obergefell v Hodges*” to generate a list of press releases that concerned the 2015 decision in *Obergefell v. Hodges*.⁸⁴ This was then coded as a dichotomous variable for either the press release mentioned that decision or not. This was done for

⁸³ Additionally, this was a hallmark of the campaigns of many high-profile Democrats like Hillary Clinton, Bernie Sanders, and Elizabeth Warren

⁸⁴ I also included a variation of the case name that included a “.” after the v in the case title to ensure that I didn’t miss a mention that titled the cases in that way.

more than 60 decisions over the terms covered by my data collection. Additionally, I also coded for some high-profile decisions that happened prior to my data collection. For example, every year both the pro-life and pro-choice sides mark the anniversary of *Roe v. Wade*, and release press releases condemning or praising the decision. Finally, a dichotomous set of variables was created based on the subject matter the decisions concerned. For example, I combined references to “*Obergefell v. Hodges*”, “*United States v. Windsor*”⁸⁵, and “*Hollingsworth v. Perry*” into a variable on gay rights.⁸⁶ Similarly for the issue of reproductive rights I combined mentions of “*Roe v. Wade*”, “*Burwell v. Hobby Lobby*”, “*Whole Woman’s Health v. Texas*”, and “*Zubick v. Burwell*” into a variable on reproductive rights. Similar groupings were done for other issues such as campaign finance⁸⁷ and the Affordable Care Act.⁸⁸ See appendix 4 for a cross tab distribution of the dependent and independent variables.

For this analysis I used logistic regression to determine which factors increase, or decrease, the odds of a press release containing a specific criticism frame. Each press release was coded so that there were three dichotomous dependent variables for the presence of the three criticism types; political/regular, counter-majoritarian, and democratic process. In the analysis presented below the unit of analysis is the press release and I run three different analyses using the same independent variables but changing the dependent variable to be the different criticism types. More specifically, the analysis below only looks at those press releases that were previously coded as negative or mixed. Thus, in each of the following models there are dichotomous variables for 7 different decision areas that the Court focused on; same sex marriage, the Affordable Care Act, campaign finance, voting rights, unions,

⁸⁵ For cases where a named party was a state, like in *Whole Woman’s Health v. Texas* or *United States v. Windsor*, the search did not include “United States” as an independent search since that would generate too many false positives, instead the search would include the terms “Windsor” and “United States v. Windsor”.

⁸⁶ While these were not the only decisions concerning gay marriage during these terms, many of the other cases were grouped in with these three decisions and these decisions were those focused on and named by the media and elected officials.

⁸⁷ Combining mentions of *Citizens United v. FEC* and *McCutcheon v. FEC*.

⁸⁸ Combining mentions of *NFIB v. Sebelius*, *Burwell v. Hobby lobby*, and *King v. Burwell*.

reproductive rights, and criminal rights.⁸⁹ While not exhaustive of all the types of decisions the Court makes in a term, these are the areas that tend to generate almost all the discussion among legislators (Morgan & Peabody, 2014). This should tell us if specific decision types tend to generate more of one type of criticism over another. I also included a dummy variable for the House as the House members of both parties there were particularly vocal on all fronts. Finally, a variable for party was included as well to control for the influence of partisanship. Table 3 below shows the results of the logit analysis of each criticism type based on the content of the press releases.

In each model we see that subject matter is a significant factor in determining the nature of the criticism used by legislators. For example, if the press release mentioned the Affordable Care Act this resulted in an increase in the presence of political criticisms but decreased the probability of a counter-majoritarian or democratic process criticism. The results also confirm some of the first impressions based on the initial examination of the data. If the press release concerned gay marriage this resulted in a significant increase in the probability of a counter-majoritarian frame being used, while a release concerned with voting rights or campaign finance significantly increased the probability of a democratic process criticism.⁹⁰

⁸⁹ Note, an earlier version of this analysis included a variable for Affirmative Action decisions. This variable was dropped from subsequent analysis as there was no variance in how those decisions were framed. All press releases that mentioned affirmative action cases were framed in a political way, none were framed as counter-majoritarian or democratic process.

⁹⁰ Note, see Appendix 5 for an alternative approach to this analysis of the press releases. I first run the logit models separately for press releases coming from Democrats and Republicans and then I perform the analysis using multiple logistic regression. The multiple logistic regression approach required a modification to the coding process; using one nominal dependent variable rather than three models using three dichotomous dependent variables. This analysis however yielded similar results to those presented in table 2. See appendix 5 for a more thorough explanation of both the data, analysis, and results.

Table 3: Logistic Regression of Criticism Type

	Model 1 Political/ Regular Criticisms		Model 2 Counter- majoritarian Criticisms		Model 3 Democratic Process Criticisms	
		Marginal Effects (dydx)		Marginal Effects (dydx)		Marginal Effects (dydx)
Gay Marriage ACA Decisions	-1.268 (.285) **	-.175 (.038)	2.256 (.241) **	.151 (.015)	-.533 (.542)	
	.514 (.105) **	.071 (.014)	-.623 (.150) **	-.041 (.010)	-.292 (.117) *	-.033 (.013)
Campaign Finance Voting Rights Unions	-1.068 (.102) **	-.148 (.013)	.263 (.153)		1.424 (.115) **	.160 (.011)
	-1.566 (.121) **	-.217 (.014)	-.367 (.193)		1.915 (.134) **	.216 (.012)
	1.176 (.633)		-1.081 (.793)		-1.127 (.754)	
Reproductive Rights	1.583 (.245) **	.219 (.033)	.397 (.193) *	.026 (.013)	-1.93 (.305) **	-.218 (.034)
Criminal Justice House	.027 (.143)		.155 (.219)		.138 (.154)	
	-.594 (.105) **	-.082 (.014)	.191 (.149)		.545 (.116) **	-.061 (.012)
Party Affiliation	1.543 (.139) **	.213 (.018)	.923 (.148) **	.062 (.010)	-2.903 (.236) **	-.328 (.024)
Model Fit						
Pearson's x2 (df =9)	680.33		177.11		944.19	
Prob. > x2	.000		.000		.000	
Pseudo R2	.213		.107		.314	
n=2,925						

** significant in a two tailed test at the $p \leq .01$ * significant in a two tailed test at the $p \leq .05$

Standard errors in parentheses.

Note, Party affiliation positive values signify Republicans.

The initial takeaway from the logit analysis is that the subject matter, matters. The types of decisions the Court hands down makes a difference in how legislators frame their criticisms of those decisions. We can further refine the analysis by looking at the marginal effects of the significant independent variables have on the probability that we will see a specific criticism frame. For example, the presence in the press releases of voting rights cases or campaign finance increases the likelihood

that we will see a democratic process criticism, respectively, by 21% and 16%. Similarly, if a press release mentioned one of the marriage equality decisions, this increased the likelihood that we would see a counter-majoritarian criticism by 15%.

It is interesting here that the presence of reproductive rights decisions in the press releases increased the probability of political/regular criticisms by around 21 percent and also had a minor increase of about 2 percent in the probability of counter-majoritarian criticisms. This was the only subject matter variable that increased the presence of two different criticism frames. This may have to do with the nature of reproductive rights and the legal/political debates. While *Roe* often was frequently criticized using political/regular criticisms, *Hellerstadt*, which had arguably counter-majoritarian elements to the decision,⁹¹ both counter-majoritarian and political criticisms.

If we then consider this distinction along with the results for partisanship, being a Democrat increases the probability of democratic process criticisms and being a Republican increases the probability of counter-majoritarian criticisms. This suggests that both parties do express concerns about the courts in relation to democracy, but they arrive at those concerns through different paths. While not surprising given the level of partisanship today, this is an important and interesting result. Rather than concern about the democratic compatibility of the judiciary being a purely partisan issue, it appears to be somewhat bipartisan, even if the specific issues and nature of the concern is different for Democrats and Republicans.

The results of these three models show that subject matter is a significant factor in how criticisms of the courts are framed. However, we also see evidence that the chamber and partisanship of

⁹¹ Similar to how *Obergefell* was arguably “counter-majoritarian”, there is room to debate over the extent to which the decision in *Hellerstadt*, which struck down a Texas abortion restriction, was counter-majoritarian depending on what we consider to be counter-majoritarian behavior (legislation alone and/or public opinion at the state versus national level).

the author matters. For example, a one unit increase in Party ID, a change from Democrat to Republican, results in an increase in the presence of both political and counter-majoritarian criticisms, and a decrease in the probability of democratic process criticisms. As a result, we also need to consider the individual factors of a legislator that may impact how they view the Court and judicial review.

For legislators their ideology, chamber, party identification, membership on the judiciary committees, and other factors may affect which type of criticisms one tends to use. It may be that as both parties' wings have begun to embrace a more populist message, as seen in the campaigns of President Trump and Senator Sanders, those at the wings of the party may be more likely to use counter-majoritarian and/or democratic process criticisms. It may be those at the wings of either party may prefer to frame their criticisms in a way that highlights a concern over the democratic implications of a decision, challenging its very validity, rather than using a political criticism which more so views the decision as legitimate but disagreeable or wrong.

It may also matter if the legislator has received a J.D.⁹² and/or was a member of either the House or Senate Judiciary Committees. As Bartels, Johnston, and Mark (2015) show, lawyers who have a more substantive relationship with the judiciary, while well aware of the political and ideological side of the judiciary, are also very trusting and supportive of the judiciary. It may be that for both of these factors, the legal education and close working experience with the judiciary affects the approach they take towards criticizing the judiciary. On one hand the counter-majoritarian difficulty is a quintessentially academic topic and therefore those who were trained in the legal academy may be more likely to raise these concerns; on the other hand, as Bartels, Johnston, and Mark find those who

⁹² Within this category I have also included the few legislators with a Bachelor of Law (L.L.B) or Masters of Laws (LL.M) degree since some legislators like Rep. Rodgers (R-KY) received their degrees (1962, University of Kentucky, Lexington) when that was still a common legal degree in the United States.

have intimate knowledge of the legal process are also supportive of it and therefore may be less likely to use language that calls into question the legitimacy of the judiciary.

In the analysis here, the unit of analysis moves from the individual press release to the individual elected official. Here I compiled three dependent variables for each elected official measuring the total number of press releases that contain political criticisms, counter-majoritarian criticisms, and democratic process criticisms. Further, for each official I also created dummy variables if they are on either the House or Senate Judiciary Committees and if they have a law degree or not. I also included their individual DW-Nominate Scores,⁹³ their Chamber, the number of years they have served in office, the total number of press releases they published, and also their party identification.

I first propose what I am calling the proximity hypotheses, which stipulates that those who work closer or have more experience with the legal system will be more likely to use political criticisms over counter-majoritarian or democratic process. Those in the Senate by default have a closer “working” relationship with the judiciary since they vet and vote on judicial nominees. Similarly, those who have spent more time in office also may have developed attitudes towards the judiciary over their years that their newer colleagues may lack. Finally, those socialized into the legal profession may have a different relationship with or attitude towards the judiciary.⁹⁴ These proximity hypotheses builds off the work of Gibson, Caldeira, and their various co-authors who have found that “to know the Court is to love it” (Gibson & Nelson, 2015, p. 170). Legislators through socialization and/or contact then may be more deferential to the judiciary, preferring to use language in their criticisms that is less “severe”.

⁹³ DW-Nominate scores collected from “Voteview: Congressional Roll-Call Votes Database” (Lewis et al., 2018).

⁹⁴ See Bartels, Johnston, and Mark (2015) who find that while lawyers may be more attuned to the political nature of the judiciary they are none the less supportive of the courts and believe in its legitimacy.

While saber rattling is not uncommon, the more dramatic examples of criticism I have uncovered here tend to come from officials at the ideological wings of both parties. As a result, using the individual legislator's DW nominate score allowed me to test the hypothesis that as officials become more ideological, they will also be more likely to use counter-majoritarian and/or democratic process criticisms. For example, almost 30 percent of all counter-majoritarian criticisms came from the 50 most conservative Republicans and 33 percent of all democratic process criticisms came from the 50 most liberal Democrats. This, and the divide between the parties discussed in the initial descriptive statistics, shows the need to account for both partisanship and ideology in the analysis.

The analysis here presents three models for the total count of each type of criticism used by the elected official. Initial analysis suggested that the data is over dispersed, with Poisson regression models showing that variances in each were more than double the means.⁹⁵ To test this further, I ran a negative binomial regression on the three models. There was significant evidence of overdispersion in each model; (political criticisms: $G^2 = 249.1$, $p < 0.001$; counter-majoritarian criticisms: $G^2 = 88.07$, $p < 0.001$; and democratic process: $G^2 = 146.84$, $p < 0.001$) as a result, the negative binomial regression model (NBRM) is more appropriate than the poisson regression model. Table 4 below shows the results of the three NBR models for the three dependent variables.

⁹⁵ In the political comments model the variance was 76.38, while the mean was 6.01. For the counter-majoritarian comments the variance was 2.56 with a mean of .637, and finally in the democratic process model the variance was 12.33 and the mean 1.65.

Table 4: Negative Binomial Regression Model of Criticism Type

	Model 1 Political/Regular Criticisms	Model 2 Counter-majoritarian Criticisms	Model 3 Democratic Process Criticisms
Chamber			
-Senate	.371 (.087) **	-.212 (.248)	-.293 (.218)
Years in Office	-.001 (.004)	.012 (.012)	-.008 (.01)
JD	-.032 (.077)	-.165 (.212)	.204 (.166)
Judiciary Committee	.203 (.109)	-.301 (.310)	.065 (.253)
Partisanship ^a	-.043 (.129)	-.648 (.379)	-1.144 (.313) **
DW-Nominate Score ^b	.060 (.279)	2.703 (.793) **	-.766 (.639)
# of releases published	.063 (.004) **	.088 (.012) **	.0616 (.008) **
Model Fit			
Pearson's χ^2 (df =7)	399.2	125.52	259.88
Prob. > χ^2	.000	.000	.000
Pseudo R ²	.188	.163	.228
n=369			

** significant in a two tailed test at the $p \leq .01$ * significant in a two tailed test at the $p \leq .05$

Robust Standard errors in parentheses.

a: Positive coding of party is Republican

b: Positive values here indicate more conservative, while negative values are more liberal. Range of -1 to 1.

In these results then we see that some of the variables of interest are statistically significant. Being in the Senate increases the probability of political criticisms but has no significant effect on the other frames. However, there is no significant effect of years in office in any of the models, nor does having a law degree or membership on either the House or Senate judiciary committees have any significant effect. Thus, there may be a sliver of evidence that those who work more closely with the judiciary, i.e.: Senators, may be more deferential to the legitimacy of the judiciary, but the absence of any significance for the other variables related to contact with the courts suggests we should be cautious how much we read into that conclusion. What does need more unpacking though are the results for the Party ID and Nominate score variables.

Confirming the initial analysis, Democrats are more likely to criticize the judiciary on democratic process terms, while conservatives are more likely to use counter-majoritarian language. This difference in the models, with ideology statistically significant in the counter-majoritarian model and partisanship significant in the democratic process model, deserves more exploration. To further unpack these results, I ran the models again. However, this time the first model used party ID as a predictor while the second model also included the nominate score, the results are presented in Table 5 below.⁹⁶

Table 5: Negative Binomial Regression Model of Counter-majoritarian criticisms

	Model 1 w/ Party ID	Model 2 + Nominate Scores
Chamber		
-Senate	-.141 (.250)	-.212 (.248)
Years in Office	-.003 (.012)	.012 (.012)
JD	-.107 (.214)	-.165 (.212)
Judiciary		
Committee	-.100 (.304)	-.301 (.310)
# of releases		
published	.091 (.012) **	.088 (.012) **
Republican	1.155 (.238) **	-1.297 (.745)
DW-Nominate		
Score ^a	-	2.703 (.793) **
Model Fit		
Pearson's x2		
(df =6,7)	113.88	125.52
Prob. > x2	.000	.000
Pseudo R2	.148	.163
n=369		

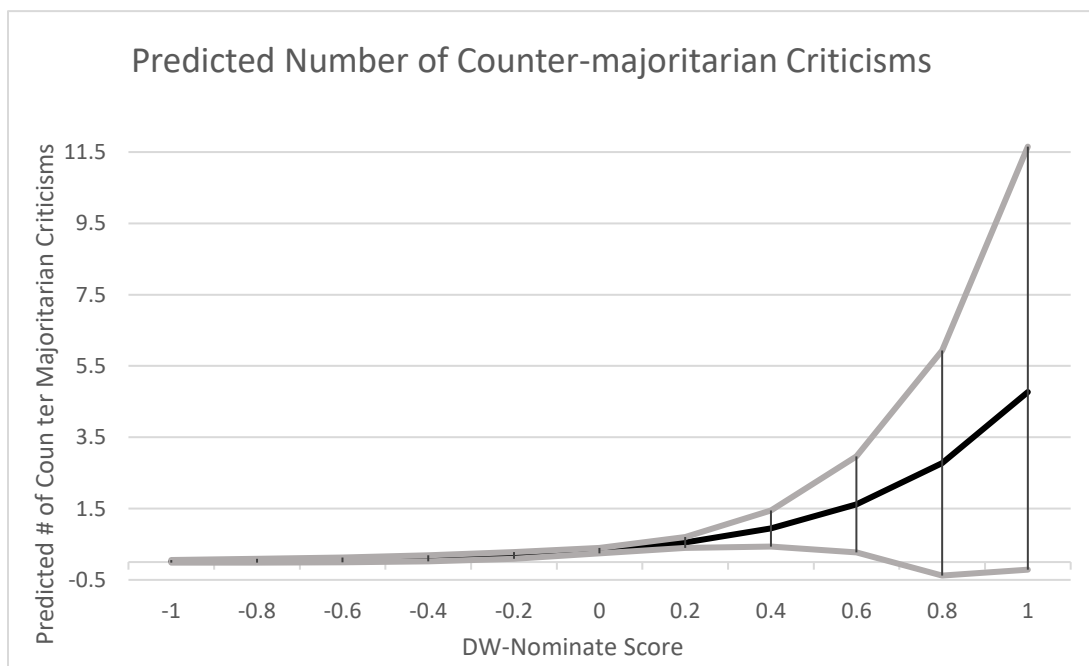
a: Positive values here indicate more conservative, while negative values are more liberal. Range of -1 to 1.

For counter-majoritarian criticisms then, the results suggest that ideology and partisanship both matter in terms of the frames chosen by elected officials. Being a Republican is initially a statistically

⁹⁶ Also see appendix 3 for a similar analysis of political criticisms, and the influence of ideology on the predicted number of political criticisms used by elected officials.

significant factor in predicting the language used by elected officials. However, when ideology is included in the model, it appears to be driving much of the influence in the predicted number of counter-majoritarian criticisms. This change is illustrated more clearly in Figure 2 below where the percentage change in the expected number of press releases with counter-majoritarian language for Republicans increases as they become more conservative. Note, the solid black line represents the predicted number of criticisms while the light grey lines are the respective upper level and lower level predictions.

Figure 2



For Republicans then it appears that ideology matters more than party alone for predicting the language used to criticize the courts. Also see Appendix 3 where I show that neither ideology, nor party ID had a significant influence on the predicted number of political criticisms, as elected officials of both parties and across the ideological spectrum made frequent use of political criticisms when attacking the Court.

While the Republican analysis focused on counter-majoritarian language, the Democratic analysis focused on democratic process language since in both the descriptive analysis and the NBRM

models we found a strong association with Democrats and this type of criticism. As was done for the counter-majoritarian criticisms I have re-run the NBRM on the democratic process dependent variable twice with party ID alone in the first model and adding in the nominate variable in the second.

Table 6: Negative Binomial Regression Model of Democratic Process criticisms

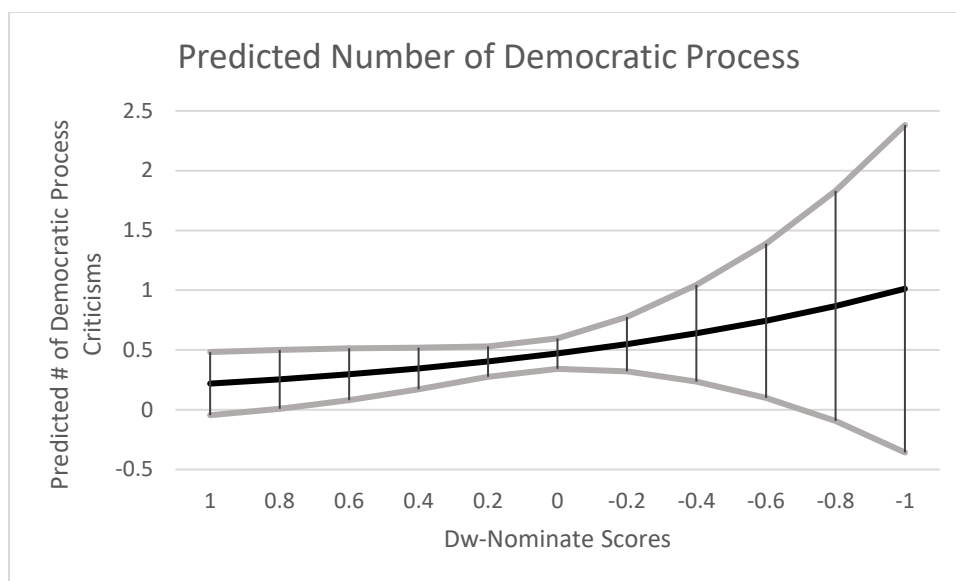
	Model 1 w/ Party ID	Model 2 + Nominate Scores
Chamber		
-Senate	-.367(.210)	-.293 (.218)
Years in Office	-.006(.009)	-.008 (.010)
JD	.185(.166)	.204 (.166)
Judiciary		
Committee	.067(.254)	.065 (.253)
# of releases		
published	.062(.008) **	.061 (.008) **
Democrat	2.974(.266) **	2.289 (.627) **
DW-Nominate		
Score ^a	-	-.766 (.639)
Model Fit		
Pearson's x2		
(df =6,7)	258.44	259.88
Prob. > x2	.000	.000
Pseudo R2	.226	.228
n=369		

a: Positive values here indicate more conservative, while negative values are more liberal. Range of -1 to 1.

When we rerun the analysis in this way then we see that being a democrat appears to be driving much of the influence in the predicted number of democratic process criticisms used.

What we see in figure 3 below, a graph of the predicted number of democratic criticisms among Democrats, is something similar to what we see among Republicans for counter-majoritarian criticisms. Namely, that while party makes a difference, it also appears that those who are more liberal are also more likely to use democratic process language.

Figure 3



In the end, the analysis reveals that there are broad concerns about the compatibility of the judiciary and democratic government. Both Democrats and Republicans approach the Court and its decisions with some degree of skepticism. However, that is where the similarities end. Republicans are focused on the classic conception of the counter-majoritarian difficulty where the concern is over an unelected judiciary overturning the will of the people via its decisions. Democrats on the other hand are concerned about the judiciary weakening democratic participation and processes through its decisions. This of course should come as no surprise in 2018, with polarization on the rise among the electorate and elected officials the fact that the parties differ here as well should be expected.

Discussion:

My analysis of legislative attitudes has two broad takeaways. First, the type of decisions handed down by the Supreme Court matters, and second that individual factors among legislators, specifically ideology, influenced the cases they criticized, and the language used in those criticisms. In this regard, concerns about judicial review are a result of both the behavior of the Court and the attitudes in

Congress. To explore the implications of these findings, I discuss them in order of what I believe to be their significance.

Decisions in some areas were more likely to elicit one type of criticism over others. Legislators who criticized the Court over its gay marriage decisions were much more likely to use counter-majoritarian language, while those that were critical of the Court for decisions on campaign finance were more likely to use democratic process language. This should not necessarily come as much of a surprise. The Court's decisions on gay marriage were arguably counter-majoritarian, overturning state bans on same sex marriage some of which had the support of a majority of the voters in those states.⁹⁷ Similarly, there is a clear connection between cases on campaign finance to participation in the democratic process. Therefore, and it should not come as much of a surprise, the nature of the issues decided influences the frames employed by those critical of those decisions. While one can disagree with the frames, both ideologically and politically, it is not as if legislators are creating these frames out of thin air. Instead, they appear to shape their criticisms to reflect the facts of the case and the nature of the decision, as well as their own partisan and ideological preferences.

There is still the difficult question here of how to disentangle the partisanship element and the cases in terms of the influence on what criticisms legislators employ. In essence, the question here is if the cases had been different, might the parties have made use of different criticisms?⁹⁸ I believe that we can look at the cases decided, and referenced, in the data to begin to answer this question. Some of the cases that received the most ire from democrats were those concerning democratic participation. Specifically, useful here are the decisions around campaign finance. These cases were framed using, overwhelmingly, democratic process criticisms. However, these cases also had a clear counter-majoritarian element as well that was often overlooked. There is a bipartisan consensus that the

⁹⁷ For a more detailed discussion of this, see Kestellec (2017) and Pew's "Religious Landscape Study" (2014).

⁹⁸ I have to thank Will Young for the question itself, and for pushing me to consider this matter in more detail.

wealthy have too much influence in our politics, and that there need to be robust campaign finance regulations.⁹⁹ Further, these cases overturned bipartisan legislation.¹⁰⁰ While this issue had clear counter-majoritarian elements, with the exception of Sen. Tester (D-MT) who occasionally highlighted the counter-majoritarian aspect, these cases were overwhelmingly framed by democrats using a democratic process frame.

In terms of Republicans, their silence on democratic process concerns is quite startling.¹⁰¹ While Republicans have benefitted most from the post-Citizens United campaign finance world (Olsen-Phillips, 2014), it is none the less surprising that out of principle they do not join their democratic peers in criticizing the role of money in our political system.¹⁰² Especially considering a majority of their voters too believe money plays too much of a role in campaigns and support fundamental changes or completely rebuilding the campaign finance system (“Americans’ Views on Money in Politics,” 2015), and President Trump campaigned on addressing the influence of money in politics.

Returning to the question of if I would expect a shift in the language used if the cases changed, and I would not. The time period here, while obviously unique, presented opportunities for both sides to engage in both types of criticisms. Democrats had opportunities to use counter-majoritarian criticisms and Republicans had opportunities to raise democratic process concerns. However, neither side showed much willingness to engage using the terms of debate from the “other side”. There may be a time where we could see a shift, the Trump administration’s additions to the Court and the tea leaves of those

⁹⁹ In a 2015 poll, the New York Times found that 84% believed that money played “too much” of a role in campaigns, and 39% supported fundamental changes to the funding of campaigns while 46% said that we need to “completely rebuild” the entire system (“Americans’ Views on Money in Politics,” 2015).

¹⁰⁰ The Bipartisan Campaign Finance Reform Act (McCain-Feingold Act) passed the House 240 to 189 and the Senate 60 to 40.

¹⁰¹ Reflecting on recent lack effort by Senate Majority Leader Mitch McConnell and President Trump to safeguard the upcoming 2020 election, maybe this lack of concern about the health of our democracy should not come as much of a surprise.

¹⁰² This may in fact *not* be surprising at all.

Justices' priorities do present the possibility that democrats may embrace the counter-majoritarian frame, however for the foreseeable future I expect the parties to engage this debate on their own terms.

While the analysis of what decisions lead to different criticisms is not the most surprising it does have significance for the larger discussion about the role of the judiciary in our political process. These results suggest that in part it is the behavior of the judiciary that leads to the use of specific types of criticisms over others. My results did not show universal condemnation of the Court, rather it showed that elected officials were reacting to specific decisions, in specific ways. Further, to the extent that judges are concerned about, or simply just attentive to, criticism from elected officials (Clark, 2009, 2010; Charles Gardner Geyh, 2008; Mark & Zilis, 2018) they are also somewhat in control of the criticisms that come their way. Decisions that involve democracy, either in the form of the will of the people or participation in the democratic process, appear to be more dangerous for the judiciary. Not only do these types of decisions generate a political backlash, which the judiciary has survived for decades, but they also increase the probability that the criticism involves questioning the role of the judiciary at a more fundamental level. Counter-majoritarian and democratic process criticisms are distinct, they represent a line of criticism that has the potential to not only damage the Court's specific support, but its very legitimacy as well.

The second key takeaway from this project is that while broadly there is bipartisan concern about judicial review, the paths by which elected officials arrive at their concerns, and even the very nature of their concern is deeply partisan. Similar to the takeaway above, this partisan difference should not come as much of a surprise, but that does not undercut its significance. Broadly speaking, Democrats appear to be more likely to criticize the Court for harm it has done to the democratic process, while Republicans are more likely to criticize the Court for undoing the will of the people. Thus, both parties appear concerned about the role of judicial review in our political process. These partisan

differences are not the whole story though, for within the parties I also find significant differences based on ideology.

Those at the ideological extremes of the parties that are much more likely to engage in criticisms that call into question the democratic compatibility of the judiciary. The more liberal or conservative an elected official was increased the predicted number of press releases that used democratic process or counter-majoritarian language. This suggests then that partisanship is only part of the picture. As the parties drift further apart and as the wings of both parties rise in both prominence and power, this suggests that we may see more of these criticisms in the future, and as voters also move to embrace more ideological candidates, we may see these criticisms resonate with more and more people. I explore this in more detail in the next chapter which focuses on public opinion of the judiciary and responsiveness to these frames.

In terms of the scholarly discussion concerning the relationship between the judiciary and Congress, I find evidence that bolsters some existing research and pushes the discussion in new directions as well. By looking at the language used to criticize the courts this project advances the analysis of court curbing in a somewhat different direction. Rather than looking at the culmination of dissatisfaction towards the judiciary, my analysis focuses on the build up to that. Even so, my analysis reveals similar trends to what scholars have found before. Specifically, that there is a wealth criticism, but fewer substantive efforts to curtail the judiciary.¹⁰³ Differing from previous studies that have focused on court curbing legislation, this takes the form of democratic process and counter-majoritarian criticisms. During the time of my data collection I found evidence that both Republicans and Democrats have serious reservations about the democratic credentials of the judiciary, but the number of these criticisms was dwarfed by the number of purely political criticisms of the Court. It is too early then to tell

¹⁰³ See Geyh (2008) who also found that while there is a wealth of criticism of the court, there are fewer substantive threats to the Court.

if these criticisms are laying the groundwork for actual court curbing legislation, or if they are just a proverbial pressure release value for legislative frustration.

Over the next few years, this discussion of what these criticisms mean, will take on a new importance. Among the 2020 Democratic Presidential Nominees, there is a wealth of discussion about what to do with a conservative Supreme Court. For example, Mayor Pete Buttigieg has suggested that he is open to the idea of “court packing”. Among democrats, at least, it will be interesting to see if these criticisms have diminished the court’s legitimacy to the extent that what was at one time a fringe or radical view gains support. In the next chapter I explore this possibility in more detail, testing if voters are responsive to democratic and/or counter-majoritarian criticisms and if these criticisms harm the legitimacy of the Court. It appears that the Justices are attentive to this type of language (Mark & Zilis, 2018), but it is unclear if they are salient to voters.

For the normative debate over the appropriate role of the judicial review, my results show that these concerns resonate with those outside of the ivory towers. While this project does not take a stance on the virtue, or lack thereof, of judicial review, my results can serve to inform that discussion. First, the concerns about judicial review are real and they exist among those impacted by judicial review. Additionally, as framing plays a significant role in discussions of public attitudes towards the judiciary, there may be space for those concerned with the normative side of this discussion to influence the larger discussion.

Second, my expansion of judicial review to include questions about the democratic process offers a new way to approach this debate in the 21st century. The expansion of our conception of counter-majoritarianism to include the democratic process concerns reflects how our politics have evolved. While the classic conception of the counter-majoritarian difficulty has value in analyzing how

the Court can behave in an anti-democratic way, we also need to consider the preemptive or passive ways in which the Court can have an equally troubling influence.

Additionally, this version of the counter-majoritarian difficulty may be more problematic in considering the compatibility of the judiciary with our democratic system. If the Court behaves in a classically counter-majoritarian fashion, there are remedies through voting and the formal political process. While counter-majoritarian behavior may be concerning, it does not deny voters or elected officials the ability to drag the Court back in line, be it by threat of or acting on court curbing. However, if the Court engages in behavior that harms the democratic process, this weakens or even eliminates those remedies. If the democratic process has been weakened, then this raises questions about the extent to which voters can influence elected branches, and by extension the Supreme Court. We should thus consider both this type of behavior by the Court and these types of criticisms as we continue to grapple with the role of the judiciary more than 50 years after Bickel coined what would become this “central obsession”.

Chapter 4: Public Opinion, Experiments, and the Supreme Court

In the previous chapter, I found that elected officials were concerned about judicial review, with both Democrats and Republicans expressing concerns about the compatibility of judicial review with a democratic system of government. However, their concerns came in response to different decisions and they framed their concerns in different ways. Following in the line of research that has found that framing, especially elite framing, can influence public opinion towards the Supreme Court (Baird & Gangl, 2006; Christenson & Glick, 2014; Zilis, 2015) in the following two chapters I explore how these frames and support for democracy relate to public attitudes towards the Court. Specifically, using a survey and survey experiment, I focus on two broad questions; first, how does the public respond to the frames uncovered in the analysis of Congressional press releases, and second, do attitudes towards democracy and democratic institutions influence the public's evaluation of the Court's legitimacy?

Much like the previous chapter, I begin by framing this analysis by looking at the political world in the wake of the 2016 election, and specifically the political debate around President Trump's nomination of Brett Kavanaugh to the Supreme Court.¹⁰⁴ From all sides there was a renewed attention towards the role of the Supreme Court in our political process. What is important to note is that in this renewed attention and discussion the power of the Supreme Court and judicial review are taken as a given. For example, in an editorial for the online publication "Jacobin", Todd Tucker (2018) proposed that "We shouldn't let a handful of reactionary judges get in the way of progressive change. It's time to pack the Supreme Court [with liberal Justices]." A similar sentiment was echoed, jokingly, by Dan Pfeiffer of "Pod Save America", who while discussing the importance of Supreme Court Justices said that "We only get nine Justices, till of course Democrats take over and we pack the Court with six members of

¹⁰⁴ It is also worth mentioning that at the time this is being written, Justice Kavanaugh has been confirmed after an intense partisan battle. The fallout of this fight is still uncertain, but it seems clear that this battle and larger battles over the Court will impact coming elections and the broader debate over the role of the Supreme Court.

antifa”(Favreau & Pfeiffer, n.d.).¹⁰⁵ Why, when expressing concern about the dangers of a conservative Supreme Court do liberal pundits and commentators immediately view this as an arms race, where the solution to a conservative Court is an even more liberal Court, rather than questioning why we have given the Supreme Court this much power in the first place?¹⁰⁶

On one hand, this response of “we need liberal Justices” is not surprising. Without a unilateral agreement to “disarm”, neither side seems likely to give up on efforts to shape the judiciary in a way that is friendly to their policies. The Court has been a powerful tool for both Democrats and Republicans (Teles, 2008), and therefore, it is not surprising that there is a reluctance to give up the power of a friendly judiciary.¹⁰⁷

This reluctance to curtail judicial review may in part also be a function of the public’s support for the judiciary. As FDR famously found out, the public views the Court highly and has historically been reluctant to make fundamental changes to the judiciary (Caldeira, 1987; Gibson & Caldeira, 2009). Questioning the compatibility of the Supreme Court, and its power of judicial review, with our democratic system would arguably fall under what we could consider fundamental changes to the way the judiciary functions.¹⁰⁸ Therefore politicians may be reluctant to suggest serious attacks on the judiciary out of fear of the potential backlash (Clark, 2009; Charles G. Geyh, 2008).

However, we can look at the fiasco that was the confirmation of Justice Kavanaugh as the culmination of events around the judiciary that may suggest public attitudes towards the Court, and by extension judicial review, are shifting. I begin with the Kavanaugh nomination itself. There has been

¹⁰⁵ Both Jacobin and Pod Save America have a clear liberal bent to their analysis of politics.

¹⁰⁶ Of course, this phenomenon isn’t limited to the left. Teles (2008) shows that in reaction to liberal successes in the judiciary there was an organized movement from the right to develop their own conservative legal movement over the last several decades.

¹⁰⁷ But see Rosenberg (2008) who argues the Court is actually limited in this regard.

¹⁰⁸ Gibson, Calderia, and Spence (2003a) as well as more recently Gibson and Nelson (2015) use several variations of limiting judicial review to measure judicial legitimacy.

widespread concern about the potential damage that the bitter confirmation battle and allegations of sexual assault may have had on the legitimacy of the Supreme Court. Many of those expressing concern specifically cited the overt partisanship of Senators, the President, and even the nominee.¹⁰⁹ For example, in his prepared opening remarks at the Senate hearing on the allegations of sexual assault, Justice Kavanaugh launched into what many have described as a partisan tirade attacking Democrats and claiming that the allegations against him were all part of a partisan “hit job” seeking revenge for among other things the 2016 election and his role in the Clinton Impeachment in the 1990’s. These comments and the overall tone of his interaction with the Senate Judiciary committee were undeniably hostile and partisan.¹¹⁰ Even before this, there was increasing partisan rancor around the death of Justice Scalia, the blocking of Judge Garland’s nomination, and the eventual confirmation of Justice Gorsuch. At the same time, as the partisan battles over nominations waged on, there has been increasing evidence that the public’s confidence in the judiciary has been declining.

In 2015, Pew released a study reporting that favorable attitudes towards the Court have been on the decline since 2006 and that unfavorable attitudes had reached a 30 year high (Doherty & Jameson, 2015). As the existing research has shown, the ability of the Supreme Court to maintain its reservoir of good will and withstand public disapproval, is contingent upon its ability to look distinct from regular politics, and to appear to be a legal rather than political institution (Gibson & Caldeira, 2009; Gibson & Nelson, 2015). As nomination fights become increasingly partisan, as the President questions the legitimacy of judges based on their ethnicity, as both liberal and conservative judges

¹⁰⁹ For example, in the course of four days, The Washington Post’s “The Monkey Cage” published three different articles by political scientists discussing the potential for the confirmation hearings to damage the legitimacy of the Supreme Court (Fisher, 2018; Nelson, 2018; Nyhan, 2018).

¹¹⁰ Justice Kavanaugh even went as far as when facing questions about his drinking habits as to turn the questioning around at Senator Klobuchar, shouting at her that “he liked to drink beer, does she like to drink beer?” Sen. Klobuchar has been open about discussing the harm alcoholism has done to her family.

openly express political views,¹¹¹ and as the public becomes less confident in the Supreme Court it may be time to revisit how the public views the Supreme Court and the role of judicial review in our political process. While in years past the public may have seen the Court as removed from the political fray, are we witnessing the beginning of a shift? If this is true, then it is a perfect time to reevaluate public attitudes towards judicial review as the public may be less confident than they once were in the role of the Supreme Court.

This portion of the dissertation proceeds as follows. First, in this chapter I situate this project in relation to the existing literature on public opinion towards the Supreme Court. In the following chapter I discuss the survey and the results there. Next, I present the survey experiment I fielded.

Literature Review:

When discussing public attitudes towards the Supreme Court I follow a long line of literature that focuses on judicial legitimacy. Legitimacy in this literature has been defined as “...a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just” (Tyler, 2006, p. 375). In regard to the Supreme Court, this is linked to the idea of diffuse support, as opposed to specific support (Easton, 1965; Gibson et al., 2003a). Legitimacy, or diffuse support, is “a[n] synonym for institutional loyalty” (Gibson et al., 2003a, p. 357) where as specific support is support for individual decisions.¹¹² A question that has occupied the literature has been to what extent are these two concepts linked.

The bulk of the evidence seems to be that specific support and diffuse support are not directly related, or only weakly connected (Caldeira & Gibson, 1992; Gibson & Caldeira, 2009; Gibson & Nelson,

¹¹¹ For example, on the right we can look to Judge Kavanaugh’s partisan tirade at the hearing, and on the left we can look to Justice Ginsburg’s comments critical of President Trump during the 2016 Election.

¹¹² Throughout the following chapters, unless otherwise noted, I will use “support”, “confidence”, or other synonyms as stand-ins for legitimacy or diffuse support simply to aid the readability and flow of the paper.

2015). However, there have been some recent studies that have found that disagreements with individual decisions, specific support, can in fact harm evaluations of the Court's legitimacy (B. L. Bartels & Johnston, 2013, 2012; but see Gibson & Nelson, 2015; Nicholson & Hansford, 2014). The argument that there is a disconnect between specific and diffuse support seems surprising, as we would expect voters to evaluate the Court based on the decisions it hands down.¹¹³ If that is not the case, then the next logical question is why.

Gibson and Caldeira (2009) have proposed the "positivity bias" as an explanation of why the Court retains public support in the wake of decisions that voters may disagree with. They argue that through exposure to the Court, for example hearing about a recent decision, even if they disagree with the decision, voters are exposed to "symbols of judicial legitimacy". These symbols include the robes, bench, and the imposing marble "temple" that is home to the Supreme Court, all of which help to rebuild public support for the Court by highlighting the idea that the Court is different from regular politics (Gibson, Lodge, & Woodson, 2014). Further, there is an existing set of ideas that come from early political socialization that help to reinforce judicial legitimacy (Gibson & Caldeira, 2009). These symbols and early political socialization together help to generate what has been referred to a "reservoir of good will". They argue that this reservoir is what allows the Court to survive the potential backlash that may come from decisions the public disagree with. Additionally, exposure to these symbols can also refill the reservoir of good will by reminding those exposed to them that the Court is legitimate and "different" from regular politics.

One aspect of the early political socialization process is important to both the origins of judicial legitimacy and this project. Caldeira and Gibson (1992) and Gibson (2007) find that "fundamental political values – particularly support for democratic institutions and processes – serve as the most

¹¹³ The idea being that among other things, Congress and the Presidency are evaluated based on what they have done. It is surprising that the Court is not evaluated in the same way.

important predictors of diffuse support” (Gibson & Nelson, 2014, p. 206). This finding may be somewhat surprising, given that the Court is by its nature is a potentially counter-majoritarian institution, and that for decades there has been considerable handwringing about the democratic credentials of the Supreme Court and judicial review.¹¹⁴

One possible explanation for this seemingly counter-intuitive finding may be the result of how these concepts have been measured. For example, Gibson (2007) uses four scales to measure support for democratic institutions and processes. However, these scales measure only a part of what one could mean by democratic institutions and processes. In Gibson’s (2007) study, many of the measures tapped concepts that were closely linked to ideas of civil liberties and civil rights. For example, the survey asks about political tolerance through the classic “least liked group battery”,¹¹⁵ to what extent the respondent valued liberty versus order, and questions on the rule of law. Of the items used, only one had a more direct electoral element, asking about the participation of different political parties and how power should be shared between minority and majority parties. This highlights an important distinction between “liberal democracy” which is related to the ideas around civil liberties and civil rights, and “electoral democracy” which is more closely related to ideas of majority rule and participation in the democratic process (Coppedge et al., 2011). Obviously, both elements are critical to a well-functioning democracy, but what remains to be explored is the extent to which they operate differently in respect to their effect on judicial legitimacy. It would not be surprising that a belief in civil rights and liberties is related to a support for the institution that is frequently associated with protecting those ideas,¹¹⁶ but it

¹¹⁴ For example, see; Waldron (2006) Tribe, Waldron, and Tushnet (2005), Tushnet (2005), Hirschl (2004), Graber (1993, 2005), Fallon (2008), Cox (1976), Ely (1980) and Bickel (1962) among volumes of others.

¹¹⁵ This battery of survey questions asks subjects which group from a list they “like the least” and then uses that group in subsequent questions asking to what extent the respondent would allow that group to engage in various acts such as teaching, running for office, and holding public rallies or demonstrations. While the battery has been questioned by some it is still a reliable and frequently used item (See Gibson, 1992, 2008, 2013)

¹¹⁶ To what extent the Court does acts as a protector of civil liberties and rights is a question open to much debate (Chemerinsky, 2015; Epstein, Parker, & Segal, 2018; Millhiser, 2016; Rosenberg, 2008).

may be harder to see how a belief in majoritarian or electoral democracy is also related to a support for an institution that some have labeled counter-majoritarian or even anti-democratic.

We can, for the moment, return to the discussion of how the Court handles, and survives, the political fray. Research and history suggests that the Court is able to survive backlash from even highly partisan and salient decisions (Gibson et al., 2003b). However, there is some debate about how, when, and why the Court's reservoir of good will may run dry.

While there is considerable evidence that the court has a sizeable reservoir of good will, "that reservoir is far from bottomless" (Gibson & Nelson, 2014, p. 205). For example, Bartels and Johnston (B. L. Bartels & Johnston, 2013) find that when subjects place themselves on the standard seven point ideological spectrum and then place the Court on the same spectrum, those with the highest level of ideological disagreement between where they placed themselves and where they placed the Supreme Court,¹¹⁷ view the Court as less legitimate. Further, Bartels and Johnston (2012) also find that much of the public views the Court as a political institution. While this may not be a surprising idea to some, it is none the less significant in terms of how we understand public attitudes towards the Supreme Court. Nicholson and Hansford (2014) as well as Christenson and Glick (2014) find that among the public this perception, of the Court and its decisions as political rather than legal, has an impact on both the acceptance of decisions and for the Court's legitimacy. Taken together, these results, and others, suggest that the framing of the Court matters for how the public conceptualizes and in turn evaluates the Court.

The idea that framing of the Court matters should be rather obvious. Compared to other institutions, the Court practically invites framing of it and its decisions by other political actors. The

¹¹⁷ For example, a subject who identified as very conservative and identified the Court as very conservative would have zero ideological disagreement, while someone who identified as a moderate or independent and said the Court was very conservative would have a disagreement level of three.

Supreme Court is passive, opaque, and communicates in an almost foreign language.¹¹⁸ What this means is that while other political actors seek out questions and controversies to involve themselves in; the Court involves itself in only issues that are brought before them, and even then, they select only a small fraction of those. Additionally, if Congress is debating salient legislation there is no end to the soundbites and media appearances of elected officials; they are on every screen and in every speaker spinning the debate and the legislation. Compare that to the Supreme Court at the end of every term. Not only do the Justices not appear on the nightly news to discuss the decisions,¹¹⁹ but the decisions are written in a language most voters do not understand, and arguably even few within the legal community read in their entirety (Chemerinsky, 2015). As a result, the decisions and behavior of the Court requires translation and communication to the public. Never ones to miss an opportunity, political elites can use these moments to spin and frame the Court and its decisions (Morgan & Peabody, 2014; Peabody & Morgan, 2013). It is in this framing then that we can see how the public's perceptions of the Supreme Court may be manipulated.

Building on the vast framing literature,¹²⁰ a number of scholars have found significant framing effects around the Court. For example, Baird and Gangl (2006) find experimental evidence that when a Court decision is framed as political, rather than legal, subjects evaluate the Court and its decision more negatively.¹²¹ Zilis (2015) pushes this line of inquiry further. He first finds, that the presence of dissenting opinions leads to an increase in the media coverage of the decision framing the decision as a conflict or fight. Second, he finds experimental evidence that when the Court's decisions are framed as such, there is a negative impact on evaluations of the decision and also has the potential to harm the Court's

¹¹⁸ Also see Chemerinsky (2015) who argues that this opacity from the Court is a critical flaw in how the Court operates and includes "fixes" such as broadcasting the Court's oral arguments and increasing the "readability" of Supreme Court decisions in his discussion of how to improve the way the Court fits within our political process.

¹¹⁹ While media appearances of Justices may be increasing (Hasen, 2016), it is undeniable that Justices differ from elected officials in their conduct and statements during these appearances.

¹²⁰ see Chong and Druckman (2007) for a thorough review of this literature

¹²¹ Also see, Christenson and Glick (2014) for a more recent version of this argument.

legitimacy.¹²² It is important to also note that the source of the frame matters for how voters evaluate the Court. For example, Clark and Kastellec (2015) find that subjects were much more supportive of court curbing proposals when the source cue was from their own party, and were less supportive when the same proposal came from the opposition party. Thus, while it may be true that ideological disagreements with specific decisions may not be enough to damage the Court, there does seem to be potential, depending on how the Court is framed, and by whom, for the Court's legitimacy to be in peril.

This project then seeks to contribute to this diverse literature on public attitudes towards the Supreme Court. Using an experiment and survey, I add my own twist on this literature. I am interested in two broad topics. First, when one broadens the conceptions of democracy to include not only concepts like civil rights and liberties, but also electoral and majoritarian elements, does the link between support for democracy and judicial legitimacy hold up? Second, building upon the literature looking at framing the attitudes towards the Supreme Court, I apply the findings of my analysis of Congressional Press releases to see the extent to which the frames found there resonate with the public and if they influence evaluations of the Court's legitimacy.¹²³

¹²² Also see, Nicholson and Howard (2003) who find that under some circumstance, like highlighting the consequences of a decision, the framing of a Supreme Court decision can harm the Court's legitimacy.

¹²³ See Grimmer (2013) and Grimmer, Westwood, and Messing (2014) for other research that has used press releases to look at how elite framing there can influence public opinion.

Chapter 5: When All Else Fails, Send in The Courts: The relationship between public attitudes towards democracy and judicial legitimacy

For this chapter of the dissertation I fielded a survey and survey experiment together. The focus of the survey was to analyze the relationship between democracy and judicial legitimacy. Specifically, I am interested in the relationship between different conceptions of democracy and citizens' perceptions of judicial legitimacy.

Prior to the experimental manipulations, subjects responded to the democracy items analyzed in this chapter. By asking these questions prior to any experimental manipulations I avoid the risk of priming subjects through any of the experimental manipulations.¹²⁴ In this chapter I focus on the survey analysis, and in the next chapter I analyze the experimental results. This project uses a non-probability convenience sample (n=1,004) recruited and provided by Dynata.¹²⁵ This type of online survey work has become increasingly common in political science, but has also generated a wealth of discussion (R. Baker et al., 2010, 2013; Kennedy & Deane, 2019; Kennedy et al., 2016; Lavrakas et al., 2017).

In the public opinion and survey literature the use of non-probability samples has received plenty scholarly debate. For example, the American Association of Public Opinion Research (AAPOR) commissioned multiple reports in the last 10 years that included discussion the use of non-probability or online samples in survey research.¹²⁶ While AAPOR approaches non-probability samples with caution, they do suggest that the use of different weighting schemes can help to limit the biases that may be associated with non-probability samples (R. Baker et al., 2010, 2013). Another benefit of these non-probability samples is cost. Fielding a nationally representative survey of this length would cost more

¹²⁴ Another benefit of this is that when analyzing the experimental results, all subject have been subject to the same potential "primes" that may come from the democracy questions.

¹²⁵ Formerly Survey Sampling International.

¹²⁶ While some like IPSOS have developed probability based online samples, most online samples remain non-probability.

than twenty thousand dollars.¹²⁷ Therefore, while obviously one would prefer to field surveys using a nationally representative sample, using a convenience sample is useful for graduate students, or others with limited budgets. Additionally, using the non-probability sample offers a “proof of concept”. Using this sample, I am able to test my measures and hypotheses, and see if there is any evidence of a “there there” before committing to the more costly nationally representative sample.

With these concerns in mind, I offer two qualifiers to my study. First, this is an exploratory study. This study is the first that explores attitudes in the United States towards a variety of conceptions of democracy and uses those attitudes to better understand attitudes towards the Supreme Court’s legitimacy. Results here suggest that more research is warranted, and in the future a probability sample should be employed to provide a more robust analysis. Second, in recruiting for this study, Dynata provided a sample that, by using quotas, is balanced based on age, gender, race, and census region (see Appendix 11 which compares the demographics of this sample to the ANES and U.S. Census demographics). Additionally, Dynata recruits from a variety of channels,¹²⁸ and has a sample pool of over 31 million across the U.S., Canada, and Mexico.¹²⁹ Thus, while not a probability sample, I can say that the sample does have relation to the U.S. population (see Appendix 5). I follow the suggestions of AAPOR by employing quotas and using post-stratification weights, provided by Dynata, to analyze the survey portion of this chapter (R. Baker et al., 2010, 2013).¹³⁰

In the survey, I offer a new, at least for the judicial legitimacy literature, conception of how to measure attitudes towards democracy. Previous studies have used scales comprised of questions asking

¹²⁷ For example, I received quotes for a 10-minute nationally representative survey costing more than \$25,000, and for a 5-minute survey the quotes were more than \$15,000. By comparison, this survey cost approximately \$3,000.

¹²⁸ Dynata reports that they recruit through loyalty panels, organic/open enrollment/partnerships, and affiliated networks (*Dynata Panel Book*, 2019). The benefit of this multiple recruitment sources is that it can help to reduce bias in the sample by expanding the types of individuals recruited (R. Baker et al., 2010).

¹²⁹ The sample used here includes on residents of the U.S. who are 18+, and thus is a portion of those 31 million.

¹³⁰ No weights are used in the analysis of the experimental results.

about mostly civil rights and civil liberties, such as; the least liked group battery and support for order versus liberty as measures of support for democracy (Gibson, 2007).¹³¹ While civil liberties and rights are a necessary component of democracy, they are not the only one.

Coppedge et al. (2011) propose six possible conceptions of democracy; electoral, liberal, majoritarian, participatory, deliberative, and egalitarian (see Appendix 7 for a full list and their definitions). While their analysis focuses on how scholars can classify if, and to what extent, a country is a democracy, the distinctions provide a useful framework for this analysis. For example, the idea behind participatory democracy is “government by the people”, while the concept underlying the majoritarian conception is “majority rule, centralization, vertical accountability”, and these compare to “liberal democracy” where the principles include “individual rights, civil liberties, and transparency” (Coppedge et al., 2011, p. 254).¹³² While the authors, and I, recognize that the boundaries between these items can be fuzzy and open to interpretation, it is none the less useful to broadly recognize these different elements of democracy.

Additionally, this also highlights one of the complexities about surveying attitudes towards democracy, namely that democracy can take on so many different meanings. In addition to the differences discussed by Coppedge et al, there is also a distinction between democracy in theory and democracy in practice. For example, Kiewiet de Jong (2016) discusses “regime abstraction” where survey respondents conflate their idealized conception of democracy with how democracy is functioning in practice. Schwertheim (2017) also highlights the challenge of using survey methods to measure support for democracy in part due to regional and national differences, as well as in the question wording.

¹³¹ It is worth noting, while I cite Gibson (2007) here frequently, his study used several items to measure support for democratic institutions and processes. Among the measures I associate with liberal democracy, there were also one measure related to electoral democracy, support for a multiparty system, and another; support for the rule of law, that I could not classify as falling into any of the conceptions, but none the less included in my analysis.

¹³² See Appendix 7 for a useful reprint of Coppedge et al.’s table outlining their different conceptions of democracy.

Specifically, she suggests that rather than asking about democracy in the abstract, researchers should ask more concrete questions about democracy in practice. As a result, I take into consideration these concerns about measuring democracy in crafting and selecting the questions I use.

Much of the work on attitudes towards democracy has focused on the rest of the world, and until recently the United States has received much less attention.¹³³ However, in some recent work on the United States, we can see the tensions raised by Schwertheim and Kiewiet de Jong at play in the United States. For example, Durtman et al. (2018) focus on analyzing which voters are more likely to support democracy or an alternative; such as military rule or a “strong leader”.¹³⁴ In this analysis they uncover that there is bipartisan skepticism of democracy, but this does not mean that there is also support for undemocratic alternatives. Instead they reach the conclusion that for many U.S. voters there is a skepticism of the existing democratic process and an overall dissatisfaction with the political process, but this does not mean that these voters are inclined to reject democracy as a result. This tension between how democracy functions versus the idea of democracy is something important to keep in mind as I analyze the results of the survey. On one hand there may be the idealized vision of the Supreme Court as a part of the system of checks and balances but there may also be skepticism of the Court based on how it functions in practice.

After completing standard demographic questions, such as; age, partisanship, ideology, and political knowledge, subjects are asked to respond to questions about their attitudes towards different conceptions of democracy. See Appendix 3 for a discussion of how the questions were presented to subjects. Following Coppedge et al. (2011), I group the questions asked based on their different conceptions, see Table 7 below. Generally, the questions fall under only one of their conceptions;

¹³³ Though, this lack of attention to democracy at home may be changing as our politics continue to (d)evolve.

¹³⁴ For more discussion of these “less than democratic” alternatives, see Levitsky and Ziblatt (2018).

however, in a few cases questions arguably could fit under two categories. See Appendix 12 for a factor analysis of the democracy items.

Table 7: Conceptions of Democracy and how they are measured.

Democracy Concept:	Description:	Measures:
Liberal Democracy	Limited Government, Civil Liberties, Individual Rights	Civil Liberties Block
		Tolerance (least liked group) *
		Liberty versus Order*
Electoral Democracy	Contestation, Competition, Are government offices filled by free and fair multiparty elections?	Cynicism
		Political Parties *
		Confidence in elections
Majoritarian Democracy	Majority rule, Does the majority (or plurality) rule?	Majority rule
		Electoral College Reform
		Delegate versus trustee
		Majority rule versus minority rights
Participatory Democracy (including deliberative and egalitarian democracy as well)	Government by the people, Do ordinary citizens participate in politics? Are citizens equally empowered? Are political decisions the product of public deliberation?	Responsiveness
		Efficacy
		Campaign Finance/Spending

Note, those items with an "" are those that were used in the Gibson (2007) study*

Under the umbrella of “liberal democracy” I have included measures (see Table 8 below) that key into attitudes towards civil rights and liberties. Included in this are some of the measures used by Gibson (2007) such as the least liked group and order versus liberty scales. I have also included a frequently used measure of support for civil liberties and rights. These items measure the extent to which subjects will extend civil liberties, such as freedom of speech and assembly, to unpopular groups and the extent to which they are willing to curtail those rights more generally. These items also relate to

principles of limited government, individual rights, and civil liberties which Coppedge et al. associate with liberal democracy.

Table 8: Items used to measure “liberal democracy”

Scale	Items	Measurement
Civil Liberties	Require everyone to carry a national identification card at all times to show to a police officer on request. Do you...	Strongly support, Support, Oppose, Strongly oppose
	Allowing law enforcement officers to stop or detain people of a particular race if these groups are thought to be more likely to commit crimes. Do you...	
	Allowing the government to record telephone calls and monitor e-mails in order to prevent people from planning terrorist or criminal acts. Do you...	
	Allowing law enforcement officials to investigate people who participate in nonviolent protests against the U.S. government. Do you...	
Tolerance (Least Liked Group scale)	Of the groups listed below, please select the group you like the least: KKK, Nazis, Radical Muslims, Militarists, Communists, Gay Rights Activists, Proponents of abortion, Opponents of abortion, Christian fundamentalists, atheists	agree strongly, agree, are uncertain, disagree, disagree strongly
	[group] should be allowed to make a speech in our community. Do you...	
	[group] should be allowed to banned from running for public office. Do you...	
	[group] should be allowed to hold public rallies and demonstrations in our community. Do you...?	
Relative value of liberty versus order	Society shouldn't have to put up with those who have political ideas that are extremely different from the majority.	Strongly agree, agree, uncertain, disagree, strongly disagree
	It is better to live in an orderly society than to allow people so much freedom that the become disruptive.	
	Free speech is just not worth it if it means that we have to put up with the danger to society of extremist political views.	

Another way to think of democracy focuses on elections. Coppedge et al. ask of electoral democracy, “are government offices filled by free and fair multiparty elections?” (2011, p. 254) The measures for this conception of democracy thus tap into this idea of free and fair elections, see Table 9 below. For example, I include a measure used by Gibson (2007) on political parties, with questions

asking the extent to which subjects agree or disagree with the following; “What our country needs is one political party which will rule the country”, “The party that gets the support of the majority ought not to have to share political power with the political minority”, and “Our country would be better off if we just outlaw all political parties”.¹³⁵ I have also included a block of questions measuring subjects’ attitudes towards elections in the United States. These questions focus on ‘democracy on the ground’ and tap the ideas of free and fair elections by asking subjects how well do the following statements describe elections in the United States; “Elections are free from tampering”, “No ineligible voters are permitted to vote”, “No eligible voters are prevented from voting”, and “The way congressional districts are determined is fair and reasonable”. While the first set of questions from Gibson tap into the idea of multiparty elections, the second set of questions measure the confidence in how free and fair our elections are, and these questions are especially relevant in the wake of recent elections and efforts to restrict voting access.

¹³⁵ I recognize that these questions are problematic, especially in the current political climate. For example, if a subject strongly agrees with the statement that we should outlaw political parties, it is unclear what that means. For example, one could agree with that statement and believe in a version of direct democracy, or they could be coming from a more authoritarian point of view. Similarly, for the questions on “one political party to rule” and the “majority not having to share power with the minority”, it is unclear if that means that after a free and fair election the majority party has free reign until the next election, or if it means a more authoritarian tendency to diminish elections and political participation more generally. None the less, since these measures were included in the original study by Gibson as measures of democratic institutions and processes, I have included them here in their original format.

Table 9: Items used to measure “electoral democracy”

Scale	Items	Measurement
Electoral integrity	[How well does the following describe elections in the United States?] Elections are free from tampering.	Very well, somewhat well, not too well, not well at all
	No ineligible (disqualified) voters are permitted to vote. No eligible voters are prevented from voting.	
	The way congressional districts are determined is fair and reasonable.	
Political parties	What our country needs is one political party which will run the country.	strongly agree, agree, uncertain, disagree, strongly disagree
	The party that gets the support of the majority ought not to have to share political power with the political minority.	
	The country would be better off if we just outlawed all political parties.	
Electoral cynicism	(Thinking about how things are in the U.S. today, how well does the following statement describe the country?) Ordinary citizens can do a lot to influence the government in Washington if they are willing to make the effort.	very well, somewhat well, not too well, not well at all
	(Thinking about how things are in the U.S. today, how well does the following statement describe the country?) Government policies generally reflect the view of most Americans	
	(Thinking about how things are in the U.S. today, how well does the following statement describe the country?) People who give a lot of money to elected officials do not have more political influence than other people.	

Webster’s dictionary defines democracy first as “government by the people *especially*: rule of the majority”(“Definition of democracy” n.d.),¹³⁶ so it is obvious that we need to include some measure of majority rule in our conceptions of democracy (see Table 10 below). Quite simply, we can measure the extent to which subjects support the idea that “public officials should be chosen by majority vote”, but we can push this concept also in some interesting ways. One way to do this is to explore support for eliminating the Electoral College, something that has received a renewed attention in the lead up to the 2020 Election. While this is a polarizing issue today, there has historically been bipartisan support for

¹³⁶ I sincerely apologize for using this Freshman writing cliché.

replacing the Electoral College with a total votes system (Jones, 2019). A second way to look at the extent to which subjects support majority rule is by looking at the age-old debate over the delegate versus trustee model by asking subjects “If a member of Congress thinks a bill is in the best interest of the country, but a majority of the people he or she represents are against it, should the member of Congress vote for the bill or against it?”.

Finally, in terms of majority rule there is the ever-thorny issue of balancing that with protecting the rights of the minority. Since the Supreme Court has often been viewed as the protector of the minority and/or unpopular voices, this is an important tension to explore. I measure this by scaling together three questions that ask subjects to express a preference for majority rule versus minority rights. Importantly, subjects are presented with a majority rule and a minority rights statement and asked which statement they agree with most; however, their options are not limited to only ‘A’ or ‘B’. Rather, subjects are given the option to say they agree “more [with] the first statement than the second” and vice versa, allowing for more variance and nuance within the responses. Important as well is that the order of the statements is randomized in all three questions. The benefit here is that by combining these questions together I have a scale from total majority rule to total protection of minority rights.¹³⁷ Neither end of the scale is necessarily “anti-democratic”, in fact both are essential to a democracy, but this scale differs from other measures of democracy which, essentially, range from anti-democratic to democratic. This offers a unique way to explore the ways in which attitudes towards this conception of democracy relate to support for the Supreme Court.

¹³⁷ Upon analysis of this scale, these items combined did not produce a reliable scale (Cronbach’s Alpha = .296). In the analysis I ran models with the scale and a single dummy variable of the question asking subjects which is most important in a democracy; that the will of the majority is followed or that minority rights are protected. As a preview of things to come, neither version was significant either statistically or substantively in any of the models.

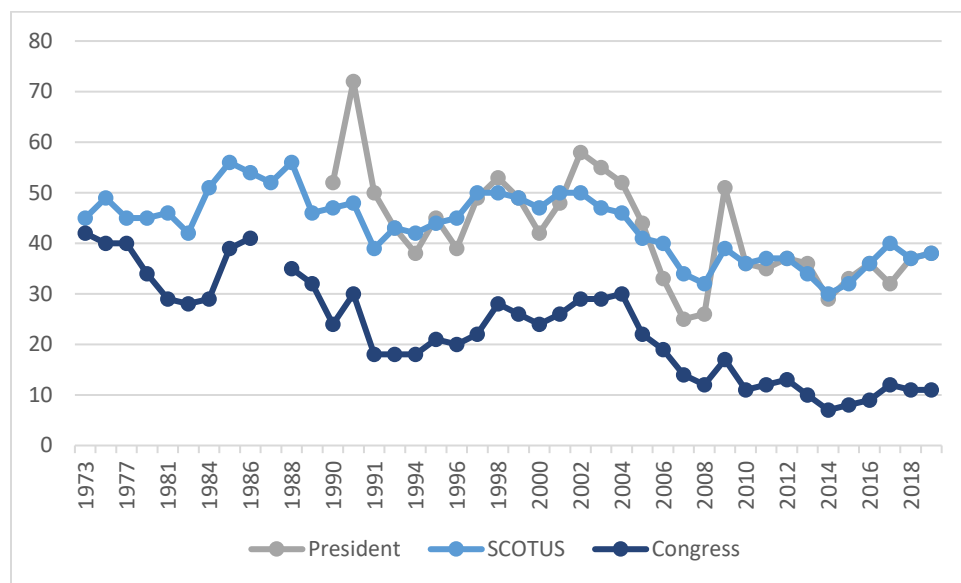
Table 10: Items used to measure “majoritarian democracy”

Scale	Items	Measurement
Majority rule	In general, if a party wins a clear majority of votes, it should be able to pass the legislation they prefer.	Strongly agree, agree, uncertain, disagree, strongly disagree
	Public officials should be chosen by majority vote.	
Electoral College	Thinking for a moment about the way in which the president is elected in this country, which would you prefer? To amend the constitution so the candidate who receives the most total votes nationwide wins the election, or to keep the current system, in which the candidate who wins the most votes in the electoral college wins the election?	Amend the constitution to total votes, Keep the current electoral college system
Delegate versus Trustee	If a member of Congress thinks a bill is in the best interest of the country, but a majority of the people he or she represents are against it, should the member of Congress vote for the bill or vote against it?	vote for it, vote against it
Majority versus Minority rights	Which of the following statements do you agree most with? [randomized order of two statements] For democracy to work best, the will of the majority must be followed OR For democracy to work best, the rights of minorities must be protected? The majority party should be able to pass legislation that is supported by a majority of the legislators OR The minority party should be able to delay or block action on legislation supported by a majority of legislators. The majority party should be able to limit or prohibit amendments to its legislation OR The minority party should be able to get a vote on its amendments to legislation?	The first statement; More the first statement than the second; More the second statement than the first; The second statement.

The next conception of democracy, as seen in Table 11 below, is participatory, which focuses on “government by the people” and “do ordinary citizens participate in politics?” (Coppedge et al., 2011, p. 254). In the context of this study this is an important concept to explore, as there is a growing bipartisan skepticism of the political process and the extent to which regular people have a say in politics and government (see Figure 4 below, showing the trust Americans have in the three branches of government over time). This is highlighted in the United States by the surprising success of both Bernie Sanders and Donald Trump’s 2016 Presidential Campaigns, where both candidates highlighted the belief that politics and political elites are not working for the people. Since several of the critiques of judicial review have as a precondition for its elimination the presence of a well-functioning democratic

process,¹³⁸ we should consider that citizens attitudes towards our representative democracy may impact how they feel about judicial review. In this grouping then I have included measures of the extent to which subjects feel that Congress is attentive to the wishes of voters and to what extent voters feel they have efficacy in influencing what Congress does. Much of the work on the Supreme Court has focused on the Court in isolation, but I believe that it is important to consider the Court as part of the larger political process. It may be that voters do not trust the other branches of government, and instead believe that the Court is their viable alternative. As a result, it may be that a decrease in the confidence in participatory democracy results in an increase in support for the judiciary.

Figure 4: % of Americans with a great deal or quite a lot of confidence in the branches of government



On one hand it may be that those with little faith in the democratic/political process view the judiciary as a venue that they can still look to for a remedy (Keck, 2014), while on the other hand it may be that those with little faith in the democratic process see the Court as partially responsible for that.¹³⁹

¹³⁸ For example, see Waldron (2006) and Hirschl (2004).

¹³⁹ For example, many Democratic Senators and Members of the House blamed the Supreme Court for damage done to the political process due to decisions like Citizens United and McCutcheon. Also see Chemerinsky (2015) and Millhiser (2016) who raise similar concerns about recent Supreme Court decisions.

Further, while the Supreme Court continues to be the most trusted branch of government its support has declined in recent years (Pew Research Center, 2015). While the public's trust in the judiciary's has somewhat declined, Congress's trust has little room to fall much more, considering its level of support is similar to that of cockroaches and traffic jams (Jensen, 2013). Scholars have also begun to recognize that when evaluating the Supreme Court, we need to do so in consideration of the larger political process, rather than focusing on the court in isolation (Frymer, 2003, 2007; Graber, 2008). Therefore, it stands to reason that when assessing the relationship between attitudes towards democracy and the judiciary, we should account for the attitudes towards the elected institutions and opinions of how well, or poorly, they function.

Table 11: Items used to measure "participatory democracy"

Scale	Items	Measurement
Spending on campaigns/elections	Thinking about spending on political campaigns and issues, which comes closer to your view	Individuals and organizations should be able to spend as much money as they want. There should be limits on the amount of money individuals and organizations can spend.
Responsiveness	Over the years, how much attention do you feel Congress pays to what people like you think when it decides what to do -- a good deal, some, or not much?	A good deal, Some, Not much
	Over the years, how much attention do you feel Congress pays to what the people think when it decides what do to – a good deal, some, or not much?	
Efficacy	How much do you feel like having elections makes Congress pay attention to what the people think – a good deal, some, or not much?	A good deal, Some, Not much
	How much do you feel like having elections gives people like you a say about what Congress does-- a good deal, some or not much?	

The final two categories of democracy are deliberative and egalitarian, which focus, respectively, on the extent to which political decisions are the product of public deliberation and if all citizens are empowered equally to participate in politics. These ideas have overlap with how we perceive of participatory democracy, both in terms of their underlying ideas but also in how they are measured here. Coppedge et al. recognize that there is overlap with their concepts, and in the context of their analysis the distinctions are more pronounced than they are here. It is none the less important to recognize that these final two conceptions are distinct in their own way and if we are going to consider the relationship between attitudes towards democracy and attitudes towards the judiciary, we should keep the fact that “government by reason” and “political equality” are important concepts to keep in the back of our mind as we analyze the results. However, for the sake of clarity and simplicity, I have grouped them together with participatory democracy.

Finally, there is an additional measure included in the analysis that needs some discussion. Gibson (2007) includes as a measure of democracy a battery of questions concerning the rule of law. These questions focus on the extent to which the respondent places a value on law and following the rule of law, for example, asking to what extent subjects agree with the statements; “it is necessary to obey a law you consider to be unjust” and “the government should have some ability to bend the law to solve pressing social and political problems”. These questions tap a key aspect of democracy that does not fall under the previous conceptualizations. To the extent that democracy is a system of government based on the rule of law, then it is important that citizens follow those laws.

Table 12: Items used to measure “something else”

Scale	Items	Measurement
Rule of Law	It is necessary to obey a law you consider to be unjust.	Strongly agree, agree, uncertain, disagree, strongly disagree
	Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.	
	The government should have some ability to bend the law to solve pressing social and political problems.	
	It is not necessary to obey the laws of a government I did not vote for.	
	When it comes right down to it, law is not all that important; what’s more important is that our government solves societies problems and makes us better off.	

Hypotheses:

The existing research has found a strong relationship between support for democratic institutions and processes and judicial legitimacy (Gibson, 2007; Gibson & Nelson, 2014). However, if we unpack the scales used to measure democratic institutions and processes the questions used in previous projects are for the most part about civil liberties and civil rights. While these concepts are necessary for a democracy, they are not sufficient.¹⁴⁰ Therefore, I propose a distinction between “liberal democracy”, defined as support for civil liberties and civil rights, and electoral, majoritarian, and participatory democracy. This is an important distinction to explore as one literature is full of debate and concern over the potential for the Supreme Court to behave in an anti-democratic fashion, while another literature focusing on judicial legitimacy finds a positive connection between support for democracy and support for the Supreme Court. As a result, I propose two preliminary hypotheses:

Hypothesis 1a: Subjects who have higher levels of support for liberal democracy will view the Supreme Court as more legitimate.

Hypothesis 1b: Subjects who express a higher level of support for electoral/majoritarian/participatory democracy will view the Supreme Court as less legitimate.

¹⁴⁰ For a more detailed analysis of the distinction between different conceptions of democracy, see Kiewiet de Jong (2016), Coppedge et al. (2011), Durtman, Diamond, and Goldman (2018), and Schwertheim (2017).

These hypotheses explore the broad tension between democratic government and the Supreme Court. However, we can explore these ideas in more detail. For example, Kiewiet de Jonge (2016) and Schwertheim (2017) find that there is a disconnect between abstract conceptions of democracy and how democracy is actually functioning.¹⁴¹ This leads to a second set of hypotheses that explores this in relation to the Supreme Court. It may be that those who believe in Congress and representative democracy may support measures to make the Supreme Court more accountable to the public and the electoral branches. Alternatively, I propose those who view Congress as less functional will be more supportive of the Court's counter majoritarian functions.

Hypothesis 1c: Subjects who view Congress as well functioning will be more supportive of proposals to make the Supreme Court more accountable to the public and/or elected branches of government.¹⁴²

Hypothesis 1d: Subjects who support protection of minority rights, more so than majority rule, will view the Supreme Court as more legitimacy.¹⁴³

Previous research has found a connection between support for democratic institutions and processes, but that research has focused on liberal democracy. My analysis expands what one means by democratic institutions and processes to include different conceptions of democracy that include electoral and majoritarian elements. This survey was not nationally representative, but the sample was both reasonably similar to the U.S. population (see appendix 11), and the data was weighted national demographics¹⁴⁴. Therefore, as an exploratory study we can take these results to be indicative of what future research, using a more robust sampling procedure, may want to focus on.

¹⁴¹ Also see PEW's "The Public, The Political System, and Democracy Survey" (2018) for a similar distinction.

¹⁴² Specifically here, I am looking at two questions from Gibson and Nelson (2014) "It is inevitable that the U.S. Supreme Court gets mixed up in politics; therefore, we ought to have stronger means of controlling the U.S. Supreme Court" and "The U.S. Supreme Court ought to be made less independent so that it listens a lot more to what the people want".

¹⁴³ Measured using the scale created from the majority rule versus minority rights questions.

¹⁴⁴ Weighting was provided by Dynata.

The dependent variables analyzed consist of six items previously used to measure judicial legitimacy (Gibson et al., 2003a; Gibson & Nelson, 2014). Subjects were asked at the beginning of the survey,¹⁴⁵ if they strongly agree, somewhat agree, neither agree nor disagree, somewhat disagree, or strongly disagree with the following six statements;

- (1) "It is inevitable that the U.S. Supreme Court gets mixed up in politics; therefore we ought to have a stronger means of controlling the actions of the U.S. Supreme Court"
- (2) "The U.S. Supreme Court ought to be made less independent so it listens a lot more to what the people want"
- (3) "Judges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judges"
- (4) "If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether"
- (5) "The right of the Supreme Court to decide certain types of controversial issues should be reduced"
- (6) "The U.S. Supreme Court gets too mixed up in politics"

These items were then combined to create a scale of judicial legitimacy, and consistent with previous research using these questions, I find that they produce a highly reliable and consistent scale (Cronbach's Alpha = .866). These questions and this scale are the starting point for my dependent variables.¹⁴⁶

The independent variables are discussed in detail in Appendix 8. In brief, I organized the independent variables into 4 different conceptions of democracy. For example, under the group of "liberal democracy" I have three scales; support for civil liberties, political tolerance, and liberty versus order. Compare those items with the items I've grouped under "majoritarian democracy"; majority rule, minority rights versus majority rule, support for the Electoral College,

¹⁴⁵ Subjects were asked these questions immediately following the basic demographic and screening questions. This was to ensure that these items were not influenced by the questions measuring attitudes towards the various conceptions of democracy or other questions in the survey/experiment.

¹⁴⁶ Some of the hypotheses are tested using a subset of questions, and I will note those sections when I arrive at them, and at that time will provide a more detailed explanation of which questions I have used and the reliability of that scale.

and preference for the delegate or trustee model of representation. These items tap into different conceptions of democracy. While democracy is a difficult concept to define, and even more difficult to measure, the items used here tap into different elements of what democracy can mean. One final note before moving into the analysis. All the variables and scales, including the dependent variables, have been recoded to have a range of 1 and either have their lowest value as 0 or the scale is centered on 0.¹⁴⁷ This facilitates ease of analysis as the unstandardized Beta will tell us the effect of moving from one end of each independent variable to the other on the dependent variable.

Hypothesis 1a: Subjects who have higher levels of support for liberal democracy will view the Supreme Court as more legitimate.

Hypothesis 1b: Subjects who express a higher level of support for electoral/majoritarian/participatory democracy will view the Supreme Court as less legitimate.

Hypotheses 1a and 1b are the most basic test of my overarching hypothesis that attitudes towards democracy will influence attitudes towards the Supreme Court. More specifically much like Gibson (2007) found, I expect that support for the civil liberties elements of democracy will be related to higher levels of support for the Court. However, my addition here is that I hypothesize that support the majoritarian, electoral, and participatory elements of democracy will be associated with less support for the Supreme Court. The logic here being that support for civil liberties will have a positive association with the institution frequently associated with those rights and liberties. Conversely, I theorize that those who are more supportive of the electoral or majoritarian elements of democracy will be less supportive of an institution that many have criticized as anti-democratic.

¹⁴⁷ For example, the majority rule versus minority rights scale ranges from -.5 to .5 where 0 represents the center of the scale preferring neither majority rule nor minority rights. Alternatively, the cynicism scale ranges from 0 to 1, with 0 representing no trust (high cynicism) in the political process and 1 meaning high trust in the political process (low cynicism).

I begin the analysis by presenting individual OLS models that include the different measures associated with the conceptions of democracy and several demographic control variables. In addition to controls for self-identified Democrats and Republicans, including leaners, I also have several over controls that need explanation. I included a dummy variable for “black” subjects, since Gibson and Caldeira (1992) finds that there is a higher level of trust among black citizens in the Court, something he attributes to the Court’s historic role in the civil rights movement. Gibson and Caldeira in a later paper also find that “to know the Court is to love it” and that political sophistication is also associated with higher levels of confidence in the Court (Gibson & Caldeira, 2009). Therefore, I include a control for the number of political knowledge questions the respondent answered correctly. Included in these questions was one asking subjects to identify the “job or title of John Roberts”.¹⁴⁸ The final control in the models is for gender. This survey was fielded in the wake of a contentious confirmation battle over Justice Kavanaugh who faced allegations of rape. This confirmation battle also resurfaced the issues of Justice Thomas’ nomination battle, where he faced allegations of sexual harassment from Anita Hill. While there is evidence that the main divide over Kavanaugh were over partisanship more so than gender, it is undeniable that gender and the #metoo movement played a role in the confirmation battle and how it was perceived by voters (Bacon, 2018).

I begin the testing of the hypotheses by looking first at hypothesis 1a and support for liberal democracy. In previous research it was argued that support for democratic institutions and processes was related to an increased belief in the legitimacy of the Supreme Court. However, the items used previously were mostly focused on the element of democracy that

¹⁴⁸ I ran the models with the full knowledge scale and then with the Roberts variable and remaining items in the knowledge scale as separate items, the method made no difference in the models’ performance. Therefore, for simplicity sake, I decided to use all the knowledge questions in a single scale.

concerned itself with civil liberties and civil rights. Hypothesis 1a retests this conclusion, and as you can see in Table 13 below, I find strong evidence confirming those earlier findings.

Table 13: OLS Regression Analysis of Liberal Democracy on Diffuse Support (Judicial Legitimacy)

Variable	
Constant	-.120 (.039)
Civil Liberties	.089 (.050)
Political Tolerance	.226*** (.042)
Liberty Versus Order	.944*** (.056)
Democrat	-.104** (.035)
Republican	.039 (.037)
Political Knowledge	.138** (.047)
Black	.000 (.034)
Women	-.045 (.026)
R ²	.366
sest	.394
Coefficients are unstandardized with standard error in parentheses. Total n = 1,000	
* significant at p<.05	
** significant at p<.01	
*** significant at p<.001	

Subjects who reported a higher level of political tolerance and a preference for liberty over social order, were more likely to support the legitimacy of the Supreme Court. This should not be much of a surprise, as the Court is frequently associated with those values. I also find evidence that backs up other research that political knowledge is associated also with an increased belief in the legitimacy of the Court. Surprisingly though, the item most directly related to support for civil liberties; the civil liberties scale, was not a statistically significant factor ($p > .05$).

Hypothesis 1b has three parts. I expect that those with confidence in electoral democracy, support the notion of majority rule, and are confident in voter's ability to participate and influence politics will be less supportive of the Supreme Court. I believe that these elements of democracy have a connection to the concerns about the counter-majoritarian nature of the Supreme Court, and therefore the more confident one is in the "regular" political process, the less supportive one will be of the Court stepping into that process.

I begin by analyzing the results of the OLS model with the items related to electoral democracy. Counter to the hypothesis, I find that confidence in elections is not a statistically significant variable, and further that a belief in a multiparty democracy is related to an increased support for the Supreme Court's legitimacy. While this does run counter to my hypothesis, it is in line with previous research that has used this measure (Gibson, 2007).

Table 14: OLS Regression Analysis of Electoral Democracy on Diffuse Support (Judicial Legitimacy)

Variable	
Constant	-.085 (.053)
Confidence in Elections	-.055 (.061)
Multiparty Democracy	1.092*** (.056)
Democrat	-.091** (.034)
Republican	.012 (.036)
Political Knowledge	.062 (.048)
Black	-.003 (.033)
Women	-.097*** (.026)
R ²	.380
σ _{est}	.389
Coefficients are unstandardized with standard error in parentheses.	
Total N = 999	
* significant at p<.05	
** significant at p<.01	
*** significant at p<.001	

While electoral democracy ran counter to the hypothesis, there are still two other conceptions of democracy to test. Something interesting in the model above for Electoral democracy was that the knowledge scale was no longer statistically significant. Upon further analysis, there was a strong correlation between the knowledge scale and confidence in elections (-.225, p<.001) and support for a multiparty democracy (.395, p<.001). In the other models there were some correlations between knowledge and elements of democracy, but none as strong as the relationship between it and support for a multiparty democracy. This finding that knowledge is not a statistically significant factor is interesting as it conflicts with a key finding of the judicial legitimacy literature, however given the non-representative nature of this sample I am hesitant to read much into the result. The next model includes the variables

related to majoritarian democracy, and as seen in Table 15, I find evidence here to support the hypothesis.

Table 15: OLS Regression Analysis of Majoritarian Democracy on Diffuse Support (Judicial Legitimacy)

Variable	
Constant	-.089 (.047)
Majoritarianism	-.674*** (.066)
Use Total Votes, not Electoral College	-.108*** (.031)
Delegate Versus Trustee	.031 (.028)
Majority Rule Versus Minority Rights	-.030 (.039)
Democrat	-.089* (.039)
Republican	-.029 (.041)
Political Knowledge	.441*** (.049)
Black	-.100** (.037)
Women	-.012 (.030)
R ²	.214
σ _{est}	.437
Coefficients are unstandardized with standard error in parentheses. Total n = 1,000	
* significant at p<.05	
** significant at p<.01	
*** significant at p<.001	

While the items for preferring majority rule over minority rights and the delegate model of representation are not statistically significant, support for majoritarianism and for switching to national popular vote are both statistically significant and are in the hypothesized direction. The distinction between the majoritarianism and majority rule vs minority rights variables needs some explanation before continuing with the analysis. The majoritarianism variable is the scale created by asking subjects the extent to which they agreed or disagreed with having public

officials selected by majority vote, and if the party that wins a majority of the vote should be able to pass the legislation they prefer. The majority versus minority rights asked subjects which was more important to a democracy: majority rule or protecting minority rights. Increasing support for the concept that the majority of voters should have the say in electing officials and the policies produced, measured both directly and indirectly via support for national popular vote, results in a decrease in the evaluations of the Court's legitimacy. This initial finding offers an interesting complication of the existing literature. Previous work had argued that a belief in democratic institutions and processes was associated with an increase in the legitimacy of the Court. The results here, however, suggest that when we broaden what we mean by democracy to include the idea of majority rule, this is associated with a decreasing confidence in the Supreme Court.

One of the other sub-hypotheses I proposed was that those who supported minority rights over majority rule would be more supportive of the Supreme Court, the logic being that the Court is often viewed as the protector of "the unpopular minority" (Rosenberg, 2008). I do not find evidence to support this hypothesis, as seen in the model above (Table 15) the variable measuring majority rule versus minority rights is not statistically significant.¹⁴⁹

The final conception of democracy to include in this initial testing of hypothesis 1b is participatory democracy. I expect that those who are more confident in the political process and in voter's ability to influence that process will be less supportive of the Court. As Keck (2014) outlines, a stalled or blocked political process creates an incentive to turn to the courts for a

¹⁴⁹ This idea of minority rights was tested in two ways. The first being a single item asking subjects which they believed was more important in a democracy "majority rule" or "minority rights", and in the form of a three-item scale asking the same question and about variations on the concept as well. The scale variable produced a concerning low Cronbach's Alpha (.296). I however tested the hypothesis using both the scale and the single item (as seen in Table 15), and in neither case was the variable statistically significant, nor did it meaningfully affect the performance of the model overall.

remedy. I expect that if you do not believe that “all else has failed”, you will be less supportive of the Court who often “meddles” in the political process.

Table 16: OLS Regression Analysis of Participatory Democracy on Diffuse Support (Judicial Legitimacy)

Variable

Constant	
Limits on Campaign Donations/Spending	.007 (.033)
How Responsive is Congress to Voters?	-.139* (.067)
Efficacy of Voters to Influence Congress	.056 (.064)
Trust in the Political Process	-.242** (.079)
Democrat	-.151***(.041)
Republican	-.047 (.043)
Political Knowledge	.388*** (.055)
Black	-.064 (.040)
Women	-.038 (.031)
R ²	.135
σ_{est}	.460

Coefficients are unstandardized with standard error in parentheses. Total n = 991

* significant at $p < .05$

** significant at $p < .01$

*** significant at $p < .001$

The table above offers some more evidence in support of my hypothesis. Among subjects who believe more that Congress is responsive to voters and as they become more confident in the political process (less cynical), there is a decrease in the legitimacy of the Supreme Court. Therefore, the more confident one is in the ability of regular people to influence and shape politics the less confident they are in the Supreme Court. Similar to the idea discussed in the previous model, this may be that the Court is often seen as “meddlesome” in the political

process and therefore if you believe that the political process “works” you may see less of a need for a intervening Supreme Court.

Across the four individual models there are a few important stories to tell before we move on. First, I find evidence that support for liberal democracy and civil rights/liberties is related to a greater belief in the legitimacy of the Supreme Court. However, when we expand our conception of democracy a different trend emerges. I find preliminary evidence here that support for the majoritarian and participatory elements of democracy is related to a decrease in the Court’s legitimacy.¹⁵⁰ This suggests that confidence in majority rule and the idea that people have a say in politics is related to a decrease in judicial legitimacy, and thus by extension to increasing support for making the Court more accountable to voters.¹⁵¹

While these are important results, and offer much to consider going forward, I offer one final model that includes all of the items for the different conceptions of democracy and the controls.¹⁵² The reason for this combined model is that while each of the previous models were related to a particular conception, at the end of the day they were still all measuring attitudes towards democracy. This combined model allows us to look at attitudes towards “democracy”, compared to the previous models that focused on attitudes towards specific conceptions, or elements, of democracy. As seen in the table below (see table 17), the results present some interesting findings to consider in relation to the earlier models.

¹⁵⁰ See Appendix XXX for an alternative analysis of the democracy factors, the correlations between them, and their relationship to judicial legitimacy.

¹⁵¹ The dependent variable here is a scale of Supreme Court legitimacy questions, and four of the six items used in the scale ask in some way about holding the Court/Justices accountable to voters or making them “listen” to the people in some manner.

¹⁵² I have also included in this model “support for the rule of law” An item used in Gibson (2007), but as I mentioned earlier did not fit within any of the existing democracy frames but I felt was none the less important both empirically and theoretically.

*Table 17: OLS Regression Analysis of Full Model (all democracy measures + controls)
on Diffuse Support (Judicial Legitimacy)*

Variable	
Constant	-.044 (.059)
Civil Liberties	.058 (.047)
Political Tolerance	.243*** (.040)
Liberty Versus Order	.378*** (.063)
Confidence in Elections	-.021 (.067)
Multiparty Democracy	.507*** (.071)
Majoritarian Democracy	-.276*** (.057)
Use Total Votes, not Electoral College	-.094*** (.026)
Delegate Versus Trustee	-.036 (.026)
Majority Rule Versus Minority Rights	.016 (.032)
Limits on Campaign Donations/Spending	.022 (.026)
How Responsive is Congress to Voters?	.026 (.053)
Efficacy of Voters to Influence Congress	-.038 (.050)
Cynicism of the Political Process	.081 (.067)
Support for the Rule of Law	.611*** (.076)
Democrat	-.028 (.032)
Republican	.015 (.034)
Political Knowledge	-.021 (.046)
Black	.016 (.031)
Women	-.065** (.024)
R ²	.509
σ _{est}	.349
Coefficients are unstandardized with standard error in parentheses. Total n=979	
* significant at p<.05	
** significant at p<.01	
*** significant at p<.001	

As shown in the table above I still find strong support for Hypothesis 1a. There is a strong, and statistically significant, positive relationship between political tolerance and liberty, and judicial legitimacy. Therefore, two of the three variables associated with the liberal conception of democracy are both strong positive predictors of judicial legitimacy. This, as mentioned earlier, is not surprising. Many voters associate the Court with protecting civil rights and liberties, and thus it is reasonable that those who strongly support those values also would support the institution associated with most closely with them.

Hypothesis 1b also has some interesting, albeit mixed, results to explore. Like the earlier model, in terms of electoral democracy confidence in elections was not statistically significant and support for a multiparty democracy was, but in the opposite direction of my hypothesis, meaning that subjects who were more supportive of the idea of a multiparty democratic system were also more supportive of the Court's legitimacy. Moving next to majoritarian democracy, I find similar results to the earlier more limited model. Increasing support for majority rule and for switching to national popular vote are statistically significant and negatively impact evaluations of the Court's legitimacy.

The measures of participatory democracy offer the biggest shift. On their own, increasing levels of confidence in how responsive Congress is to voters and more trust (less cynicism) about the political process, were associated with a decrease in judicial legitimacy. In this larger model these two variables are no longer statistically significant. This suggests that while these variables play some role in attitudes towards the Court, they do so only weakly and their effect is washed out when we consider a more holistic view of democracy. This does not undermine the analysis above, rather it offers up a path for future research to explore these findings in more detail.

Finally, it is worth mentioning here the remaining democracy question and the controls since they also produce some interesting results. First, support for the rule of law, is unsurprisingly associated with a strong support for the legitimacy of the Court, a finding that backs up earlier research on this topic. However, in contrast to some earlier research there was no statistically significant effect of political knowledge in the larger model.¹⁵³ In the individual models, except for the electoral democracy model, increasing levels of political knowledge were

¹⁵³ I hesitate to draw much more attention to this finding beyond mentioning it as my sample was not a nationally representative sample, and previous work using online samples has found that they are often more informed about politics (Ansolabehere & Schaffner, 2014; Clifford & Jerit, 2016).

associated with an increasing evaluation of the Court's legitimacy. Earlier work also found a strong link between political knowledge and support for the Supreme Court.¹⁵⁴ In a similar way, in each of the individual models, self-identified Democrats were less supportive of the Court's legitimacy, but in the full model this variable is no longer statistically significant.

Hypothesis 1c: Subjects who view the political process as well functioning will be more supportive of proposals to make the Supreme Court more accountable to the public and/or elected branches of government.

Hypothesis 1c narrows the focus of the analysis some. Here instead of using the full battery of legitimacy questions, I have selected four of them that focus on accountability,¹⁵⁵ the idea here being that those that are more confident in elected institutions, the electoral process, and political institutions will also be more supportive of making the Court more accountable. This scale of a subset of the legitimacy questions is reliable, with a Cronbach's Alpha of .775, with only one variable upon its removal improving the internal consistency of the scale, but only marginally. A final note on the dependent variable, a negative coefficient signifies more support for making the Court accountable, as this idea is a negative evaluation of the Court's legitimacy.

Testing this hypothesis, similar to the proceeding two, employs OLS regression.

However, the independent variables in the model are slightly different. Included here are the

¹⁵⁴ It is worth noting as well that this model was ran two different ways using the knowledge questions. One of the knowledge questions asked respondents to correctly identify the job or title of John Roberts. The model presented above used that question in the same political knowledge scale as the other 4 items. The model was run again where the Roberts question was used as its own dichotomous item, in addition to the now four-point scale. The results were the same in both models, neither knowledge nor correctly identifying John Roberts had a statistically significant effect.

¹⁵⁵ Subjects reported the extent to which they agreed or disagreed with the following statements; "The U.S. Supreme Court ought to be made less independent so it listens a lot more to what the people want", "Judges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from office", "If the U.S. Supreme Court started making a lot of decisions that most people disagreed with, it might be better to do away with the Supreme Court altogether", and "It is inevitable that the U.S. Supreme Court gets mixed up in politics; therefore we ought to have a stronger means of controlling the actions of the U.S. Supreme Court" Gibson and Nelson (2014).

variables measuring confidence in the electoral process, support for a multi-party democracy, support for the notion of majority rule, preference for switching to national total vote from the electoral college, preference for the delegate rather than trustee model of representation, perceptions how responsive to voters Congress is, perceptions of how effective citizens are in influencing politics in Washington, a measure of trust in the political process, and similar control variables to the earlier model.

As shown in Table 18 below, the model performs well in some areas and poorly in others. Of interest, those that support switching to national total votes from the electoral college and those who support majority rule are have lower evaluations of the Court's legitimacy, meaning that they agree more with ideas that we need better control of the Court and accountability of the Court to voters. However, neither of the variables on efficiency, responsiveness, nor cynicism were statistically significant and the variable measuring support for a multiparty democracy was statistically significant but in a positive direction. Thus, for hypothesis 1c, there are mixed results. To some extent it appears that those who want more accountability in the process also support making the, infamously unaccountable, Supreme Court more accountable, but it does not appear as though confidence in the electoral process or the ability of voters to shape or have a say in the political process influences attitudes towards the Supreme Court.

Table 18: OLS Regression Analysis of Majoritarian Democracy on Diffuse Support (Judicial Legitimacy)

Variable	
Constant	-.008
Confidence in Elections	-.028 (.037)
Multiparty Democracy	.509*** (.030)
Majoritarian Democracy	-.162*** (.031)
Use Total Votes, not Electoral College	-.052*** (.014)
Delegate Versus Trustee	-.019 (.014)
How Responsive is Congress to Voters?	-.005 (.029)
Efficacy of Voters to Influence Congress	.005 (.028)
Cynicism of the Political Process	.042 (.018)
Democrat	-.036* (.018)
Republican	-.002 (.037)
Political Knowledge	.056* (.025)
Black	-.003 (.017)
Women	-.029* (.014)
R ²	.399
σ _{est}	.194
OLS Coefficients are unstandardized with standard error in parentheses. Total N = 991	
* significant at p<.05	
** significant at p<.01	
*** significant at p<.001	

In their discussion of exploring attitudes towards democracy, Kiewiet de Jong (2016) and Schwertheim (2017) discuss the importance of democracy on the ground versus democracy in theory. In the analysis thus far, we have found strong evidence that democracy in theory is a strong predictor of support for the Supreme Court. In the testing of hypotheses 1c, we see that items measuring support for democratic values in the abstract (such as support for the idea of a multiparty democracy, and support for the notion of majority rule) both perform rather well. However, implicit in hypothesis 1c is the idea that if one supports the way our democracy is functioning on the ground, then they will be more supportive of means to make the Court more accountable to the democratic process. Therefore, we can adjust the model for hypothesis 1c, to eliminate the theoretical items and only include those that relate to the ways in which our elected institutions are functioning.

Included in this model then are items measuring confidence in elections, support for total votes rather than the Electoral College, how responsive Congress is to voters, how effective citizens are at influencing Congress, cynicism in the political process, and the control variables.

This model adds some interesting new ideas to consider in evaluating hypothesis 1c. As shown in Table 19 below, those that are more confident in elections and believe we should switch to national total vote are also more supportive of making the Court more accountable to the people. However, neither efficacy, responsiveness, nor cynicism is statistically significant in this model. The measure of cynicism is though approaching statistical significance ($p=.057$) and the unstandardized coefficient is headed in the right (negative) direction as well.

Table 19: OLS Regression Analysis of Electoral Democracy on Diffuse Support (Judicial Legitimacy)

Variable	
Constant	.081 (.034)
Confidence in Elections	-.151*** (.043)
Use Total Votes, not Electoral College	-.078*** (.016)
How Responsive is Congress to Voters?	-.047 (.034)
Efficacy of Voters to Influence Congress	.055 (.032)
Cynicism of the Political Process	-.081 (.042)
Democrat	-.075*** (.021)
Republican	-.039 (.022)
Political Knowledge	.189*** (.028)
Black	-.028 (.020)
Women	-.005 (.016)
R ²	.160
σ_{est}	.229
Coefficients are unstandardized with standard error in parentheses. Total N = 991	
* significant at $p<.05$	
** significant at $p<.01$	
*** significant at $p<.001$	

In all, hypothesis 1c offers mixed results. There is some evidence that those with more trust in the electoral process and elected institutions were more supportive of making the

Supreme Court more accountable. Much like Kiewiet de Jonge (2016) and Schwertheim (2017) I find evidence that there is a difference between attitudes towards democracy in theory (what should democracy look like) and democracy on the ground (how does our democratic process actually function). What appears to be driving much of the support here, however, are theoretical values. Items measuring support for democracy in theory, appear to be significant predictors of the Court's (ill)legitimacy, with support for the idea of a multiparty democracy being a significant positive predictor of the Court's legitimacy, and support for the idea of majority rule being a significant negative predictor. The model was thus, rerun without the theoretical predictors, and only including, in addition to controls, variables measuring democracy in practice (or on the ground).

The on the ground model showed interesting results again. It appears as if citizens who are more confident in how democracy is functioning, in practice, are less supportive of the Court's legitimacy, and therefore support means of making the Court more accountable to voters. While these independent variables are not perfect proxies for democracy on the ground, they do reasonably approximate support for the political process as it functions. The confidence in elections block, for example, asks about how free, fair, and reliable elections are, something that is undeniably related to democracy, and the support for switching from the Electoral College to national popular vote is a sign that the subject supports the democratic political process and wants all voices to be counted in electing the President.

I find some evidence to support hypothesis 1c; that subjects who are more confident in the political process support making the Court more accountable to voters/the political process. However, further examination of the results suggests that when looking at the Supreme Court there may be an important distinction between democracy in theory and democracy in practice. Initially, it appears that support for the theory of democracy is a more significant predictor of

support for the Court, both positively and negatively. Confidence, or lack thereof, on the other hand in the democratic process as it functions while weaker is negatively related to the Court's legitimacy. This leads to an interesting twist on the existing literature. While it does appear that support for democratic institutions and processes, in theory, is generally related to a greater support for the Court's legitimacy, as confidence in those same institutions and processes in practice are shaken there does appear to be some harm done to the Court's legitimacy. While this is an initial exploratory study, using a non-probability sample, this appears to suggest a new direction for future research to take in exploring attitudes towards the Supreme Court, its legitimacy, and the study of democracy more broadly.

Conclusions:

In this survey I wanted to better understand how attitudes towards democracy influence attitudes towards the legitimacy of the Supreme Court. Previous work had found that early political socialization and especially support for democratic institutions and processes was associated with a belief in the Court's legitimacy. My survey expands how we measure democratic institutions and processes. Specifically, I conceptualize democracy in four different ways: liberal, majoritarian, electoral, and participatory.¹⁵⁶ While a preliminary, and exploratory study, I find interesting results that can guide future research.

In line with previous research, I find that support for liberal democracy; a belief in civil liberties and civil rights, is associated with increasing support for the Supreme Court. I also find that support for the majoritarian conception of democracy was associated with decreasing support for the Court,

¹⁵⁶ See Appendix 12 for a Factor Analysis of the items used to measure attitudes towards democracy, and an explanation of how this relates to my analysis. This analysis lends support to the idea that democracy has multiple different elements and conceptions. Specifically, the measures used line up roughly with how I have categorized them, but the factor analysis does shift the groupings some.

meaning that those who more strongly believe that in a democracy we should follow the will of the majority, view the Court as less legitimate. There is also some evidence that support for elements of the electoral and participatory conceptions, may harm the Court's legitimacy too. This offers an important new caveat to our understanding of the sources of judicial legitimacy. It appears that support for some democratic institutions and processes results in an increasing belief in the legitimacy of the Court, while a belief in other elements harms the Court's legitimacy.

Future research should test these results using a nationally representative survey and improved measures of democracy. While many of these items performed well, measuring attitudes towards democracy is a tricky task. The fact that these items are often designed for use in other countries, such as the Latinobarómetro, Eurobarometer, and Afrobarometer, presents an additional complication in using and tweaking those items to use with voters in the United States. Therefore, the next step of this research will be to use a nationally representative sample and additional/improved measures of democracy to see if these results hold up. Qualifications and caveats aside, the results here are important to the overall study of the origins of judicial legitimacy. As we broaden how we conceive of democracy we gain a more nuanced understanding of how that relates to judicial legitimacy.

As there is evidence that attitudes towards democracy influence evaluations of judicial legitimacy, the next step is to investigate in more detail. Using a survey experiment, fielded in the same survey as these questions analyzed here, I test these concepts in a political context. Specifically, the analysis here finds that a belief in majoritarian and participatory elements of democracy have a negative relation with evaluations of judicial legitimacy. In the experiment I test how voters respond to a counter-majoritarian critique of the Court (indirectly related to the majoritarian conception) versus a democratic process critique of the Court (indirectly related to the participatory element), and the extent to which partisanship influences responses to these treatments. If the attitudes towards democracy evaluated

here are, in theory, free from the influences of partisanship, the analysis of the experiment in the following chapter directly invites the biases and influence of partisanship into the analysis.

Chapter 6: Who Are You ‘Countering’ And How? Experimentally testing voters’

responsiveness to framing the Supreme Court as anti-democratic

In the previous chapter I found that attitudes towards democracy can both help and hurt the public’s evaluations of judicial legitimacy. In this chapter, I test how responsive voters are to messages that frame the Court as “anti-democratic”. While previous work has found that specific decisions do little to undermine judicial legitimacy (Gibson et al., 2003a, 2003b; Gibson & Nelson, 2014, 2015) there is some evidence that framing the Court as “political” or strategic can harm the Court’s legitimacy (B. L. Bartels & Johnston, 2013, 2012; Hetherington & Smith, 2007). My analysis offers a twist on this by directly confronting subjects with a message that the Court is damaging to democracy and testing if those messages undermine judicial legitimacy.

In the analysis of the survey results I needed to offer qualifications and explanation for the use of a non-probability sample. In the experimental literature, the use of non-probability samples is common and generally accepted. As Clifford and Jerit (2014) argue, these online experiments, using non-probability opt-in samples, may have some downsides, but overall the decreased costs¹⁵⁷ and increased response rates outweigh those negatives compared to lab based experiments.¹⁵⁸ In a comparison of convenience samples to population based samples, Mullinix et al. find similar results between the two concluding that “our results may be reassuring for those who have little choice but to rely on cheaper convenience samples” (2015, p. 123).¹⁵⁹ Thus, while a population-based sample is still the gold standard, there is strong evidence in the literature that a convenience sample, for the purposes of the experiment, is both common and sufficient. Finally, in the study of courts and judicial legitimacy, I

¹⁵⁷ For reference, using an online probability sample for a survey/experiment can cost tens of thousands of dollars.

¹⁵⁸ Clifford and Jerit (2014) identify as the potential negatives, compared to lab experiments, as a difference in reported distractions and an increased use of “outside sources” on political knowledge questions.

¹⁵⁹ Such as graduate students.

follow in a long line of experimental work, dating back almost twenty years (B. L. Bartels, 2014).¹⁶⁰

Specifically, the use of vignettes as part of the experimental design, as I use here, are frequently used in the judicial legitimacy literature (Baird & Gangl, 2006; Christenson & Glick, 2014; Zilis, 2015).

After completing the questions on democracy used in the analysis of the survey results, subjects were randomly assigned to one of nine experimental manipulations (see Table 20 below).¹⁶¹ Using a 3 x 3 design, subjects (n=1,004) were randomly assigned to a treatment where they read a passage from a Republican, Democratic, or bipartisan group of Senators and members of the House criticizing the judiciary.

Table 20: Experimental Design

	Criticism Type		
	Political	Counter-majoritarian	Democratic Process
Source Cue	Democrat		
	Republican		
	Bipartisan		

Using the language found in the analysis of Congressional press releases as a guide, I crafted three different criticisms that reflect the main idea of each type of criticism. In an effort to make the criticisms believable, the language of the criticisms is undeniably negative but generic enough so that it could be reasonably be attributed to any of the sources. This means that the criticisms do not mention specific decisions or ideological positions. For example, it would be hard to believe a criticism of Citizens

¹⁶⁰ For example, see (B. L. Bartels & Johnston, 2013; Gibson, Caldeira, & Spence, 2003b; Gibson et al., 2014; Mondak, 1992)

¹⁶¹ By presenting subjects with the manipulations after the democracy questions any priming effects will be uniform across subjects and thus remedied through the random assignment of treatments.

United or the Court being too conservative would come from a Republican or that a criticism of Obergefell or the Court being too liberal would come from a Democrat. Importantly, the language here mirrors the language I found in the press releases of elected officials to describe the courts. Below is the text of each manipulation, with the portions that are bracketed and bolded being changed based on the source cue the subject was assigned to.

Political frame:

In a recent speech, **[a bipartisan group of Senators and members of the House of Representatives / a group of Republican Senators and members of the House of Representatives / a group of Democratic Senators and members of the House of Representatives]** discussed the role of the Supreme Court. The **[bipartisan group of Senators and members of the House of Representatives / group of Republican Senators and members of the House of Representatives / group of Democratic Senators and members of the House of Representatives]** criticized the Court saying that; "The Supreme Court continues to make the wrong decisions. This is not about ideological disagreement, instead the Court simply continues to read and apply the constitution incorrectly. Instead of making decisions based on the text of the constitution and legal precedent the Justices make decisions based on their own political preferences. We are deeply concerned about the future of our country if we continue to allow the Supreme Court to substitute the political ideology of the justices for sound legal reasoning. As a nation founded on Constitutional principles and the rule of law, we urge all Americans to question why we allow the Supreme Court to continue to undermine that."

Counter-majoritarian frame:

In a recent speech, **[a bipartisan group of Senators and members of the House of Representatives / a group of Republican Senators and members of the House of Representatives / a group of Democratic Senators and members of the House of Representatives]** discussed the role of the Supreme Court. The **[bipartisan group of Senators and members of the House of Representatives / group of Republican Senators and members of the House of Representatives / group of Democratic Senators and members of the House of Representatives]** criticized the Court saying that; "The Supreme Court continues to make decisions that are opposed to the wishes of voters. In a democracy it should not be allowed that nine unelected, and unaccountable, judges are able to make decisions that contradict the will of the people. It should be through the political process, where voters decide what is best for them, and in turn elect representatives to carry out those wishes. We, the elected representatives, and the voters should resolve these issues, and not turn that over to judges to make those decisions behind closed doors. The Supreme Court is not only making the wrong decisions, but by ignoring and invalidating the will of the people, it is undermining our democratic form of government."

Democratic Process frame:

In a recent speech, **[a bipartisan group of Senators and members of the House of Representatives / a group of Republican Senators and members of the House of Representatives / a group of Democratic Senators and members of the House of Representatives]** discussed the role of the Supreme Court. The **[bipartisan group of Senators and members of the House of Representatives / group of Republican Senators and members of the House of Representatives / group of Democratic Senators and members of the House of Representatives]** criticized the Court saying that; “The Supreme Court continues to make decisions that weaken the ability of the voters to have a voice in government and politics. All voters should be troubled by a Court that allows special interests to drown out the voice of voters. In a democracy it should be the voters, not special interests, who elected officials pay attention to. The Supreme Court should be making decisions that encourage voting and participation in our political process, instead it continues to rule against these core democratic values. We should encourage all citizens to have a voice and to exercise their right to vote, but the Supreme Court appears opposed to allowing voters to exercise these most fundamental rights.”¹⁶²

After reading the passage, subjects are then given two sets of questions that serve as the dependent variables in analysis. First, subjects are asked a series of question to measure their agreement with the statement itself. I also measure how strong they felt the argument is in the statement was and how credible those quoted in the article were. These variables represent a basic reaction to the passage, if I am to uncover evidence that the frames had an effect, it would first be here that we would detect any influence. We can take the analysis in a more significant direction and evaluate the extent to which these treatments impact judicial legitimacy.

The second set of dependent variables consists of the same measures of judicial legitimacy used at the beginning of the survey (see the items below).¹⁶³ By asking subjects to evaluate the legitimacy of the Court at the beginning of the survey and after receiving these criticisms I am able to measure any change from their initial evaluations of the Court’s legitimacy, and see what, if any, influence the treatments have had. Additionally, these measures are potentially more important for both my study as

¹⁶² Introductions to each passage and the text of the source cues come from experimental manipulations used by Gibson and Nelson (n.d.)

¹⁶³ Note, these items are those asked by Gibson, Caldeira and Spence (2003a) and Gibson and Nelson (Gibson & Nelson, 2014). Additionally, they also produce a highly reliable scale with a Cronbach Alpha of .866.

well as for the larger discussion over judicial legitimacy. Much of the literature on the Court has found limited evidence of the Court's legitimacy being harmed by specific decisions. In fact, there are those that argue even exposure to a disagreeable decision or news will in the end increase judicial legitimacy via exposure to the symbols of judicial legitimacy (Gibson et al., 2014). Therefore, compared to simply agreeing with a statement, these measures represent a higher bar to cross. Finding a change here would offer important new information to the debate over judicial legitimacy.

(1) "It is inevitable that the U.S. Supreme Court gets mixed up in politics; therefore we ought to have a stronger means of controlling the actions of the U.S. Supreme Court"

(2) "The U.S. Supreme Court ought to be made less independent so it listens a lot more to what the people want"

(3) "Judges on the U.S. Supreme Court who consistently make decisions at odds with what a majority of the people want should be removed from their position as judges"

(4) "If the U.S. Supreme Court started making a lot of decisions that most people disagree with, it might be better to do away with the Supreme Court altogether"

(5) "The right of the Supreme Court to decide certain types of controversial issues should be reduced"

(6) "The U.S. Supreme Court gets too mixed up in politics"

Hypotheses:

Broadly speaking, in the experiment I am interested in public attitudes towards the three criticism frames; counter-majoritarian, democratic process, and political, that I found in my analysis of the Congressional press releases. Based on the framing effects found in the existing literature (Christenson & Glick, 2014; Clark & Kastellec, 2015; Nicholson & Hansford, 2014; Zilis, 2015), this project explores how voters respond to the different criticism frames, and the potential for this to harm judicial legitimacy. The broad goal of this analysis is to see how voters react to the frames presented. Specifically, since I find stark partisan differences in Congress,¹⁶⁴ I am interested in the extent to which

¹⁶⁴ Also see Clark and Kastellec (2015), who find that voters are more supportive of court curbing proposals when they come from a co-partisan.

voters are responding to the frame versus the source cue. As a result, I propose the following hypothesis;

Hypothesis 2a: Subjects will respond to the partisanship, or source cue, of the criticism rather than the type of frame used.

Based on existing research on framing and partisanship in regards to support for the Supreme Court (Clark & Kestellec, 2015), and the current level of hyper-partisanship among the American electorate (Mason, 2018), I expect that subjects will respond more favorably to a criticism that is from their co-partisans, regardless of the frame used. Therefore, even though my data shows that Republican elected officials make use of counter-majoritarian frames more frequently, I hypothesize that, for example; Republican subjects will respond to a Republican sourced democratic process criticism more favorably than a Democratic sourced counter-majoritarian criticism. As with much of today's politics, I expect that partisanship will be a driving factor here, even though the specific messaging may be something that subjects would otherwise agree with.

However, even if partisanship is a driving force, we can look within the parties and the manipulations to explore the responsiveness there to the different frames. This leads me then to the following hypotheses;

Hypothesis 2b: Self-identified Democratic subjects, when presented with a Democratic source cue, will be more supportive of a democratic process frame, compared to counter-majoritarian framing. They will also evaluate Democrats using the democratic process frame as more credible than those using a counter-majoritarian frame.

Hypothesis 2c: Self-identified Republican subjects, when presented with a Republican source cue, will be more supportive of a counter-majoritarian frame, compared to a democratic process framing. They will also evaluate Republicans using the counter-majoritarian frame as more credible than those using the democratic process frame.

The dependent variables here, in hypotheses 2b and 2c, will be comprised of the questions asking agreement with the statement, the credibility of the speaker, and the strength of the argument. I expect that subjects, when presented with a co-partisan source, will evaluate

statements that are ideologically consistent more positively than those that are framed in the opposing manner. Important to note here that what I mean is that a consistent framing for a Democrat would be a democratic process frame and a consistent framing for a Republican would be a counter-majoritarian frame, an inconsistent framing would be where the parties and criticism frame are reversed.

Based on my findings in the press releases there are stark differences between the parties and the criticism frames they employ, as a result I expect that this will manifest among voters in a way that a counter-expectations framing will cause an incongruence. They may none the less agree with the statement based on the source cue, but the level of support will be higher when the frame and partisanship are in line. Another way this may manifest is in how subjects evaluate the source. I expect that when Republican subjects are presented with a Republican source cue, they will rate the credibility of the speaker higher when they use a counter-majoritarian criticism compared to a democratic process one, and the same would hold true with a Democrat subject receiving a Democratic source cue with a democratic process frame. I expect that “borrowing” language from the other side will harm the credibility of the speaker. This does not mean that they will not believe a co-partisan speaker, simply that they believe them more when the source cue and frame are consistent.

I am also interested in how these types of criticisms affect judicial legitimacy. Much of the research has shown that the Court’s legitimacy is not harmed by disagreement with specific decisions (Caldeira & Gibson, 1992; Gibson et al., 2003a, 2003b; Gibson & Nelson, 2014, 2015; B. L. Bartels & Johnston, 2013). However, other projects have found that when the Court is viewed as political, partisan, or “strategic” there is a danger to the Court’s legitimacy (Baird & Gangl, 2006; B. L. Bartels & Johnston, 2012; Christenson & Glick, 2014; Clark & Kestellec, 2015; Nicholson & Hansford, 2014; Zilis, 2015). My analysis takes this in a somewhat different direction and looks at the extent to which voters

view the Court as less legitimate if its democratic credentials are called into question. Scholars have grappled with the Court's democratic credentials as a theoretical issue for decades, but there has been little systematic analysis of the extent to which the public is responsive and/or concerned about these issues (but see Morgan and Young Forthcoming). Therefore, I propose two hypotheses based on the experimental manipulations;

Hypothesis 2d: Subjects, presented with a co-partisan source cue, who are exposed to either a democratic process or counter-majoritarian criticism will have a lower evaluation of the Court's legitimacy, compared to those exposed to political criticisms.

Hypothesis 2e: Subjects who are presented with a counter-partisan source cue and a democratic process or counter-majoritarian frame, will increase their evaluations of the Court's legitimacy.

The logic here is that, differing from criticisms of specific decisions, attacks on the democratic compatibility of the Court will harm the Court's legitimacy, however only when that attack comes from a co-partisan. Alternatively, I propose what I am calling the "ruffing the ref hypothesis". When the more substantial criticisms come from a counter-partisan, I expect there to be a backlash where partisans react to this counter-partisans attack by coming to a defense of the Court's legitimacy.¹⁶⁵

Finally, subjects could also receive a bipartisan frame paired with any of the criticisms. In the current political climate, "bipartisan" may mean different things to different people. On one hand, since the Court is a highly trusted institution, a bipartisan criticism may be given more weight since it would appear to be coming from a shared point of concern, rather than purely an ideological or partisan perspective. However, on the other hand, in this polarized environment strong partisans may view bipartisanship as "cooperating with the enemy". Therefore, I propose a final hypothesis around the bipartisan source cues;

Hypothesis 2f: Bipartisan statements will be evaluated more positively when they are paired with political criticism compared to counter-majoritarian or democratic process criticisms.

¹⁶⁵ Also see Clark and Kastellec (2015) for a similar set of findings focused on court curbing proposals specifically.

The logic behind hypothesis 2f is based on the analysis of congressional press releases I completed previously. I found that both Democrats and Republicans frequently employed political criticisms, while the counter-majoritarian and democratic process criticisms were associated more so with Republicans or Democrats respectively. Therefore, I believe this will manifest in how voters respond to the passages they read. I expect there will be an incongruence when a bipartisan criticism comes with a democratic process or counter-majoritarian frame, while this incongruence will not be present when a political criticism is used.

Broadly then, these hypotheses allow me to explore the relationship between the public's attitudes towards democracy and the Supreme Court. While this is an exploratory study, it does provide critical new insights into a number of scholarly questions. First and foremost, this provides empirical evidence to advance the scholarly debate over the compatibility of judicial review with a democratic system of government. There has been limited scholarly attention to what those who are potentially thwarted by judicial review think about this. If we want to continue the discussion over judicial review's democratic credentials, we should be aware of what the public thinks. Second, there has been a robust scholarly debate over judicial legitimacy and the majority of findings have been that in most situations the Court's legitimacy is not impacted by decisions people disagree with, and in fact this exposure to disagreeable decisions has the potential to actually increase the Court's legitimacy. This project takes this analysis in a new direction and explores the extent to which some of the language used by elected officials has the potential to undermine judicial legitimacy. Further, this language differs from previous studies that have focused on specific decisions and instead looks at criticisms that raise more fundamental questions about the role of the Court in our political process.

Analysis:

As a refresher, subjects were randomly assigned to one of nine treatment conditions where they were presented with a criticism of the court; political, counter-majoritarian, or democratic process and that criticism was attributed to either Democrats, Republicans, or a Bipartisan group. Following the passage, subjects were asked if they agreed or disagreed with the statement, the strength of the argument presented, the credibility of the speaker, if they would consider donating to a movement or cause seeking to address the concerns raised by the speaker, and finally they completed the same battery of questions on judicial legitimacy that they responded to at the beginning of the survey. These questions serve as the dependent variables that will be used to test the various hypotheses outlined earlier.

Before moving to the analysis, I conducted several randomization checks. There was no statistically significant correlation between any of the demographic variables; age, gender, education, party identification, ideology, political knowledge, or race, and the treatment conditions.¹⁶⁶ In addition to the randomization checks, I also looked at the frequencies for the manipulation checks. Subjects were asked both “who was quoted in the article you just read” and “True or false, the passage you just read praised the supreme court”. 41.8% of the subjects got one of the questions correct, and an additional 37.4% got both manipulation checks correct. Therefore, unless otherwise noted, the analysis proceeds by using only those subjects who passed at least one of the manipulation checks.¹⁶⁷

Hypothesis 2a claims that subjects will respond to the source cue of the criticism, rather than the frame used. The idea here being that since “partisanship is a hell of a drug” I would

¹⁶⁶ For race, since subjects had the option to “select all that apply”, I created dummy variables for those that identified as “white”, “black”, and/or “Hispanic” as these were the three largest racial groups in my sample and tested for correlation between them and the treatment conditions. There were no statistically significant relationships.

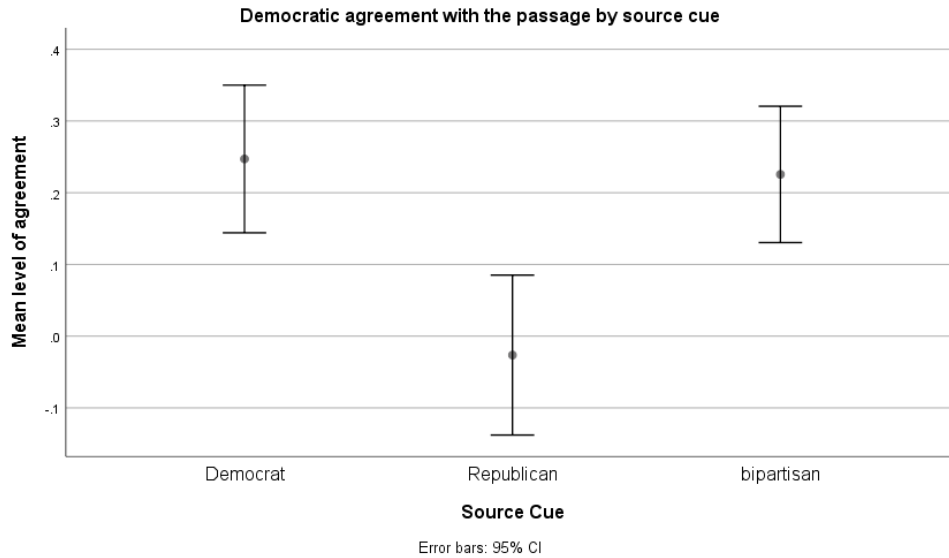
¹⁶⁷ There were some statistically significant relationships between several demographic variables and the manipulation checks. I detail these in appendix 10.

expect that subjects first reaction to the statements will be contingent upon the partisanship of the source cue. This does not mean that the message does not matter, rather that I expect the criticism frame to come into play when the message comes from a co-partisan source. For this analysis then I have run several two-way between subjects ANOVA's for Democrats and Republicans separately looking at the effects of the source cue and criticism frame on the four dependent variables.

For Democrats, there is a statistically significant effect for both the source cue ($F(2,344)=7.708, p=.001, \eta^2=.042$) and criticism frame ($F(2,344)=3.219, p=.041, \eta^2=.017$) when it comes to their level of agreement with the passage.¹⁶⁸ The Tukey HSD post-hoc test showed that statistically significant differences between the Republican source cue and the Democratic ($p=.001$) and bipartisan ($p=.001$) source cues. Democratic subjects evaluated the Republican statements worse by .27, almost a quarter of the scale, compared to those from a Democratic source, and .266 worse than those coming from a bipartisan source. There was no statistically significant difference between the Democratic and bipartisan source cues ($p=.997$).

¹⁶⁸ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

Figure 5

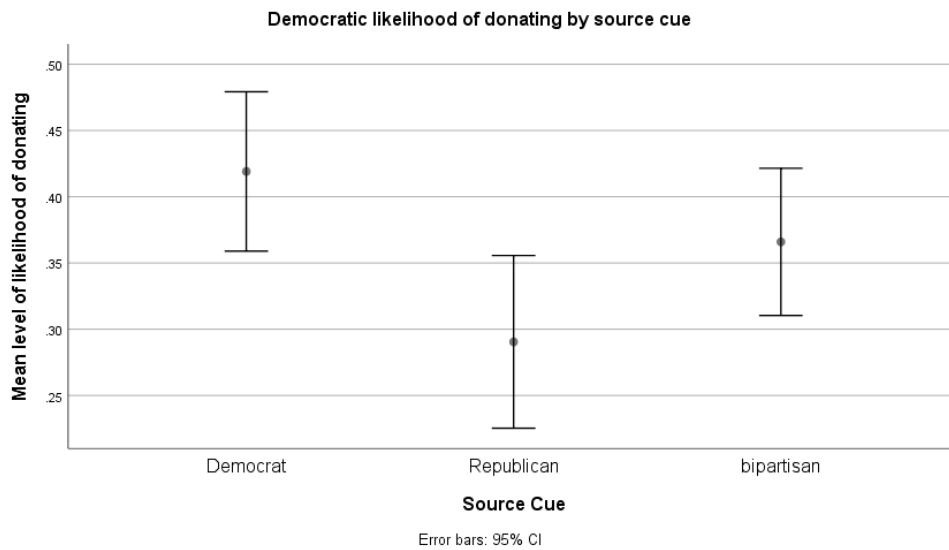


For the criticism frames, it was the democratic process frame that was evaluated more positively than the counter-majoritarian frame by .199 ($p=.02$). The post-hoc analysis did not show any other comparisons as statistically significant.

When we look at how likely Democrats would be to donate, we see a statistically significant difference based on the source cue ($F(2,344)=4.084$, $p=.018$ $\eta^2=.023$), but not for the criticism type.¹⁶⁹ The Tukey HSD post-hoc test showed that in terms of donating, the statistically significant difference was between the Democratic and Republican source cues ($p=.019$), with the Democratic source cue being .121 points higher. The other comparisons did not reach statistical significance.

¹⁶⁹ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

Figure 6



Similarly, when it comes to evaluation of the passage's strength, there is a statistically significant difference based on the source cue ($F(2,344)=3.141$, $p=.044$ $n^2=.018$), but not for the criticism frame.¹⁷⁰ However, the Tukey HSD post-hoc analysis does not show any statistically significant differences, although the difference between the both the Democratic and bipartisan source cues compared to the Republican source cues were both approaching statistical significance ($p=.079$, and $p=.085$) and in the theorized direction. This may be the result of the sensitivity of ANOVA to differences, compared to the analysis performed by the post-hoc test.

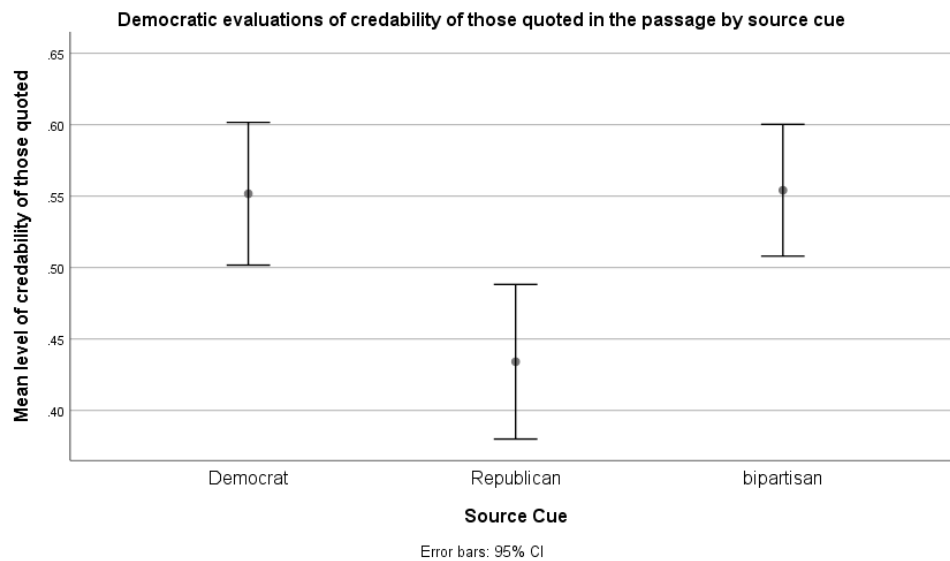
Finally, for the credibility afforded to those quoted in the passage, among democrats I find another statistically significant difference based on the source cue ($F(2,344)=6.712$, $p=.001$ $n^2=.037$), but not for the criticism frame.¹⁷¹ The difference here appears to be that Democratic subjects are negatively evaluating press releases based on the absence of fellow Democrats

¹⁷⁰ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

¹⁷¹ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

being quoted. The post-hoc analysis showed that Republican passages were had a mean evaluation .113 less than those attributed to only Democrats ($p=.006$), and .122 less than those attributed to both Democrats and Republicans in the bipartisan treatment ($p=.002$).

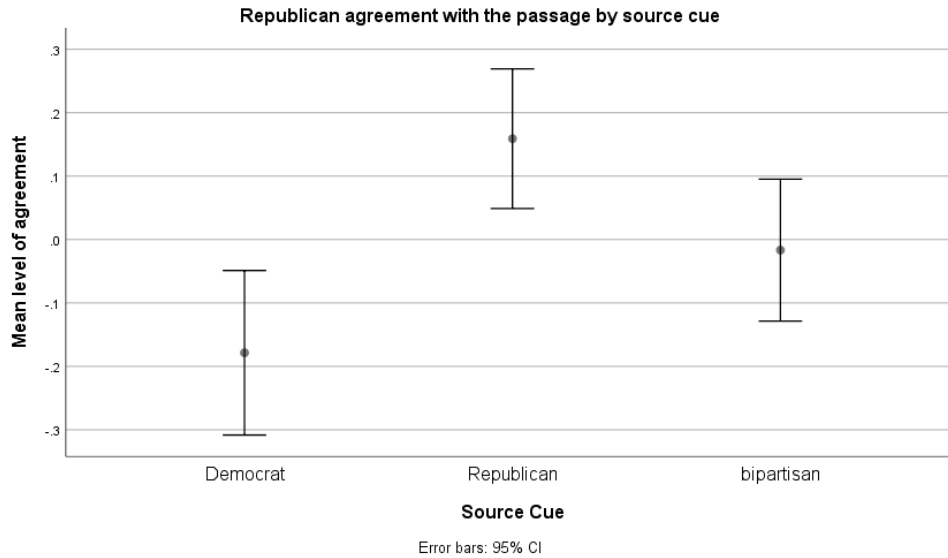
Figure 7



Moving now to Republicans, I find an even stronger effect of partisanship in terms of their level of agreement with the passage. The difference between evaluations was statistically significant based on the source cue ($F(2,288)=7.744$, $p=.001$ $\eta^2=.049$), but not for the different criticism types ($p=.055$).¹⁷² The Tukey HSD post-hoc test showed that Republican subjects evaluated passages attributed to Democrats compared to those from Republicans worse by roughly 1/3rd of the scale (.344) ($p<.001$). The other comparisons were not statistically significant.

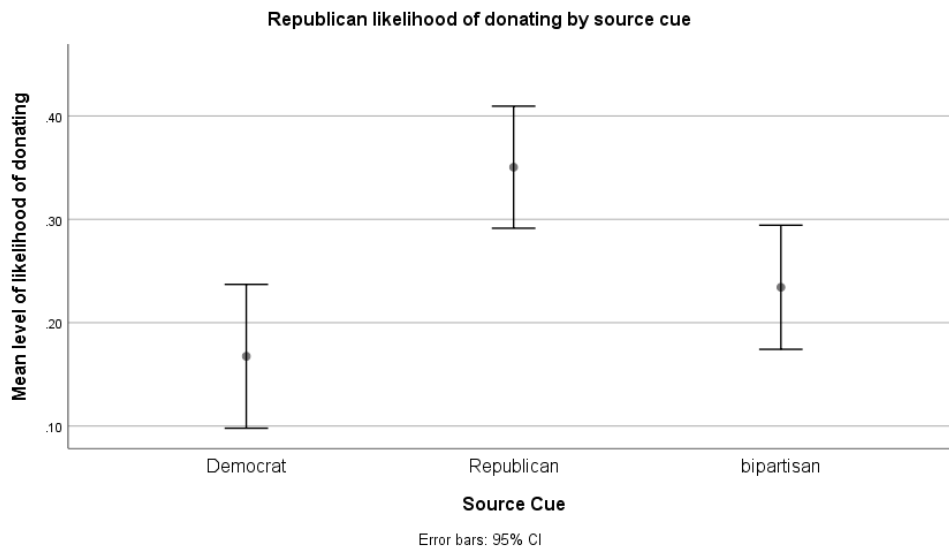
¹⁷² Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

Figure 8



When we move to Republican's likelihood of donating the model Levene's Test was statistically significant ($>.05$), violating the assumption of homogeneity of variance. Since this is the case, I proceed with some level of caution and will look for a significance level of $<.01$, rather than the normal $.05$ level. Even with this higher bar, I find that there is a statistically significant effect of the source cue on Republicans likelihood of donating ($F(2,288)=8.32$, $p<.001$ $n^2=.053$), but the source cues were not statistically significant. The Tukey HSD post-hoc tests showed a statistically significant difference of $-.184$ between the mean levels of Republican's likelihood of donating to between passages attributed to Democrats versus Republicans ($p<.001$), and between the Republican and bipartisan source cues ($p=.018$).

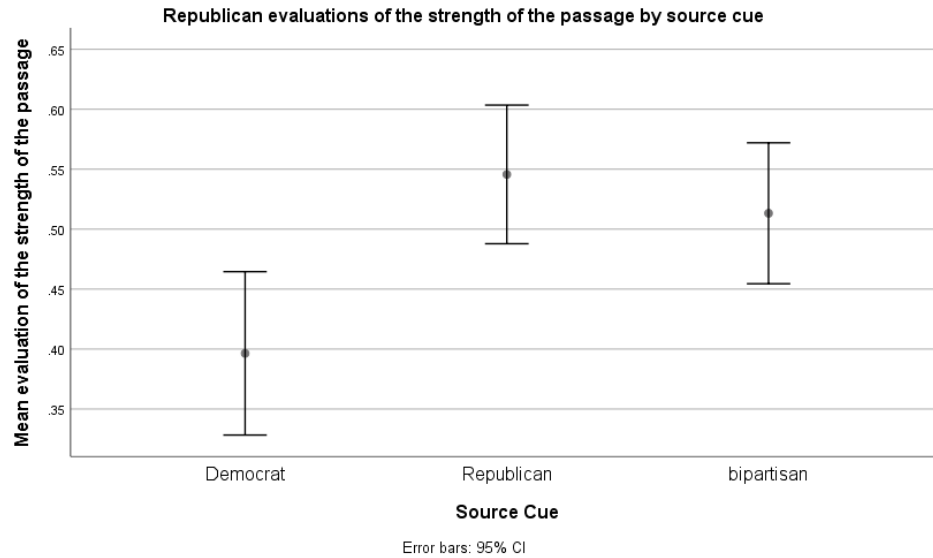
Figure 9



Turning to how strong Republicans viewed the passage to be, I find a statistically significant difference here as well based on the source cue ($F(2,288)=5.728$, $p=.004$ $\eta^2 = .036$).¹⁷³ Republicans appear to punish those passages that do not include co-partisans. Using the Tukey HSD post hoc test, compared to a Republican source cue, those that came from Democrats were evaluated worse by .157 ($p=.002$) and compared to a bipartisan source cue Democratic statements received a lower rating by .123 ($p=.019$). There was not a statistically significant difference between the Republican and bipartisan statements ($p=.7$).

¹⁷³ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

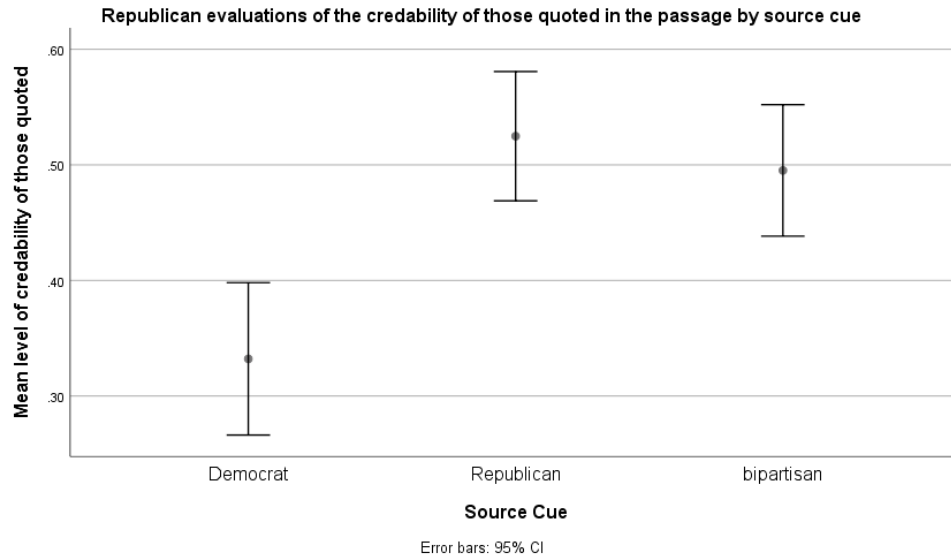
Figure 10



Finally, Republicans also appear to evaluate the credibility of the those quoted in the passage based on the partisanship of who was quoted ($F(2,288)=10.62$, $p<.001$ $\eta^2 = .067$), while the source cue was not statistically significant.¹⁷⁴ Similar to how they evaluated the strength of the passage, Republicans appear to punish press releases that do not include fellow Republicans, with those coming from Democrats being evaluated worse by $-.19$ compared to a Republican source cue ($p<.001$), and Democratic passages were evaluated worse than to the bipartisan treatment by $-.159$ ($p=.001$), based on the Tukey HSD post-hoc test. There was not a statistically significant difference between the Republican and bipartisan source cues ($p=1.0$).

¹⁷⁴ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

Figure 11



For the first hypothesis, I find evidence supporting it. Both Democrats and Republicans look like they are first and foremost concerned about the partisanship of those quoted in the passage. Across the board I find that partisans evaluate the passage as more credible, view it as stronger, are more likely to donate, and generally agree more with passages that come from co-partisans.¹⁷⁵ This though does not mean that the frames do not matter. Rather, that we need to remove the partisan influence by looking at the influence of the criticism frames within co-partisan treatments.

Hypotheses 2b and 2c are two sides of the same coin. The idea here is that since I found that partisanship is a significant factor, we need to remove its influence and look at how partisans respond to a co-partisan frame. If we are to find that the statements made a difference it would be in these analyses. For this analysis then I will proceed by using one-way

¹⁷⁵ In some cases this positivity towards co-partisans meant that they also viewed the bipartisan treatment more positively.

ANOVA and focusing on partisans who received a co-partisan frame, while also excluding those who did not answer at least one of the manipulation checks correctly.

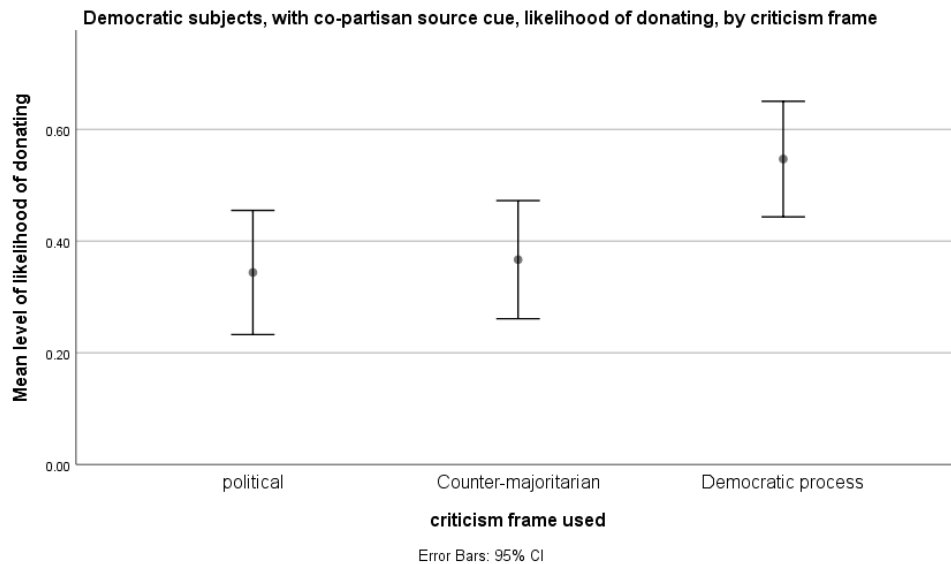
Beginning with democrats in terms of agreement with the passage I find that the effect of the criticism frame is approaching statistical significance ($F(2,114)=2.934$, $p=.057$). The Tukey HSD post-hoc test also shows that the difference between the democratic process and counter-majoritarian frames was also approaching statistical significance ($p=.063$), with counter-majoritarian frames being received worse than the democratic process ones.¹⁷⁶

In terms of their willingness to donate, Democratic subjects appear to respond to the criticism frame presented to them. I find a statistically significant difference ($F(2,114) = 3.851$, $p=.024$) between the frames.¹⁷⁷ The Tukey HSD post-hoc test shows that the statistically significant difference is between the democratic and political frames ($p=.031$), with Democrats being .20 points more likely to donate when presented with a democratic process frame compared to the political frame. Additionally, the difference between the counter-majoritarian and democratic process frame was approaching statistical significance ($p=.055$) and was in the hypothesized direction.

¹⁷⁶ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

¹⁷⁷ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

Figure 12



In terms of evaluations of the strength of the passage ($p=.139$) and its credibility ($p=.453$), I find that there is no statistically significant difference between the criticism frames for democrats who received a co-partisan source cue.¹⁷⁸

In the end then this analysis suggests limited evidence that Democratic subjects responded to the criticism frames presented to them. Even when we remove the influence of partisanship, there is weak evidence that Democrats agreed more with the democratic process frame compared to the counter-majoritarian and that they were more willing to donate when exposed to the democratic process frame compared to the political one. This offers some limited evidence in support of the first part of hypothesis 2b. For the second part of the hypothesis, looking at the credibility afforded those quoted, I find no evidence that the frame presented influenced how credible democrats viewed the passage to be.

¹⁷⁸ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

For Republicans, I find even less evidence that the criticism frame influenced their attitudes towards the passage. There was no statistically significant difference between the frames in terms of agreement with the passage ($p=.575$), willingness to donate ($p=.490$), how strong the argument in the passage was ($p=.538$), nor for how credibly those quoted in the passage were ($p=.918$). Therefore, for hypothesis 2c, I find no evidence that Republicans responded to the criticism frames they were presented with.

Hypothesis 2d looks at the influence the frames may have on evaluations of the Court's legitimacy. Previous research has found that disagreement with specific decisions of the Court does little, if anything, to harm the Court's legitimacy (Gibson, 2007; Gibson & Nelson, 2014, 2015) but other work has found that framing the Court in a way other than "legal" has the potential to affect how legitimate voters view it to be (Baird & Gangl, 2006; B. L. Bartels & Johnston, 2012; Nicholson & Hansford, 2014). This hypothesis takes this line of inquiry in a different direction by asking if framing the Court as harmful to democracy harms evaluations of its legitimacy. To the extent that the democratic process and counter-majoritarian frames call into question the Court's legitimacy in a way that the political criticisms do not, I hypothesize that these frames will diminish the Court's legitimacy.

For this analysis I shift my approach to use a Two-Way Repeated Measures ANOVA, taking advantage of the same legitimacy questions being asked of all subjects at the beginning of the survey and after the treatments. Repeated measures ANOVA has the benefit of controlling for the effect of how legitimate voters viewed the Court at the start of the survey, prior to any of the treatments, allowing me to more effectively detect any changes in the post-treatment measures and facilitating a between subjects analysis (between the different criticism frames) and a within subjects analysis (comparing the pre and post treatment legitimacy scores).

For Democratic subjects, who received a Democratic source cue, I find that there is no statistically significant effect of the criticism frame on evaluations of legitimacy. While the within subjects analysis ($p=.453$) was not statistically significant, the between subjects analysis was approaching statistical significance ($p=.055$).¹⁷⁹ Further, the Bonferroni post-hoc test showed that compared to those who received the political criticisms, subjects who received the democratic process frame had a lower post treatment evaluation of the Court's legitimacy, and that this difference was approaching statistical significance ($p=.052$), and in the hypothesized direction.

Among Republicans I also find no evidence that the criticism frames, when paired with a co-partisan source cue, had any effect on evaluations of judicial legitimacy. The within subjects analysis was not statistically significant ($p=.735$) nor was the between subjects analysis (.671).

Thus, for the hypothesis that these criticism frames would harm the Court's legitimacy, I find no clear evidence to support that. While some work has found that framing the Court as political, rather than legal, may damage the Court's legitimacy, my analysis does not suggest that highlighting the potentially anti-democratic nature of the Court has a similar effect.

Hypothesis 2e is a flip on the previous hypotheses. Since partisanship is a driving factor in responsiveness to the passages, I expected that when subjects were presented with a counter-partisan framing they might come to the defense of the Court. Clark and Kastellec (2015) for example find that when presented with a counter-partisan court curbing proposal,

¹⁷⁹ Note, since the between subjects analysis was approaching statistical significance I dug into these results further. The pairwise comparisons showed that the difference between the political frame and the democratic process frame was the comparison that was approaching statistical significance ($p=.052$). The problem appears to be a problem with the random assignment. There was a statistically significant difference between treatment types and subject's pre-treatment evaluations of the Court's legitimacy ($p=.044$). Thus, while this result is approaching statistical significance, the underlying reasons behind it make me conclude that we should not read into this result.

subjects came to the defense of the Court and increased their support for the Court. In my analysis then I expect that when presented with a counter-partisan frame that calls into question the compatibility of the Court and democracy, subjects will come to the defense of the Court and increase their evaluations of how legitimate they view the Court to be.

Using Two-Way Repeated Measures ANOVA again I test this hypothesis by looking at both the within subjects change from the pre-treatment scores to the post-treatment scores, and at the effects between subjects by the criticism frame they were presented. Looking at Democrats first, I find no evidence that when presented with a counter-partisan frame that they view the Court as more legitimate. Neither the within subjects analysis ($p=.999$) nor the between subjects analysis ($p=.531$) was statistically significant.

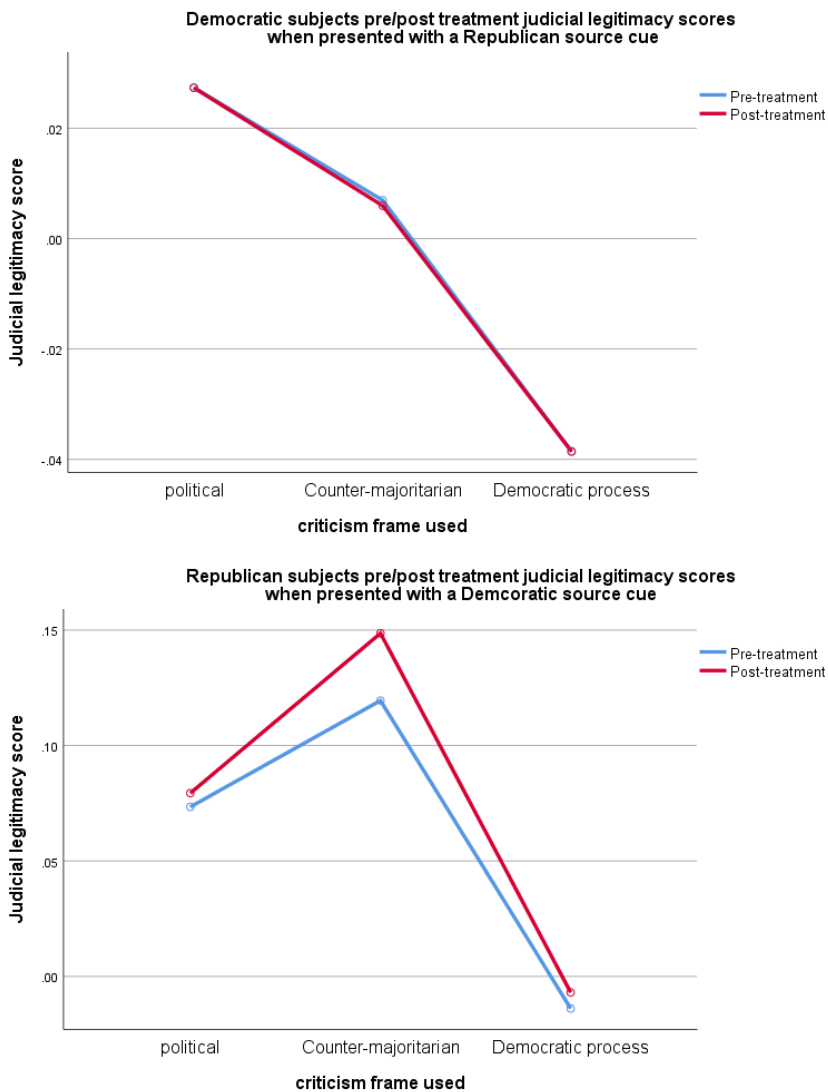
For the Republican subjects, there was not a statistically significant change within subjects when presented with a Democratic attack on the Court ($p=.824$). However, the between subjects analysis did show a statistically significant difference between the criticism frames ($F(2,78)=3.344$, $p=.04$).¹⁸⁰ According to the Bonferroni post-hoc test, evaluations of the Courts legitimacy after the treatment were .144 points lower in the democratic process frame compared to the counter-majoritarian frame ($p<.05$).

While I find no evidence among Democrats that counter-partisan framing had any effect on their evaluations of the Court, Republicans on the other hand are interesting in how they responded to the attacks from Democrats. As seen in the graphs below, Republicans do appear to come to the Court's defense when Democrats use counter-majoritarian language. Importantly, the difference between the criticism frames and the pre-treatment legitimacy

¹⁸⁰ Note, this analysis did not violate the assumption of equality of variance, with the Levene's Test Statistic being $>.05$.

scores was not statistically significant ($p=.07$). Thus, there is something about receiving the counter-partisan frame and either the counter-majoritarian or democratic process frame that influenced Republican's attitudes towards the Court.

Figure 13



In the graph above, while the difference between the pre and post treatment evaluations of judicial legitimacy are not statistically significant, the fact that there is a difference between how Republicans evaluate counter-majoritarian and democratic process criticisms, that came from a

Democrat, is interesting. This suggests Republicans are responsive to these frames, and when Democrats “borrow” Republican language to attack the Court that they view this differently than when Democrats attack the Court on their own terms.¹⁸¹ While the criticisms did not appear to change individual evaluations of the Court, Republicans at least appear to express a distinction between the criticism frames in terms of how legitimate they view the Court to be.

Finally, I am interested in how voters view the bipartisan treatments. The analysis thus far has focused mainly on the Democratic and Republican source cues, but subjects could also have been assigned to receive a bipartisan source cue. The idea here is that since I found stark partisan differences in how legislators discuss the Supreme Court, I expect that voters will associate the language with the different parties. This means that it would be unlikely that Democrats and Republicans would come together and use either Democratic process or counter-majoritarian language. For this final analysis I looked at overall agreement with the passage, credibility of those quoted, and evaluations of the strength of the passage.

Using One-Way ANOVA analysis, I find that for neither Democrats, Republicans, nor Independents did they evaluate the bipartisan source cues as different based on the criticism frame that accompanied them. Further, the bipartisan treatments across the board were essentially viewed as the “middle ground”, as was intended. Democrats and Republicans tended to view the bipartisan treatment not as positively as a co-partisan source but not as negatively as a counter-partisan source. Offering more evidence to support the original hypothesis that partisanship is driving much of the response to these messages.

Conclusion:

¹⁸¹ For “terms” here, what I mean is that based on the differences in how Democratic and Republican elected officials attack the Court, I associate Republicans with counter-majoritarian language and Democrats with democratic process language.

This chapter set out to test some of the findings of the previous two chapters; how do voters react to the frames I uncovered in the analysis of press releases, and how do voters respond when the Court's compatibility with democracy is directly called into question. In this conclusion I speak to these questions in regard to both the academic discussion on public opinion and judicial legitimacy, but also to the larger discussion about the role of the Court in our current political environment.

The literature is full of examples that disagreement with specific decisions of the Court does little, if anything, to harm the Court's legitimacy. Other projects have looked at how the framing of those decisions can influence support for them, and even the Court's legitimacy. My study takes this in a somewhat different direction by analyzing the extent to which framing the Court as anti-democratic can influence attitudes towards the Court's legitimacy. Briefly, my results suggest that while these criticisms do not drain the Court's reservoir of good will or its legitimacy, these anti-democratic frames may open the door for Court curbing and a threat to judicial legitimacy over the long run.

My analysis finds limited evidence that attacking the Court as anti-democratic does much to harm the Court's legitimacy. Even when presented with a co-partisan source cue, which subjects tend to agree more with, I do not find evidence that highlighting the ways in which the Court is incompatible with or harmful to democracy diminishes the Court's legitimacy. The most interesting finding in this area however is that Republican subjects appear to come to the Courts defense when presented with a Democrat attacking the Court using counter-majoritarian language. However, this does not mean that these frames were not salient to subjects.

Once we account for the partisanship of those quoted in the passage, I find evidence that subjects responded to frames in a way that was consistent with the partisan divide in how

legislators used those same frames. Specifically, I find that Democrats are more responsive to the democratic process framing, while Republicans prefer the counter-majoritarian language. This preference appears to be strongest among Democrats, who most interestingly express a greater willingness to donate when presented with the democratic process framing. Based on the overwhelming preference of Democratic legislators to use this frame in their press releases, it appears that they may have beaten me to this finding that Democrats are willing to donate when they hear about how the Court is harming access to and participation in the democratic process.

For the larger discussion about the role of the Supreme Court in our democracy, I find that voters are responsive to these messages that the Court is, potentially, anti-democratic. Even though there were few statistically significant differences between how voters responded to the frames, this also means that voters did not reject these frames outright. While these messages did not directly diminish the Court's legitimacy, the fact that voters did not reject them means that they are listening. As the Court continues to involve itself in many of our most salient and controversial social and political questions,¹⁸² we may see that these frames be invoked more frequently. While a one off criticism does not appear to diminish the Court's legitimacy, what remains to be seen is if sustained criticisms of a Court that continues to involve itself in our democratic and political process strike a nerve with voters over time, possibly opening the doors for criticisms of the Court that previously would have been political unthinkable.

¹⁸² For example, in its current term (2019-2020) the Supreme Court is set to rule on a Louisiana abortion law, which some fear may overturn Roe, protections for LGBTQ employees, Age discrimination in the workplace, the constitutionality of the Consumer Financial Protection Bureau, President Trump's efforts to end DACA, and the constitutionality of the Affordable Care Act (for the fourth time).

Chapter 7: Conclusion

I began this project with the seemingly easy question of “does anyone care about the Counter-majoritarian dilemma”? What started as an easy question, of course, turned out to be much more complicated once I dug into it more. The short answer to the question is; it depends. I find that both elected officials and voters express concerns about the Court being a potentially anti-democratic institution, however when and to what extent they express these concerns varies. In each section of the dissertation I have situated my analysis within the framework of the literature and the broader academic and political discussions. I will briefly review those findings and ideas here and when necessary provide elaboration on those ideas. However, the bulk of this conclusion will concern itself with the idea of “democratic process counter-majoritarianism”. This new conception of the counter-majoritarian difficulty, I believe has the most relevance and significance to both the academic discussion about the role of the Court in our democratic system and to our understanding of the current political moment in which we find ourselves.

Congress and the Court: You and me could write a bad romance

One of the “anyone’s” I was interested in finding out if they were troubled by the potential for the Court to be anti-democratic was elected officials. Generally, when we think of the Supreme Court acting in a counter-majoritarian or anti-democratic fashion we are thinking of the Court striking down legislation passed by the people’s elected representatives. Thus, legislators have a unique stake in this discussion, as their personal preferences and their actions on behalf of their constituents may be thwarted when the Court acts in an anti-democratic fashion. It makes sense then to begin this analysis by looking at elected officials; specifically, here members of the House and Senate.

On the surface I find evidence that legislators from both political parties and both chambers are concerned about the Court behaving in an anti-democratic fashion. However, this is where the

similarities end. Republican elected officials express a greater degree of concern over the Court acting to nullify or invalidate the expressed will of the people. Their concern echoes what Bickel raised decades ago. Democrats on the other hand, expressed a different type of concern about the courts behaving in a counter-majoritarian fashion. Their concerns were less so about the will of the people being invalidated after the fact; rather they were more concerned about access to and participation in the democratic process, something I have labeled as “democratic process counter-majoritarianism”.

This democratic process counter-majoritarianism looks at the ability of voters to express their will in the first place. Often these criticisms took the form of attacking the Court for weakening voter protections, diluting voters’ voices through gerrymandering and voter disenfranchisement, and other actions that have the effect of preventing the will of the people from being expressed in the first place. This is not necessarily what Bickel had in mind when he coined the term the counter-majoritarian difficulty, but it draws upon Bickel’s concerns and incorporates elements of Ely’s (1980) defense of judicial review. In the end, I believe that this form of counter-majoritarianism is much more insidious and damaging to democracy.

I find that there are two main sources of these criticisms; partisanship/ideology and the cases being responded to. Democrats favored democratic process criticisms while Republicans, especially those that were more conservative, favored counter-majoritarian language. These partisan differences remained but the language selected by elected officials was influenced by the nature of the decisions that the courts hand down. For example, Republicans reacting to the decisions on gay marriage were statistically more likely to make use of a counter-majoritarian frame, while Democrats reacting to the Shelby County decision were more likely to make use of a democratic process frame. This makes sense, as some decisions, such as those mentioned above, lend themselves to being framed in one way or another.

There is some evidence that the Court pays more attention to some forms of criticism than others. Specifically, Mark and Zilis (2018) find that criticisms suggesting court curbing or call into question the legitimacy of the Court are taken more seriously by sitting judges. If this is the case at least at the level of the Supreme Court, given the control it has over its docket, if the Justices are concerned about being attacked than they can simply avoid taking cases that are more likely to generate these types of attacks. This does not mean that the Court must avoid all salient cases. Many topics did not result in an increase in counter-majoritarian or democratic process attacks, and thus if the Court is worried about facing these criticisms more so than pure partisan attacks, it can reflect this concern in selecting its docket.

While the Court has some control over the criticisms it faces, one area that is beyond its control is the composition of Congress. I find that as elected officials become more ideological there is an increasing likelihood that they will make use of these stronger attacks. Therefore, as Congress becomes increasingly polarized, we may see more of these attacks on the Court. While the Court could avoid some topics there is little evidence based on the recent, and upcoming, docket that they have any desire to do so. This may lead to a “perfect storm” of some form. As the Court drifts further to the right and hands down decisions reflecting that,¹⁸³ it may face an increasingly liberal Congress that is already expressing concerns about the health of our democracy and the harm the Court has done to it. If this is the case, the ideological drift of the Court and its decisions may run up against a Congress, and nation, moving in the opposite direction and this may result in consideration of proposals to curb the judiciary that would have previously not been viable.¹⁸⁴

¹⁸³ See, (Liptak, 2019; Stohr, 2019) on the rightward shift of the Court with the additions of Kavanaugh and Gorsuch and see Chappell (2019) on the decision of the Court to hear a case questioning workplace protections for LGBTQ individuals.

¹⁸⁴ For example, Pete Buttigieg’s proposal to have 5 Democratic and 5 Republican Justices who must then agree “unanimously, or by a super majority” to confirm 5 additional Justices (Lederman, 2019).

Alternatively, the increasing partisanship of Congress may protect the Court from backlash. Since Democrats and Republicans are coming at their concerns from different directions and responding to completely different cases, it is unlikely that a bipartisan critical mass that can threaten the Court can be reached. Since the decisions that anger one party are largely ignored, or even praised, by the other party, to the extent that the Court continues to anger “both sides” it may be able to avoid responsibility or meaningful backlash. Therefore, while the Court has control over its docket and may be able to avoid some subjects, it may not need to do so as the increasing partisan divide in Congress and the electorate may also foreclose the possibility of any meaningful repercussions.

If there is to be a cost to the Court for its actions, there must be some buy in from the public. This brings us to the second part of the dissertation.

Public Opinion, Democracy, the Supreme Court, and judicial legitimacy: Drove my Chevy to the levee, but the levee was (possibly running) dry

My analysis of the survey and experiment have two important conclusions. First, the public appears somewhat responsive to messages which frame the Court as incompatible with our democratic system. The second take away is that while support for civil rights and civil liberties; i.e. liberal democracy, is associated with increasing support for the Supreme Court’s legitimacy, a belief in majoritarian elements of democracy and trust in the political process are related to decreasing support for the Court.

The literature is full of evidence that disagreement with specific decisions of the Court does little to harm its legitimacy. I find evidence that even when we frame attacks on the Court in a way that calls its democratic credentials into question, there is little if any harm done to the Court’s legitimacy. This does not mean however, that these frames do not resonate with the public. When presented with a co-partisan source, I find evidence that Democrats are more responsive to a democratic process frame and

Republicans are more responsive to a counter-majoritarian frame. A finding that is in line with what we would expect based on the partisan divides in the Congressional press releases. This offers some preliminary evidence that more work is needed into how voters respond to messaging about the Court. These attacks on the Court's democratic credentials have become more and more common in recent years, with both President Trump and many of the 2020 Democratic Presidential hopefuls offering up their own attack on the legitimacy of the Court. The extent to which these criticisms resonate with the public needs more study, but my results suggest that they may find an audience and open the doors for more substantial attacks on the Court.

The findings of the experiment offer evidence backing up much of the existing literature but results of my survey challenge some of the conventional wisdom. I find that attitudes towards democracy are related to attitudes towards the Supreme Court, but that relationship can be positive and negative. While a belief in civil liberties and rights is associated with increasing trust in the Supreme Court, a belief in majoritarian and participatory democracy is associated with decreasing trust in the Court. This of course comes with the caveat that these results were from a non-probability sample, and thus should be replicated with a nationally representative sample, but none the less they offer an interesting avenue for future research.

In addition, I also find evidence that there may be an important distinction to explore between attitudes towards the theory of democracy and attitudes towards democracy in practice and how those impact support for the Supreme Court. The results of my survey show that generally, when asked about democratic ideals and big picture concepts, with some exceptions, these are associated with increasing support for the Supreme Court. For example, when asked about abstract commitments to civil rights and liberties and to the participation of multiple parties in our political process I find that increasing support here is related to increasing support for the Supreme Court. Alternatively, when asked about the extent to which voters can influence Congress and if we should switch from the electoral college to

national popular vote (a hypothetical, but concrete concept), increasing values here are associated with decreasing confidence in the Supreme Court. Future research should look at not only attitudes towards democracy, but also the difference between attitudes towards the theory of democracy and confidence in democracy as it is happening. I present here initial evidence to suggest that if voters believe democracy, on the ground, is more responsive and attuned to them this may present a diminished willingness to let the Supreme Court interfere in that.

This then leads me to the final discussion of my work in reference to the literature, and something I briefly discussed in the conclusion to my analysis of the survey results. My results suggest that when we are expressing concerns about the potential for the Supreme Court to behave in an anti-democratic fashion, by focusing on the Court specifically we may be missing the mark. In their key works arguing for limiting the role of the Court, Waldron and Hirschl have a key stipulation that the political process is well functioning. If we are concerned about judicial review, my results lead me to believe that we should be focusing our attention on the political process and the Court's role in that, rather than the Court and judicial review in isolation.

There is a widespread belief in the public that our democratic system is flawed. My results suggest that as voters perceive Congress as less responsive to them and as they become more cynical about politics, this increases their support for the Supreme Court. For those that are critical of judicial review this presents a problem. Those critics are attempting to convince a population that by in large is skeptical of the elected institutions that they need to trust in those institutions more and limit the role of the institution (the Court) that they do trust. Therefore, it may be fruitful for those that are concerned about judicial review to focus on improving the political process. I find that as voters become more confident in democracy and the political process, they are less supportive of the Court. By focusing on improving democracy on the ground, advocates for limiting (or eliminating) judicial review can sidestep the thorny question of court curbing, and instead create an environment where turning to the

Court is simply less appealing or desirable. Much like the other conclusions I present here, this offers a direction for future research.

This of course brings us to the Court's role in our democracy, and why I argue that the democratic process counter-majoritarianism is more concerning than the original counter-majoritarian difficulty. If we shift our focus to improving democracy as a means of addressing the concerns about judicial review, then we should be particularly troubled when the Court makes decisions that damage democracy.

Thinking of the original counter-majoritarian difficulty in its simplest form, we have a situation where legislation is passed by a legislature which is then struck down by the Supreme Court.¹⁸⁵ This is obviously problematic, and in a democracy presents a serious problem. However, in this example there are remedies available. The literature has shown us that saber rattling and "stern language" from elected officials is enough, at times, to stop an overly zealous Court either initially or from going further (Caldeira, 1987; Clark, 2009, 2010; Charles G. Geyh, 2008). Thus, if voters are upset about the Court thwarting their will, they have remedies at their disposal. In this example, voters are still able to pressure legislators to respond to the situation, and if the legislators do not do so, voters are able to hold them accountable too in the next election. In addition to pressuring legislators to respond and remedy the situation, as was seen in the dispute over Terri Schiavo (R. K. Baker, 2007), voters also have tools at their own disposal. For example, we can think of the reaction to the Supreme Court of Iowa which in 2009 ruled against the state's ban on same sex marriage. For the first time in the state's history, voters in Iowa removed three Judges that ruled against the ban (Sulzberger, 2010). While this example came in response to a state Supreme Court, the fact remains that when a court behaves in a

¹⁸⁵ This is a very simplified version of the counter-majoritarian difficulty. I also recognize several problems with this oversimplification. First, voters can pass a ballot initiative that is struck down, and second, this assumes that the legislation passed by elected officials represents the will of the people. While these are legitimate points, for the sake of the example, we can bracket them for now.

way counter to the preferences of the majority, there are paths open for voters to meaningfully respond to and even punish the court. This is where the democratic process form of counter-majoritarianism differs and becomes more insidious.

The difference between a Court thwarting the will of the people, and democratic process counter-majoritarianism is that the latter prevents the will of the people from being expressed in the first place. For example, gerrymandering means that a minority of voters can elect a majority of the elected officials, voter ID laws and voter disenfranchisement can prevent otherwise eligible voters from participating in elections, and the ability of wealthy donors and interests to fund campaigns and movements means that the voices of regular voters are either drowned out or elected officials are less likely to hear/listen to them. Obviously, the Court is not responsible for creating these problems but their silence or even tolerance of them ensures that they remain firmly entrenched in our politics. While counter-majoritarian behavior by the Court can harm democracy, when the Court's decisions undermine access to or participation in our democratic process, this damages the democracy in a more fundamental way. By weakening the democratic process by refusing to ensure that the rules of the game are fair, a Court harms democracy in a way that Bickel couldn't have imagined. Counter-majoritarian behavior has remedies, but democratic process counter-majoritarianism either weakens or outright eliminates the means by which people access those remedies.

This democratic process counter-majoritarian behavior is not only limited to voting and formal participation in the political process. In recent decades the Court has engaged in a rolling back of the right to access the judicial system for remedy as well. To the extent that a democracy is a system of rules, there must be a venue where disputes over those rules can be adjudicated. Staszack (2015) traces this history of judicial retrenchment, following the development of alternative dispute resolution and arbitration as a means by which disputes can be moved outside of the judicial sphere, and into a realm more favorable to monied interests (Sherwin, 2018; Silver-Greenberg & Gebeloff, 2015). Another

example of this type of behavior outside the realm of elections and voting is the Court rolling back workplace protections. Again, to the extent that democracy is a system of rules and laws, we must have ways to hold others accountable when they break those laws. However, in recent years the Supreme Court has ruled against workers abilities to hold their employers accountable for breaking the rules. For example, in 2007 the Supreme Court ruled in *Ledbetter v. Goodyear Tire and Rubber Company* that a female employee was unable to sue for pay discrimination because she was unaware that the discrimination was happening until years later. This decision has implications for workers ability to hold employers accountable when they violate the rule of law, but also has implications for participation in democracy. The literature on gender and political candidacy shows that informal social/career networks are key to gaining access to candidacy (Ditmar et al., 2018), to the extent that women are blocked from these networks (in the case of Ledbetter she was denied promotions and raises, which would open these networks up) the Court's ruling here has implications for both participation in the political process and in access to venues to ensure that the rules of society are enforced. While the analysis so far has focused on the ways in which the Court can attack democracy in the form of majority rule and voting, we also need to consider the judiciaries' role in undermining other elements of democracy, such as the rule of law.¹⁸⁶

Ely (1980) proposed a defense of judicial review where the Court should be able to intervene and remove stoppages in the deliberative and democratic process. The Court was not there to resolve

¹⁸⁶ Another example can be seen in the Rehnquist Court's 6-3 decision in *DeShaney v. Winnebago County Department of Social Services* (1989). Here the Court ruled that the state of Wisconsin did not have a duty to act to protect a child from his abuse father, abuse which would eventually leave him mentally handicapped. The majority opinion left open the venue of suing for civil damages but said that there was no affirmative requirement that the state intervene to protect a citizen from abuse. The reasoning of the Court that the Due Process clause is "not as a guarantee of certain minimal levels of safety and security; while it forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." (CITE MAJORITY OPINION) suggests that the Court views limits on the ability of citizens to use the judiciary for redress when other government venues have failed or are unresponsive.

every dispute or question, rather it existed to ensure that the political and democratic venues were well functioning, and this provided a venue to resolve those matters. The democratic process counter-majoritarianism is not a failure to live up to Ely's ideal, rather it is the deliberate antithesis of it. We can contrast Ely's vision with the decision of the Court in two recent gerrymandering cases. Chief Justice Roberts, writing for the majority, declares that partisan gerrymandering is not a decision that the Court can decide, and that instead the remedy lies with elected officials who can simply pass legislation to limit the role of partisan gerrymandering. This decision represents a clear power grab by conservative activists, and in his decision, we see Roberts disingenuously attempt to mask this by articulating a 'solution' that expresses a level of ignorance and naivety previously reserved for children who believe the magician really can pull the rabbit from their hat.

Allowing partisan gerrymandering to stand means that states like Wisconsin and North Carolina a minority of the population can control a majority of seats in the state legislature. This minority will never vote to relinquish their own power by ending partisan gerrymandering. Further the opportunity to adjust the boundaries comes along once every ten years, and in many states those same politicians that benefit from the gerrymandered maps are in charge of designing the new maps. If an element of democracy is majority will, this blatantly flies in the face of that. In practice as well, this means that not only does the majority not rule, but it means that if a majority does wish to overcome the barriers erected before them, they would need a super majority to do so. By failing to act in the face of such a blatantly anti-democratic power grab, the Chief Justice is claiming that they are avoiding the political thicket. Rather, by "deciding not to decide" the Court is making a decision and setting precedent that poses a significant threat to our nation. What remains to be seen is if this power grab by conservative politicians and activists kills the goose that lays the proverbial golden egg. It may be that the nation is willing to tolerate a Court that ideologically thwarts their will on occasion, but we are yet to see how the nation responds to a Court that thwarts democracy.

Appendix 1: Excluded Elected Officials:

Dynamic pages press release page, unable to pull releases:

John	Carter	Texas	31	Republican
Raul	Grijalva	Arizona	3	Democrat
Steny	Hoyer	Maryland	5	Democrat
Richard	Hudson	North Carolina	8	Republican
Billy	Long	Missouri	7	Republican
Ben Ray	Lujan	New Mexico	3	Democrat
Jan	Schakowsky	Illinois	9	Democrat
Bill	Shuster	Pennsylvania	9	Republican
Kyrsten	Sinema	Arizona	9	Democrat
Chris	Smith	New Jersey	4	Republican

Only Provided Press Releases for most recent year (2017):

Joe	Barton	Texas	6	Republican
Gregg	Harper	Mississippi	3	Republican
Frank	LoBiondo	New Jersey	2	Republican
Steve	Pearce	New Mexico	2	Republican
Carol	Shea-Porter	New Hampshire	1	Democrat
Bernie	Thompson	Mississippi	2	Democrat

Provided No Press Releases:

Joyce	Beatty	Ohio	3	Democrat
David	Joyce	Ohio	14	Republican
Bill	Keating	Massachusetts	9	Democrat
Beto	O'Rourke	Texas	16	Democrat

Other issues with news feed/press releases:

Kenny	Merchant	Texas	24	Republican
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Took office 2014 or later:

Ralph	Abraham	Louisiana	5	Republican
Alma	Adams	North Carolina	12	Democrat
Pete	Aguilar	California	31	Democrat
Rick	Allen	Georgia	12	Republican
Jodey	Arrington	Texas	19	Republican
Brian	Babin	Texas	36	Republican
Don	Bacon	Nebraska	2	Republican
Jim	Banks	Indiana	3	Republican
Nanette	Barragan	California	44	Democrat
Jack	Bergman	Michigan	1	Republican

Don	Beyer	Virginia	8	Democrat
Andy	Biggs	Arizona	5	Republican
Mike	Bishop	Michigan	8	Republican
Rod	Blum	Iowa	1	Republican
Lisa	Blunt Rochester	Delaware	0	Democrat
Mike	Bost	Illinois	12	Republican
Brendan	Boyle	Pennsylvania	13	Democrat
Anthony	Brown	Maryland	4	Democrat
Ken	Buck	Colorado	4	Republican
Ted	Budd	North Carolina	13	Republican
Shelley Moore	Capito	West Virginia	Senator	Republican
Salud	Carbajal	California	24	Democrat
Earl "Buddy"	Carter	Georgia	1	Republican
Bill	Cassidy	Louisiana	Senator	Republican
Liz	Cheney	Wyoming	0	Republican
James	Comer	Kentucky	1	Republican
Barbara	Comstock	Virginia	10	Republican
Luis	Correa	California	46	Democrat
Catherine	Cortez Masto	Nevada	Senator	Democrat
Ryan	Costello	Pennsylvania	6	Republican
Tom	Cotton	Arkansas	Senator	Republican
Charlie	Crist	Florida	13	Democrat
Carlos	Curbelo	Florida	26	Republican
John	Curtis	Utah	3	Republican
Steve	Daines	Montana	Senator	Republican
Warren	Davidson	Ohio	8	Republican
Val	Demings	Florida	10	Democrat
Mark	DeSaulnier	California	11	Democrat
Debbie	Dingell	Michigan	12	Democrat
Daniel	Donovan	New York	11	Republican
Tammy	Duckworth	Illinois	Senator	Democrat
Neal	Dunn	Florida	2	Republican
Tom	Emmer	Minnesota	6	Republican
Joni	Ernst	Iowa	Senator	Republican
Adriano	Espallat	New York	13	Democrat
Ron	Estes	Kansas	4	Republican
Dwight	Evans	Pennsylvania	2	Democrat
John	Faso	New York	19	Republican
Drew	Ferguson	Georgia	3	Republican
Brian	Firzpatrick	Pennsylvania	8	Republican
Matt	Gaetz	Florida	1	Republican
Michael	Gallegher	Wisconsin	8	Republican
Ruben	Gallego	Arizona	7	Democrat

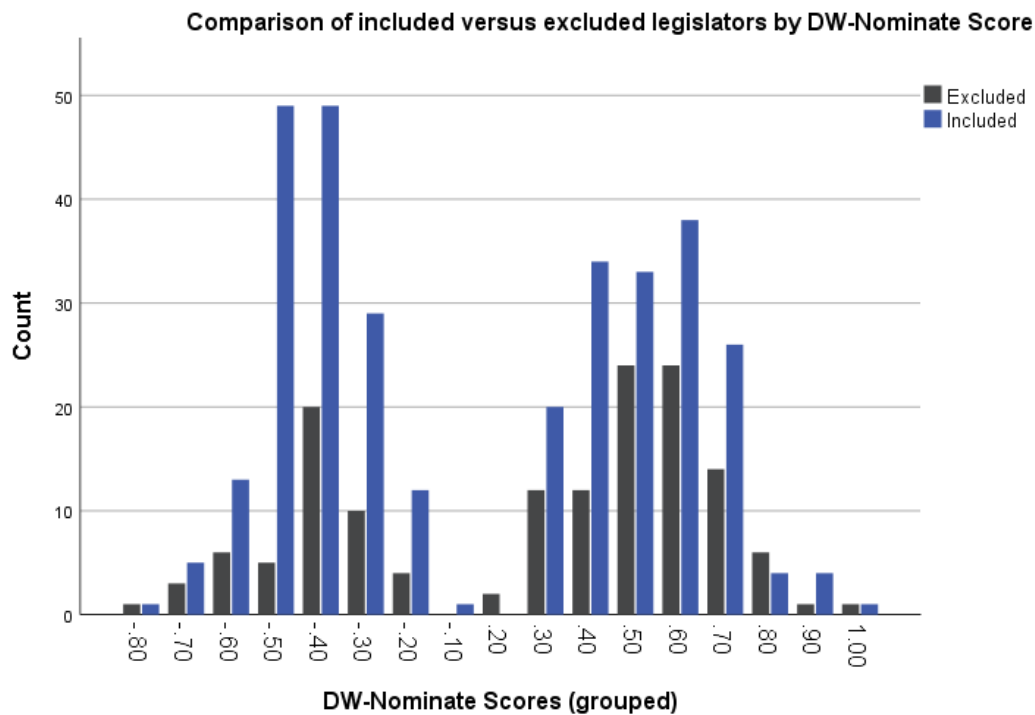
Cory	Gardner	Colorado	Senator	Republican
Thomas	Garrett	Virginia	5	Republican
Greg	Gianforte	Montana	At Large	Republican
Jimmy	Gomez	California	34	Democrat
Vincente	Gonzalez	Texas	15	Democrat
Jennifer	Gonzalez Colon	Puerto Rico	At Large	Democrat
Josh	Gottheimer	New Jersey	5	Democrat
Garret	Graves	Louisiana	6	Republican
Glenn	Grothman	Wisconsin	6	Republican
Colleen	Hanabusa	Hawaii	1	Democrat
Karen	Handel	Georgia	6	Republican
Kamala	Harris	California	Senator	Democrat
Margaret Wood	Hassan	New Hampshire	Senator	Democrat
Jody	Hice	Georgia	10	Republican
Clay	Higgins	Louisiana	3	Republican
French	Hill	Arkansas	2	Republican
George	Holding	North Carolina	2	Republican
Trey	Hollingsworth	Indiana	9	Republican
Will	Hurd	Texas	23	Republican
Pramila	Jayapal	Washington	7	Democrat
Evan	Jenkins	West Virginia	3	Republican
Mike	Johnson	Louisiana	4	Republican
John	Katko	New York	24	Republican
Trent	Kelly	Mississippi	1	Republican
John	Kennedy	Louisiana	Senator	Republican
Ro	Khanna	California	17	Democrat
Ruben	Kihuen	Nevada	4	Democrat
Stephen	Knight	California	25	Republican
Raja	Krishnamoorthi	Illinois	8	Democrat
David	Kustoff	Tennessee	8	Republican
Darin	LaHood	Illinois	18	Republican
James	Lankford	Oklahoma	Senator	Republican
Brenda	Lawrence	Michigan	14	Democrat
Al	Lawson	Florida	5	Democrat
Jason	Lewis	Minnesota	2	Republican
Ted	Lieu	California	33	Democrat
Barry	Loudermilk	Georgia	11	Republican
Mia	Love	Utah	4	Republican
Tom	MacArthur	New Jersey	3	Republican
Roger	Marshall	Kansas	1	Republican
Brian	Mast	Florida	18	Republican
Donald	McEachin	Virginia	4	Democrat
Martha	McSally	Arizona	2	Republican

Paul	Mitchell	Michigan	10	Republican
John	Moolenaar	Michigan	4	Republican
Alexander	Mooney	West Virginia	2	Republican
Seth	Moulton	Massachusetts	6	Democrat
Stephanie	Murphy	Florida	7	Democrat
Dan	Newhouse	Washington	4	Republican
Ralph	Norman	South Carolina	5	Republican
Tom	O'Halleran	Arizona	1	Democrat
Gary	Palmer	Alabama	6	Republican
Jimmy	Panetta	California	20	Democrat
David	Perdue	Georgia	Senator	Republican
Gary	Peters	Michigan	Senator	Democrat
Stacey	Plaskett	U.S. Virgin Islands	At Large	Democrat
Bruce	Poliquin	Maine	2	Republican
Amata	Radewagen	American Samoa	At Large	Republican
Jamie	Raskin	Maryland	8	Democrat
John	Ratcliffe	Texas	4	Republican
Kathleen	Rice	New York	4	Democrat
Thomas	Rooney	Florida	17	Republican
Francis	Rooney	Florida	19	Republican
Jacky	Rosen	Nevada	3	Democrat
Mike	Rounds	South Dakota	Senator	Republican
David	Rouzer	North Carolina	7	Republican
Steve	Russell	Oklahoma	5	Republican
John	Rutherford	Florida	4	Republican
Ben	Sasse	Nebraska	Senator	Republican
Brad	Schneider	Illinois	10	Democrat
Lloyd	Smucker	Pennsylvania	16	Republican
Darren	Soto	Florida	9	Democrat
Tom	Souzzi	New York	3	Democrat
Elise	Stefanik	New York	21	Republican
Luther	Strange	Alabama	Senator	Republican
Dan	Sullivan	Arkansas	Senator	Republican
Scott	Taylor	Virginia	2	Republican
Claudia	Tenney	New York	22	Republican
Thom	Tillis	North Carolina	Senator	Republican
Norma	Torres	California	35	Democrat
David	Trott	Michigan	11	Republican
Chris	Van Hollen	Maryland	Senator	Democrat
Mark	Walker	North Carolina	6	Republican
Mimi	Walters	California	45	Republican
Bonnie	Watson Coleman	New Jersey	12	Democrat
Bruce	Westerman	Arkansas	4	Republican

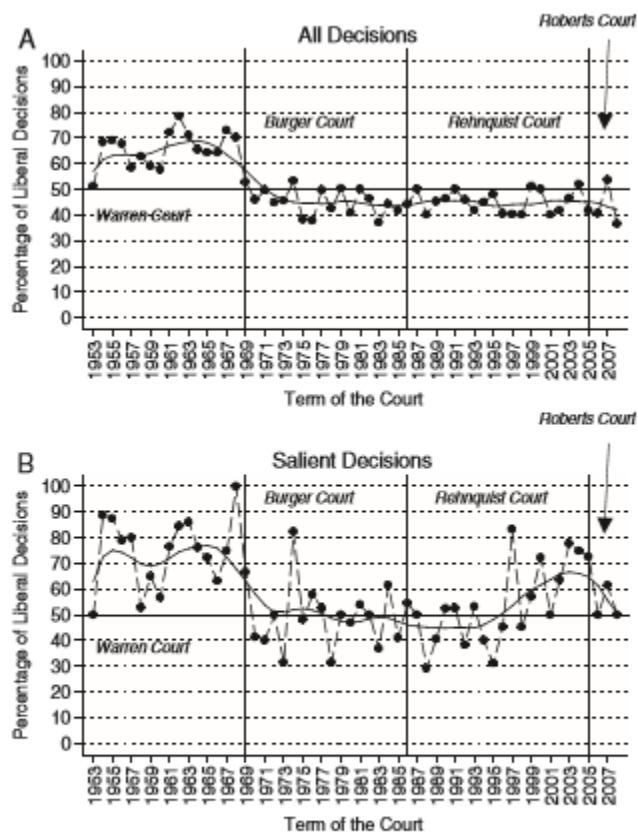
Todd	Young	Indiana	Senator	Republican
David	Young	Iowa	3	Republican
Lee	Zeldin	New York	1	Republican

I also analyzed the included versus excluded officials to see if there was a difference between the two samples. For this I ran two one-way ANOVA's, one for Democrats and one for Republicans, to see if there was a difference between those who were included versus excluded in terms of their DW-nominate scores. The analysis showed no statistically significant differences for Democrats ($p=.891$) nor for Republicans ($p=.908$).

Figure 14



Appendix 2: Reprint of Bartels and Johnston (2013, p. 186) Supreme Court Liberalism for all Decisions (A) and Salient Decisions (B), 1953 – 2008 Terms:

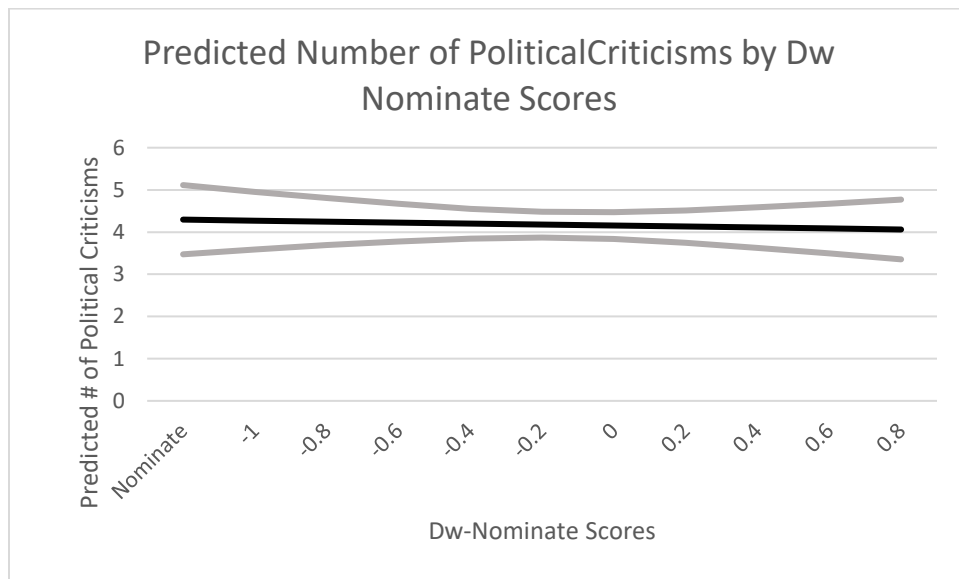


Note: Salient cases are those that were covered on the front page of the *New York Times* the day after the Court's decision (Epstein and Segal 2000).

Appendix 3: Predicted Number of political criticisms by ideology

In addition to looking at the predicted number of counter-majoritarian and democratic process criticisms, I also analyzed the predicted number of political criticisms. The analysis here is, unsurprisingly, predictable. Namely, elected officials across the ideological spectrum make use of political criticisms at a relatively equal rate. The difference between the predicted number of political criticisms between the most conservative and the most liberal was in fact only .235.

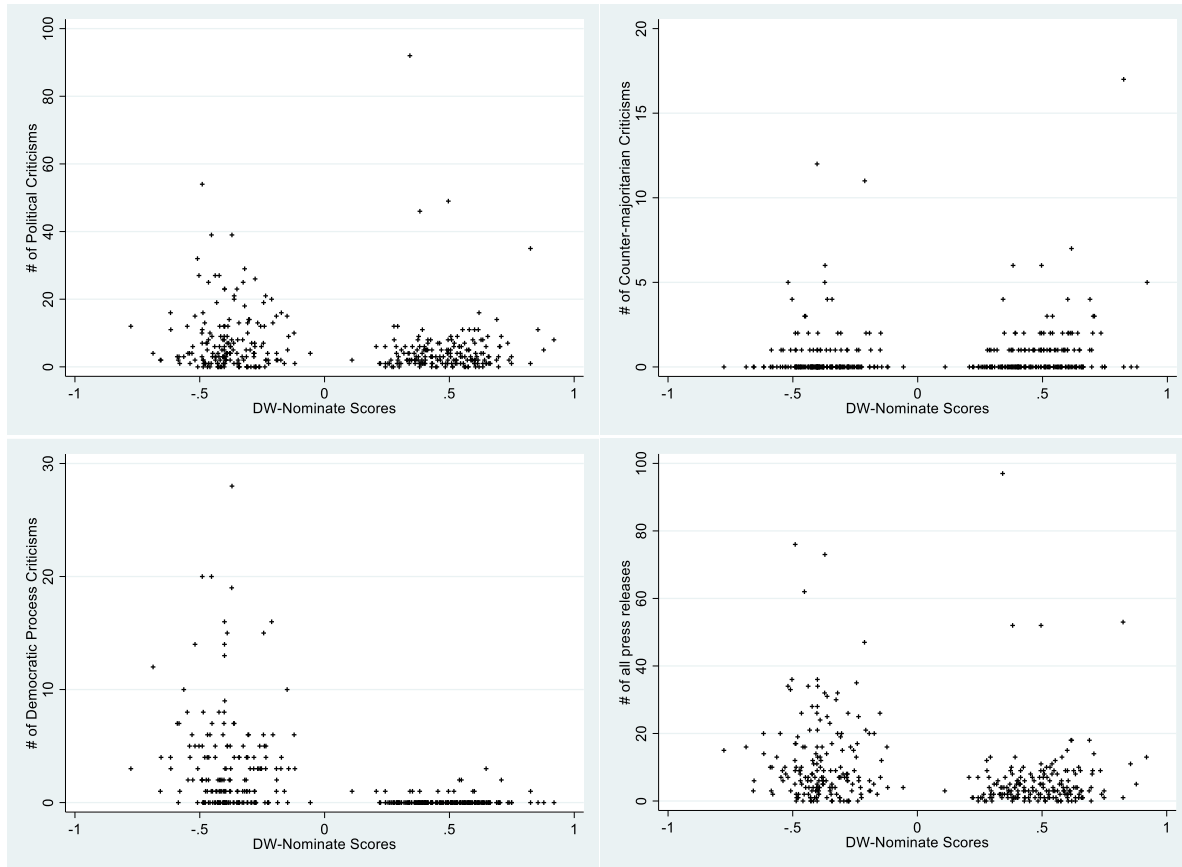
Figure 15



Appendix 4: Distribution of Criticism Frames

	# of Political Criticism	# of Counter-majoritarian Criticisms	# of Democratic Process Criticisms
Democrat	1316	93	570
House	692	45	368
Senate	654	54	224
Republican	893	138	21
House	524	88	16
Senate	369	50	5
Gay Marriage Decisions	65	43	5
Voting Rights Decisions	200	21	240
Reproductive Rights Decisions	438	44	14
ACA Decisions	1519	123	396
Campaign Finance Decisions	742	90	412
Union Decisions	36	2	2
Criminal Justice Decisions	281	29	104

Figure 16: Count of Criticism Frames used by legislators across ideology



Appendix 5: Partisan logistic regression and multinomial logistic regression analysis of press releases

In the analysis below I re-ran the three logit models of the press release data where the dependent variables were the three criticism types. In each model I ran the analysis separately for press releases that came from Democratic and Republican elected officials.

Table 21: Logistic Regression Models of Criticism Types for Democrats

	Model 1		Model 2		Model 3	
	Political/ Regular Criticisms		Counter- majoritarian Criticisms		Democrati c Process Criticisms	
		Margina l Effects (dydx)		Margina l Effects (dydx)		Margina l Effects (dydx)
Gay Marriage	.341 (.573)		(omitted)		-.243 (.581)	
ACA	.452	.073 (.019)	-.519	-.024 (.011)	-.350	-.054 (.019)
Decisions	(.12)**		(.230)*		(.122)*	
Campaign	-1.422	-.230	.902		1.540	.230
Finance	(.117)**	(.016)	(.222)**	.043 (.011)	(.120)**	(.016)
Voting	-1.836	-.297			2.007	.313
Rights	(.140)**	(.018)	.018 (.281)		(.143)**	(.017)
Unions	1.105 (.764)		(omitted)		-1.006 (.764)	
Reproducti ve Rights	2.078	.336 (.052)	.628 (.304)*	.030 (.014)	-1.859	.290 (.047)
Criminal	(.330)**				(.310)**	
Justice	-.032		.557 (.270)*	.026 (.013)	.103	
	(.159)				(.161)	
House	.599	.096	.477 (.218)*	.022 (.010)	-.503	-.078
	(.118)**	(.018)			(.120)**	(.018)
<hr/>						
Model Fit			Model Fit			Model Fit
Pearson's x2 (df =8)	510.17		Pearson's x2 (df =6)	29.98		Pearson's x2 (df =8)
Prob. > x2	.000		Prob. > x2	.000		Prob. > x2
Pseudo R2	.21		Pseudo R2	.038		Pseudo R2
n=1,954			n=1,908			n=1,954

** significant in a two tailed test at the $p \leq .01$ * significant in a two tailed test at the $p \leq .05$
Standard errors in parentheses.

Table 22: Logistic Regression Model of Criticism Types for Republicans

	Model 1		Model 2		Model 3
	Political/ Regular Criticisms		Counter- majoritarian Criticisms		Democratic Process Criticisms
		Marginal Effects (dydx)		Marginal Effects (dydx)	Marginal Effects (dydx)
Gay	-1.559	-.11	2.657	.267	omitted
Marriage	(.315)**	(.022)	(.296)**	(.026)	
ACA	.699	.049	-.654	-.065	.415 (.502)
Decisions	(.252)*	(.018)	(.209)*	(.021)	
Campaign	.778	.054	0.472		
Finance	(.336)*	(.024)	(.259)		-.232 (.506)
Voting	-.472		-1.314		1.298
Rights	(.407)		(.608)*	-.132 (.061)	(.511)* .037
Unions	.511				
	(1.080)		-.747 (.865)		omitted
Reproductive	.664				
Rights	(.378)		.200 (.252)		omitted
Criminal	.133				
Justice	(.428)		-.379 (.389)		.591 (.551)
House	.462				
	(.208)		-.073 (.218)		-.913 (.544)
<hr/> Model Fit			<hr/> Model Fit		<hr/> Model Fit
Pearson's x2	55.1		Pearson's	128.19	Pearson's
(df =8)			x2 (df =8)		x2 (df =6)
Prob. > x2	.000		Prob. > x2	.000	Prob. > x2
Pseudo R2	.098		Pseudo R2	.160	Pseudo R2
n=971			n=971		n=694

** significant in a two tailed test at the $p \leq .01$ * significant in a two tailed test at the $p \leq .05$
Standard errors in parentheses.

By separating out the logit models for Democrats and Republicans, I find largely similar results to the original model where I simply controlled for partisan affiliation. What this approach does however is magnify the influence of specific subject areas. For example, voting rights and campaign finance are positively associated with Democratic process criticisms and gay marriage is associated with Counter-

majoritarian language, but the marginal effect of their presence is larger when we include in the analysis only on Democrats and Republicans.

I also analyzed the press releases using multinomial logistic regression, which provides a comparison of how categories of a dependent variable differ from a base category. To complete this analysis, it required that I recode and organize some of the data. Therefore, I will proceed by explaining how the data was adjusted to facilitate this analysis, then I will present and analyze the results, and finally I will explain how these results differ from the logistic regression models presented in the chapter.

In the original logistic regression analysis, I created three dichotomous dependent variables based on the frames used in each press release; political frame (or not), counter-majoritarian frame (or not), and democratic process frame (or not). However, these three variables could not simply be combined into one three-point dependent variable for the multinomial logistic analysis since the coding could overlap as press releases could be coded, for example, as having both a political and counter-majoritarian frame. Therefore, I had to create a new dependent variable for this analysis.

To accomplish this, I recoded the press releases based on the main frame used. For this press releases from the original analysis that were coded as containing only one frame I simply used that coding. For press releases that had multiple codes I recoded them based on the primary frame used. Therefore, if a hypothetical press release was primarily attacking the court decision for interpreting the constitution wrong (a political criticism) and mentioned in the last sentence or in passing that the decision was also counter-majoritarian, in recoding the press releases this would be coded now as political. In the end, this created a 3-point nominal dependent variable, see table 21 below for the distribution. I retained the same independent variables as in the three logistic regression models and added a dichotomous variable for “ambiguity”. This ambiguity variable denoted those press releases

that originally contained multiple frames, but were subsequently coded as only one of the three, thus allowing me to control for the influence of forcing press releases into only one category. Table 23 below shows the output of the model, and I analyze the results below that.

Table 23: Multinomial Logistic Regression

Political Criticisms		(Base outcome)		Democratic Process Criticisms	
Counter-majoritarian Criticisms					
Gay marriage decisions	1.742 (.287) **			Gay marriage decisions	-.297 (.552)
ACA decisions	-0.882 (0.203) **			ACA decisions	-.356 (.119) **
Campaign finance decisions	-.036 (.226)			Campaign finance decisions	1.378 (.117) **
Voting rights decisions	-.765 (.521)			Voting rights decisions	1.952 (.137) **
Union decisions	-.994 (1.060)			Union decisions	-1.066 (.755)
Reproductive rights decisions	-0.567 (0.308)			Reproductive rights decisions	-2.100 (.319) **
House	.504 (.213) *			House	.593 (.266) **
Party	1.014 (.216) **			Party	-3.159 (.266) **
Ambiguity	1.306 (.289) **			Ambiguity	1.207 (.266) **
Constant	-4.403 (.417) **			Constant	1.213 (.309) **
Model Fit					
Pearson's x2 (df=18)	1159.64				
Prob. > x2	.000				
Pseudo R2	.292				
n=2927					

** significant in a two tailed test at the $p < .01$

* significant in a two tailed test at the $p < .05$

Standard Errors in parentheses

Since the frames of most interest are the counter-majoritarian and democratic process ones, this model compares the probability of one of those frames compared to using a political criticism. For example, if a press release mentioned gay marriage decision this increased the relative log odds of the criticism being counter-majoritarian rather than political by 1.742. Similarly, we also see that the presence of either campaign finance decisions or voting rights decisions, increases the relative log odds

of a democratic process frame being used by 1.378 and 1.952, respectively. Between both models we also see that the presence of decisions concerning the Affordable Care Act decreases the odds of both criticism frames.

These results then line up with those from the three logistic regression models. Gay marriage cases increase the likelihood of a counter-majoritarian frame, while voting rights and campaign finance decisions increase the likelihood of democratic process frames, and finally mention of the Affordable Care Act decisions increases the likelihood that we will see a political criticism used. With the exception of being in the House and reproductive rights decisions, the independent variables were in the same direction and statistically significant in both versions of the analysis.

In this analysis, House membership increased the likelihood of counter-majoritarian frames compared to political frames, while in the logistic regression analysis there was not a statistically significant effect. Similarly, in the logistic regression model reproductive rights decisions increased the probability of counter-majoritarian frames while in this analysis it was not statistically significant. A possible explanation here is due to the recoding. Some of the mentions of Hellerstadt, for example, which struck down a Texas abortion restriction, were primarily focused on how bad the decision was and how this would increase the number of abortions, and in passing mentioned that this was an (arguably) counter-majoritarian decision since it overturned the will of the people of Texas as enacted by their elected officials. In recoding the press releases, since I focused on the primary frame used, a hypothetical press release that was 80% talking about the negatives of a decision, and was 20% a counter-majoritarian critique, would be coded as “political” in this version of the data while the original coding would have captured the presence of both frames. Thus, the minor difference between the models on the reproductive rights variable may simply be an artifact of the coding. None the less, both versions of the analysis present similar results, suggesting that the nature of the cases taken by the court and the decisions handed down influences how legislators go about framing their criticisms.

Appendix 6: “Salient” United States Supreme Court Cases that occurred during the data collection

In table 24 below, I list the cases decided by the Supreme Court during the time period I analyze. This list was created post-hoc based on initial analysis of the data, specifically which cases were being mentioned by the legislators, as well as attention to the cases frequently discussed by the political and legal community in academic and media circles. The table below also includes “classic” cases which were decided prior to my data collection, but none the less were hot topics of discussion. In addition to serving as a useful point of reference, this list allows me to also explore, in a qualitative, way how the cases decided by the Court and their facts interact with the responses of elected officials.

Table 24: List of salient cases

Case	Year Decided
National Federation of Independent Businesses v. Sebelius	2012
United States v. Windsor	2013
Hollingsworth v. Perry	2013
Shelby County v. Holder	2013
Kelo v. City of New London	2005
Citizens United v. FEC	2010
Brown v. Board of Education of Topeka	1954 / 1955
Roe v. Wade	1973
Microsoft v. Baker	2017
Overton v. United States	2017
Turner v. United States	2017
T.C. Heartland v. Kraft	2017
Hernandez v. Mesa	2017
Murr v. Wisconsin	2017
Trinity Lutheran Church v. Comer	2017
Los Angeles County v. Mendez	2017
Gloucester County School Board v. G.G.	2017
Lee v. Tam	2017
Endrew v. Douglas County School District	2017
United States v. Texas	2016
Friedrichs v. California Teachers Association	2016
Enwell v. Abbott	2016
Welch v. United States	2016
Foster v. Chatam	2016
U.S. Army Corps of Engineers v. Hawkes	2016

Betterman v. Montana	2016
Whole Woman's Health v. Hellerstedt	2016
Fisher v. University of Texas at Austin	2013 / 2016
Holt v. Hobbs	2015
Young v. United Parcel Service	2015
Alabama Democratic Conference v. Alabama	2015
Alabama Legislative Black Caucus v. Alabama	2015
Williams-Yulee v. Florida Bar	2015
Equal Employment Opportunity Commission v. Abercrombie & Fitch	2015
Elonis v. United States	2015
Zivotofsky v. Kerry	2015
Walker v. Texas Division, Sons of Confederate Veterans	2015
Reed v. Town of Gilbert	2015
Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project	2015
Arizona State Legislature v. Arizona Independent Redistricting Commission	2015
Michigan v. EPA	2015
King v. Burwell	2015
Obergefell v. Hodges	2015
Glossip v. Gross	2015
McCutcheon v. Federal Election Commission	2014
Schuette v. BAMN	2014
Town of Greece v. Galloway	2014
Hall v. Florida	2014
Utility Air Regulatory Group v. EPA	2014
ABC v. Aereo	2014
Riley v. California	2014
National Labor Relations Board v. Noel Canning	2014
McCullen v. Coakley	2014
Harris v. Quinn	2014
Burwell v. Hobby Lobby	2014

Over the time period I focused on, there were opportunities for both parties to use the frames I discuss. For example, Democrats had the opportunity to use the counter-majoritarian frame when attacking the Court's roll back of reproductive rights in the *Burwell v. Hobby Lobby*, where a slim majority opposed the decision (Lipka, 2014) and also to attack the decision in *Elonis* which many viewed as an attack on unions who most Americans view favorably (Gramlich, 2018). It is surprising then that most Democrats avoided using counter-majoritarian language in their press releases, and even when

they did it was paired, frequently, with a democratic process criticism. For example, see the press release below from Sen. Tester (D-MT) on campaign finance;

“What makes America great is the belief that everyone has a say in the decisions we make. That each of us, from the richest to the poorest, has an equal stake in electing our leaders,” Tester said before today's vote. ***‘But the Supreme Court can't seem to figure that out. It's time to overturn Citizens United. It's time to put people and their ideas back in charge of our elections’*** ...The measure responds to Supreme Court rulings, such as 2010's Citizens United, that have overturned laws that kept wealthy groups and individuals from spending unlimited amounts of money to influence elections. Another ruling, this year's McCutcheon decision, invalidated a 40-year-old law that limits the total amount of money an individual can contribute to campaigns each cycle ... Tester highlighted Montana's long history of fighting the corruptive influence of wealthy individuals and corporations in elections. ***In 1912, Montana voters passed an initiative limiting corporate influence - a law recently upheld by Montana's Supreme Court, but overturned by the U.S. Supreme Court. In response to that decision and the Citizens United decision, Tester last year introduced his own Constitutional Amendment clarifying that corporations are not people, restoring the right of Congress to limit corporate influence in elections***” (Tester 2014, emphasis added)

For republicans it is not surprising that they avoided the democratic process frame. As mentioned earlier, even though there is strong bipartisan agreement that our democratic process is damaged and that money in politics is a problem, cynically I am not surprised that Republicans avoided these lines of criticism. Beyond their own benefit from the post-Citizens United world, the Republican party appears to be determined to diminish voting rights and access to the polls. For example, we can look to recent efforts by Kris Kobach, the former Republican Secretary of State for Kansas who was a leader of efforts there and across the country to make voting more difficult and to Governor Kemp in Georgia who used his position as Secretary of State to purge voter rolls and generally weaken minority turnout in his race against Stacy Abrams in 2018. While we should expect, and hope, that Republicans would be committed to democracy and express outrage when our own citizens are denied the right to vote, their political interests appear to trump these more principled values, and this is reflected in their silence on cases decided by the Court relating to our democratic process.

Appendix 7: Reprint of Coppedge et al. (2011, p. 254) Conceptions of Democracy

Table 25: Conceptions of Democracy

	Principles	Question	Institutions
Electoral (aka elite, minimal, realist, Schumpeterian)	Contestation, competition	Are government offices filled by free and fair multiparty elections?	Elections, political parties, competitiveness and turnover
Liberal (aka consensus, pluralist)	Limited government, multiple veto points, horizontal accountability, individual rights, civil liberties, transparency	Is political power decentralized and constrained?	Multiple, independent, and decentralized, with special focus on the role of the media, interest groups, the judiciary, and a written constitution with explicit guarantees
Majoritarian (aka responsible party government)	Majority rule, centralization, vertical accountability	Does the majority (or plurality) rule?	Consolidated and centralized, with special focus on the role of political parties
Participatory	Government by the people	Do ordinary citizens participate in politics?	Election law, civil society, local government, direct democracy
Deliberative	Government by reason	Are political decisions the product of public deliberation?	Media, hearings, panels, other deliberative bodies
Egalitarian	Political equality	Are citizens equally empowered?	Designed to ensure equal participation, representation, protection, and politically relevant resources

Appendix 8: Measures, scales, and questions used in the analyses:

Table 26: Conceptions of Democracy and how they are measured

Democracy Concept:	Description:	Measures:	Source	Cronbach's Alpha
Liberal Democracy	Limited Government, Civil Liberties, Individual Rights	Civil Liberties Block	ANES	.726
		Tolerance (least liked group)	Gibson	See comment below
		Liberty versus Order	Gibson	.760
Electoral Democracy	Contestation, Competition, Are government offices filled by free and fair multiparty elections?	Electoral integrity	PEW Democracy Study	.614
		Political Parties	Gibson	.740
Majoritarian Democracy	Majority rule, Does the majority (or plurality) rule?	Majority rule	Own/Sullivan et al.	.441
		Majority versus minority rights	Park and Smith	.297 ¹⁸⁷
		Electoral College	Own	Single item
		Delegate/Trustee	PEW Research Center for the People and the Press	Single Item
Participatory Democracy (includes deliberative and egalitarian democracy)	Government by the people, Do ordinary citizens participate in politics? Are citizens equally empowered? Are political decisions the product of public deliberation?	Spending on campaigns/elections	PEW Democracy Study	Single Item
		Electoral cynicism	PEW Democracy Study	.622
		Responsiveness of Congress to people	ANES	.819
		Efficacy, ability to influence congress	ANES	.692
"Something Else"	Should government and/or individuals follow the rule of law	Rule of law	Gibson	.708

¹⁸⁷ Since this item scaled so poorly, the models where it was included were run with both the scale and a single item that captured the "essence" of this item. No significant differences were present when comparing the models with the scale to the model with the single item.

For the least like group scale, subjects were presented with a list of “unpopular” groups and asked which of those they liked the least. The next set of questions asked the extent to which subjects would allow the group they selected from that list various rights and liberties. Responses to these three questions were scaled together to generate individual scales for each group, and then these groups were combined to create an overall “least liked group” scale. Since I am unable to compute the reliability statistic for the overall least liked group scale, since it is comprised of mutually exclusive scales, reliability statistics were generated for each group. The following values are the Cronbach’s alpha for each group; atheists .762, pro-life activists .690, pro-choice activists .729, gay rights activists .852, Christian fundamentalists .584, communists .667, militarists .445, radical Muslims .816, the KKK .797, and Nazis .830. Apart from militarists and Christian fundamentalists, each scale comes close to or exceeds the standard .7 threshold for reliability. As these items have been used for years in a variety of contexts and they theoretically go together to measure political tolerance I am confident using them together as a scale.

Questions asked in survey for each conception of democracy:

- Liberal Democracy:
 - Principles: Limited government, multiple veto points, horizontal accountability, individual rights, civil liberties, transparency
 - Question: Is political power decentralized and constrained?
 - Institution: Multiple, independent, and decentralized with special focus on the role of the media, interest groups, the judiciary, and a written constitution with explicit guarantees
 - MEASURES:
 - Civil liberties block
 - Require everyone to carry a national identification card at all times to show to a police officer on request. Do you...
 - Measurement: (Strongly support, Support, Oppose, Strongly oppose)
 - Allowing law enforcement officers to stop or detain people of a particular race if these groups are thought to be more likely to commit crimes. Do you...
 - Measurement: (Strongly support, Support, Oppose, Strongly oppose)
 - Allowing the government to record telephone calls and monitor e-mails in order to prevent people from planning terrorist or criminal acts. Do you...
 - Measurement: (Strongly support, Support, Oppose, Strongly oppose)
 - Allowing law enforcement officials to investigate people who participate in nonviolent protests against the U.S. government. Do you..
 - Measurement: (Strongly support, Support, Oppose, Strongly oppose)
 - Tolerance (LLG) (Gibson, 2007)
 - Groups: KKK, Nazis, Radical Muslims, Militarists, Communists, Gay Rights Activists, Proponents of abortion, Opponents of abortion, Christian fundamentalists, atheists
 - [group] should be allowed to make a speech in our community. Do you...
 - Measurement: agree strongly, agree, are uncertain, disagree, disagree strongly
 - [group] should be allowed to banned from running for public office. Do you...
 - Measurement: agree strongly, agree, are uncertain, disagree, disagree strongly
 - [group] should be allowed to hold public rallies and demonstrations in our community. Do you...?

- Measurement: agree strongly, agree, are uncertain, disagree, disagree strongly
- Order (Gibson, 2007)
 - Society shouldn't have to put up with those who have political ideas that are extremely different from the majority.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - It is better to live in an orderly society than to allow people so much freedom that they become disruptive.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - Free speech is just not worth it if it means that we have to put up with the danger to society of extremist political views.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)

- Electoral Democracy:
 - Principles: Contestation, competition
 - Question: Are government offices filled by free and fair multiparty elections?
 - Institutions: Elections, political parties, competitiveness and turn over
 - MEASURES:
 - Electoral integrity (PEW Research Center, 2018)
 - Elections are free from tampering.
 - Measurement: (Very well, somewhat well, not too well, not well at all)
 - No ineligible (disqualified) voters are permitted to vote.
 - Measurement: (Very well, somewhat well, not too well, not well at all)
 - No eligible voters are prevented from voting.
 - Measurement: (Very well, somewhat well, not too well, not well at all)
 - The way congressional districts are determined is fair and reasonable.
 - Measurement: (Very well, somewhat well, not too well, not well at all)
 - Political parties (Gibson, 2007)
 - What our country needs is one political party which will run the country.
 - Measurement (strongly agree, agree, uncertain, disagree, strongly disagree)
 - The party that gets the support of the majority ought not to have to share political power with the political minority.
 - Measurement (strongly agree, agree, uncertain, disagree, strongly disagree)
 - The country would be better off if we just outlawed all political parties.
 - Measurement (strongly agree, agree, uncertain, disagree, strongly disagree)

- Majoritarian Democracy:
 - Principles: Majority rule, centralization, vertical accountability
 - Question: Does the majority (or plurality) rule?
 - Institution: Consolidated and centralized with special focus on the role of political parties.
 - MEASURES:
 - Majority rule block
 - In general, if a party wins a clear majority of votes, it should be able to pass the legislation they prefer.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - Public officials should be chosen by majority vote.
 - (Sullivan, Marcus, Feldman, & Piereson, 1981)
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - Electoral College
 - Thinking for a moment about the way in which the president is elected in this country, which would you prefer? To amend the constitution so the candidate who receives the most total votes nationwide wins the election, or to keep the current system, in which the candidate who wins the most votes in the electoral college wins the election?
 - Measurement: (Amend the constitution to total votes, Keep the current electoral college system)
 - Delegate versus Trustee (Pew Research Center for the People & the Press Political Survey, October 2013)
 - If a member of Congress thinks a bill is in the best interest of the country, but a majority of the people he or she represents are against it, should the member of Congress vote for the bill or vote against it?
 - Measurement: (vote for it, vote against it)
 - Majority versus Minority rights (Park & Smith, 2016; Smith & Park, 2013)
 - Which of the following statements do you agree most with? (randomized order of two statements)
For democracy to work best, the will of the majority must be followed
OR
For democracy to work best, the rights of minorities must be protected?
 - Measurement: The first statement; More the first statement than the second; More the second statement than the first; The second statement.
 - Which of the following statements do you agree most with? (randomized order of two statements)
The majority party should be able to pass legislation that is supported by a majority of the legislators
OR

The minority party should be able to delay or block action on legislation supported by a majority of legislators.

- Measurement: The first statement; More the first statement than the second; More the second statement than the first; The second statement
- Which of the following statements do you agree most with?
The majority party should be able to limit or prohibit amendments to its legislation
OR
The minority party should be able to get a vote on its amendments to legislation?
 - Measurement: The first statement; More the first statement than the second; More the second statement than the first; The second statement

- Participatory Democracy:
 - Principles: Government by the people
 - Question: Do ordinary citizens participate in politics?
 - Institution: Election law, civil society, local government, direct democracy
 - MEASURES:
 - Spending on campaigns/elections (Pew Democracy Survey)
 - Thinking about spending on political campaigns and issues, which comes closer to your view?
 - Individuals and organizations should be able to spend as much money as they want.
 - There should be limits on the amount of money individuals and organizations can spend.
 - Responsiveness (ANES)
 - Over the years, how much attention do you feel Congress pays to what people like you think when it decides what to do -- a good deal, some, or not much?
 - Measurement: (A good deal, Some, Not much)
 - How much do you feel like having elections gives people like you a say about what Congress does-- a good deal, some or not much?
 - Measurement: (A good deal, Some, Not much)
 - Efficacy (ANES)
 - How much do you feel like having elections makes Congress pay attention to what the people think – a good deal, some, or not much?
 - Measurement: (A good deal, Some, Not much)
 - Over the years, how much attention do you feel Congress pays to what the people think when it decides what to do to – a good deal, some, or not much?
 - Measurement: (A good deal, Some, Not much)
 - Electoral cynicism block (PEW Research Center, 2018)
 - (Thinking about how things are in the U.S. today, how well does the following statement describe the country?) Ordinary citizens can do a lot to influence the government in Washington if they are willing to make the effort.
 - Measurement: (very well, somewhat well, not too well, not well at all)
 - (Thinking about how things are in the U.S. today, how well does the following statement describe the country?) Government policies generally reflect the view of most Americans
 - Measurement: (very well, somewhat well, not too well, not well at all)
 - (Thinking about how things are in the U.S. today, how well does the following statement describe the country?) People who give a lot of money to elected officials do not have more political influence than other people.

- Measurement: (very well, somewhat well, not too well, not well at all)

- Something else?
 - Rule of Law (Gibson, 2007)
 - It is necessary to obey a law you consider to be unjust.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - The government should have some ability to bend the law to solve pressing social and political problems.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - It is not necessary to obey the laws of a government I did not vote for.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)
 - When it comes right down to it, law is not all that important; what's more important is that our government solves societies problems and makes us better off.
 - Measurement: (Strongly agree, agree, uncertain, disagree, strongly disagree)

Appendix 9: Survey/experiment design considerations

It is worth exploring how those questions were presented to the respondents. As this study is on the long side, on average taking more than ten minutes, there is a motivation to using matrix style questions to speed things up. Couper, Taraugott, and Lamias (2001) find that the use of matrix questions resulted in subjects completing the survey in a shorter amount of time; however this approach comes at a cost. In his own study, and in a review of the literature, Liu finds that “... a more visually cluttered web survey design, such as menu matrix, is associated with a lower data quality as measured by item nonresponse. Also, consider the poorer respondent's subjective rating of the menu matrix, it is advised to replace the menu matrix with other question types” (2017, p. 68). Following these results, my survey employs single multiple-choice questions on a page,¹⁸⁸ while this may be a slower format the benefit of improved data quality outweighs the benefits of a shorter survey.¹⁸⁹ Finally, the order of the question blocks, questions within those blocks, and when possible the order of response options were randomized to mitigate the potential of biasing based on question order.¹⁹⁰

¹⁸⁸ With the exception of one dependent variable scale.

¹⁸⁹ It is also worth noting that one concern with longer surveys is respondent fatigue. While matrix-style questions may be faster, the evidence from Liu and his review of the literature is that the “cluttered” nature of matrix-style questions decreases the respondent’s opinion of the survey, even if this results in a shorter survey.

¹⁹⁰ The exception being that subjects were all asked some preliminary demographic questions and the pre-treatment Supreme Court legitimacy battery at the very beginning of the survey. This was to ensure that this measure was not primed or otherwise affected by the subsequent questions about democracy. But see a recent study by Mummolo and Peterson (2019) who study the oft cited concern about experimental demand, and find that even when presented with a financial incentive to align their behavior with the researcher’s expectations, subjects do not do so frequently. While these results are interesting, and drawn from a robust and widespread sample, approximately 12,000 subjects, I still make an effort to decrease the danger of experimental demand in this study.

Appendix 10: Significant Correlations between demographics and manipulation checks.

In the exploration of the data prior to the analysis, I uncovered a correlation between several of the demographic variables and the manipulation checks. There was a weak positive correlation between age and the combined measure of the manipulation checks ($r = .287$, $n = 991$, $p < .001$). A similarly weak and positive relationship was found between the manipulation checks and education ($r = .243$, $n = 990$, $p < .001$), political knowledge ($r = .359$, $n = 991$, $p < .001$), and self-identified white subjects ($r = .212$, $n = 991$, $p < .001$). There were equally weak and negative correlations between the manipulation checks and self-identified black respondents ($r = -.116$, $n = 991$, $p < .001$) and Hispanics ($r = -.099$, $n = 991$, $p < .01$).

While correlations are never ideal, the fact that the randomization was carried out successfully and the small correlations reported above, these findings should not complicate the analysis or muddy the results of the experiment.

**Appendix 11: Demographic characteristics of the experiment sample compared to U.S. Census
and 2016 American National Election Time Series**

	Percent of Sample	US Census ¹⁹¹	ANES ¹⁹²
Gender			
Male	47.4	49.2	46
Female	52.4	50.8	52
Other	.2		.2
Race			
Non-white	39	39.3	28
White (non-Hisp.)	61	60.7	71
Age			
18-24	11.9	9	7.6
25-34	19	14	16.6
35-49	26.5	19	23.3
50-64	27.1	19	27.3
65+	15.5	16	22.3
Party ID			
Rep	37		40.5 ¹⁹³
Ind.	17.2		13.5
Dem	45.8		45.4
Ideology			
Lib	28.7		24.1
Con	35.1		32.2
In btwn.	36.3		20.9 ¹⁹⁴
Political knowledge			
0-3 correct	60.5		
4-5 correct	39.5		
0-2 correct ¹⁹⁵			64
3-4 correct			36

¹⁹¹ Gender and Race: <https://www.census.gov/quickfacts/fact/table/US/PST045218>;

[Age](#):

https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPSYASEXN&prodType=table note, age percentages here do not include 0 – 17.

¹⁹² ANES 2016 Time Series

¹⁹³ Collapsed version of ANES 7-point Party Identification question.

¹⁹⁴ Collapsed version of ANES 7-point ideology question.

¹⁹⁵ ANES knowledge questions were different than those used here; I have included them simply for the sake of broad comparisons between the two samples.

Appendix 12: Factor analysis of items used to measure democracy

Since this project is one of the first to analyze democracy as a broad multi-concept construct, I have also analyzed the survey results using confirmatory factor analysis. The survey was designed as to conceptualize democracy in three different ways; liberal, electoral, majoritarian, and participatory. For this analysis, I used the items analyzed in the survey portion of the dissertation. Specifically, this means that some items, like the civil liberties questions, have been scaled together, while others such as the electoral college and delegate/trustee questions, are their own items. For clarity, see the table below which includes the conception of democracy, its description, and the items used to measure each conception of democracy.

Table 27: Conceptions of democracy, their description, and how they are measured

Democracy Concept:	Description:	Measures:
Liberal Democracy	Limited Government, Civil Liberties, Individual Rights	Civil Liberties Block
		Tolerance (least liked group)
		Liberty versus Order
Electoral Democracy	Contestation, Competition, Are government offices filled by free and fair multiparty elections?	Trust
		Political Parties
		Confidence in elections
Majoritarian Democracy	Majority rule, Does the majority (or plurality) rule?	Majority rule
		Electoral College Reform
		Delegate versus trustee
		Majority rule versus minority rights
Participatory Democracy (including deliberative and egalitarian democracy as well)	Government by the people, Do ordinary citizens participate in politics? Are citizens equally empowered? Are political decisions the product of public deliberation?	Responsiveness
		Efficacy
		Campaign Finance/Spending

I believe that in the factor analysis I will find that the items load onto these four conceptions of democracy. Importantly, the measures may not load as cleanly as I have them laid out above. As noted in the chapter, these concepts are open to interpretation and the lines between them can be fuzzy at times. For example, if we look at the descriptions of Electoral Democracy and Participatory Democracy, we could make a case that items in one belong in another. While I have distinguished them here and, in my analysis, I also recognize that the lines may be fuzzy at times. None the less, I generally expect that items will load together as described above.

Initial analysis of the factor was run to determine the type of rotation that is appropriate. I began by using an oblique rotation, since I believe that the constructs will be related to each other. While I argue that these items are all distinct constructs, they are none the less measuring different elements of what we mean by democracy. Based on the component correlation matrix (see table 26 below) we see that none of the cells have an absolute value of greater than .32, therefore we can change the rotation to an orthogonal rotation methods (Veramax).

Table 28: Component Correlation Matrix

Component	1	2	3	4
1	1.000	-0.241	-0.089	0.122
2	-0.241	1.000	0.038	-0.108
3	-0.089	0.038	1.000	-0.020
4	0.122	-0.108	-0.020	1.000

Extraction Method: Principal Component Analysis.

Rotation Method: Oblimin with Kaiser Normalization.

Table 27 below shows the correlation matrix of the measures, including the significance levels. None of the items here have a correlation level of greater than .8, telling us there is not multi-collinearity. Additionally, with a determinant of .034 exceeds the minimum level of .0001, we know that the items are at least minimally correlated. Further, as seen in Table 28, the Kaiser-Meyer-Olkin Measure of Sampling Adequacy (KMO) value of .817 exceeds the standard level of .6 telling us that the

partial correlations among the measures is sufficiently small and the Bartlett's Test of Sphericity is statistically significant ($<.001$) meaning that there is sufficient correlation between the measures to proceed with the factor analysis.

Table 29: Correlation Matrix

		LD civil liberties	LD llgscale	LD Order liberty	ED elections	ED parties	MD Majoritar- ianism	MD Electoral college	MD Majority minority	MD Delegate trustee	PD Responsive- ness	PD efficacy	PD cynicism	PD spending
C o r r e l a t i o n	LDcivil liberties	1.000												
	LDllgscale	0.052	1.000											
	LDorderliberty	0.455	0.192	1.000										
	EDelections	-0.409	0.062	-0.374	1.000									
	EDparties	0.378	0.042	0.659	-0.378	1.000								
	MDmajoritarianism	-0.167	0.003	-0.260	0.207	-0.287	1.000							
	MDelectoralcollege	0.181	-0.105	-0.028	-0.121	-0.001	0.185	1.000						
	MDmajorityminority	-0.160	-0.026	-0.082	0.113	-0.100	0.107	-0.145	1.000					
	MDdelegatetrustee	0.201	-0.113	0.180	-0.216	0.229	-0.080	0.052	0.004	1.000				
	PDresponsivness	-0.313	0.155	-0.295	0.479	-0.345	0.176	-0.029	0.078	-0.324	1.000			
	PDefficacy	-0.258	0.182	-0.169	0.403	-0.189	0.186	-0.022	0.059	-0.302	0.659	1.000		
	PDtrust	-0.412	0.087	-0.367	0.568	-0.406	0.195	-0.152	0.168	-0.285	0.576	0.515	1.000	
	PDspending	0.133	0.013	0.158	-0.164	0.182	0.026	0.153	-0.104	0.127	-0.215	-0.110	-0.214	1.000
S i g	LDcivil liberties													
	LDllgscale	0.053												
	LDorderliberty	0.000	0.000											
	EDelections	0.000	0.026	0.000										
	EDparties	0.000	0.094	0.000	0.000									
	MDmajoritarianism	0.000	0.468	0.000	0.000	0.000								
	MDelectoralcollege	0.000	0.001	0.189	0.000	0.492	0.000							
	MDmajorityminority	0.000	0.210	0.005	0.000	0.001	0.000	0.000						
	MDdelegatetrustee	0.000	0.000	0.000	0.000	0.000	0.006	0.052	0.445					
	PDresponsivness	0.000	0.000	0.000	0.000	0.000	0.000	0.179	0.008	0.000				
	PDefficacy	0.000	0.000	0.000	0.000	0.000	0.000	0.244	0.032	0.000	0.000			
	PDcynicism	0.000	0.003	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000		
	PDspending	0.000	0.340	0.000	0.000	0.000	0.207	0.000	0.001	0.000	0.000	0.000	0.000	

- a. Determinant = .034
- b. Significance levels: 1 tailed

Table 30: KMO and Bartlett's Test

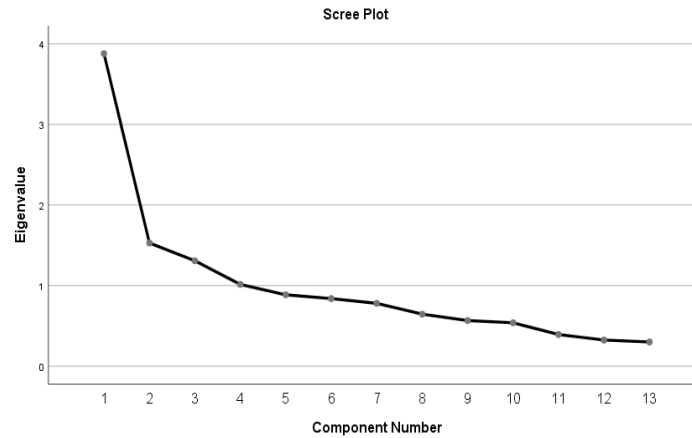
Kaiser-Meyer-Olkin Measure of Sampling Adequacy.		0.817
Bartlett's Test of Sphericity	Approx. Chi-Square	3272.882
	df	78
	Sig.	0.000

Looking next at the Scree Plot and Total Variance Explained Table (Table 29) we see that SPSS extracted four factors, which explain 59% of the total variance. This is not ideal, the greater the variance explained the better, but it is promising that both SPSS and I identified four distinct factors.

Table 31: Variance Explained and Scree Plot

Component	Initial Eigenvalues			Extraction Sums of Squared Loadings			Rotation Sums of Squared Loadings		
	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %	Total	% of Variance	Cumulative %
1	3.877	29.826	29.826	3.877	29.826	29.826	2.914	22.417	22.417
2	1.528	11.755	41.581	1.528	11.755	41.581	2.371	18.241	40.659
3	1.308	10.059	51.641	1.308	10.059	51.641	1.294	9.951	50.610
4	1.014	7.801	59.442	1.014	7.801	59.442	1.148	8.832	59.442
5	0.886	6.813	66.255						
6	0.839	6.452	72.707						
7	0.780	5.996	78.703						
8	0.646	4.968	83.671						
9	0.566	4.355	88.027						
10	0.538	4.142	92.168						
11	0.393	3.024	95.192						
12	0.324	2.495	97.687						
13	0.301	2.313	100.000						

Extraction Method: Principal Component Analysis.



The important part of this factor analysis though is which factors load together, and on which concepts. Using Table 30 below, we can see evidence that offers some confirmation of the way in which I designed the survey and its measures to evaluate attitudes towards democracy. Importantly, the table below is sorted by size and I have suppressed the coefficients that have an absolute value of less than .3 simply to aid in the readability. Further, I also added labels to the variables for the conception of democracy I originally placed them under; PD- Participatory Democracy, ED-Electoral Democracy, MD-Majoritarian Democracy, LD-Liberal Democracy.

Table 32: Factor Loading Analysis with Varimax Rotation for a Four-Factor Solution for Conceptions of Democracy

Item	Factor Loading				Communality
	1	2	3	4	
PD Efficacy, ability to influence Congress	0.82				0.68
PD Responsiveness, how “attentive” is Congress to voters	0.81				0.70
ED Trust/Cynicism, government listens to the voters	0.69	-0.35			0.65
ED Elections, quality/trust in elections	0.59	-0.39			0.53
MD Preference for delegate or trustee style of representation	-0.51				0.39
LD Preference for liberty or order		0.85			0.75
ED Parties, ability of multiple political parties to compete in elections		0.75			0.64
LD Civil liberties Scale	-0.31	0.56			0.50
LD Least Like Group Scale	0.48	0.50			0.48
MD Electoral College or popular vote?			0.72	-0.35	0.65
MD Majority rule		-0.30	0.64		0.62
PD Limits on campaign spending/donations?			0.54		0.39
MD Preference for majority rule or minority rights				0.85	0.74
Eigenvalues	2.91	2.37	1.29	1.15	
% of variance	29.83	41.58	51.64	59.44	

Note: Loadings <.3 are omitted

N=977

Extraction Method: Principal Component Analysis.

Rotation Method: Varimax with Kaiser Normalization.

a. Rotation converged in 5 iterations.

Table 30 above offers some confirmatory evidence of how I grouped the items measuring components of democracy, and even evidence that my caution of the fuzziness of the lines between the conceptions of democracy may be correct as well. For example, we see that efficacy, responsiveness, trust, and elections all stack together in component 1. We also see that under component 2, the items measuring liberal democracy also stack together well and in a positive direction, similarly for component 3 which includes two of the three items measuring majoritarian democracy. As for the “fuzziness”, under component two we see three of the liberal democracy items loading as well as one of electoral democracy elements as well. This

makes some intuitive sense as we could conceptualize the ability of political parties to compete for votes to have some shared elements with civil liberties and civil rights.

Based on this reorganization of the factors used in the survey, it is worth also revisiting the results discussed in the chapter. Below, in Table 31, I have reprinted the OLS regression including all the democracy measures. In the full model, factor 1 which loads many of the confidence in elections and the political process items does not have any significant variables, nor does factor 4 which includes the measure of majority rule versus minority rights.

Factor 2 which includes the civil liberties related items has three that are statistically significant, and positive, effects on evaluations of judicial legitimacy; support for political tolerance, support for liberty over order, and support for a multiparty democracy. Whereas factor 3, which includes many of the majoritarian democracy elements has two factors; support for majority rule and support for national popular vote over the Electoral College, both are significant and have a negative effect on evaluations of judicial legitimacy.

This would suggest that there are two distinct elements of democracy that directly influence evaluations of the Court's legitimacy. On one side, support for civil liberties and civil rights, and a competitive multiparty democracy, is associated with increasing belief in the legitimacy of the Court. On the other hand, a belief in majority rule and support for the electoral college are associated with decreasing belief in the Court's legitimacy. Taken together this offers an interesting twist on the existing literature about the origins of the Court's legitimacy. Much like the existing literature, I find that the civil liberties and civil rights components of democracy are associated with support for the Court's legitimacy (Gibson, 2007). However, I also find that when we look at attitudes towards the majority rule elements of democracy, elements there are associated with a diminishing belief in the Court's legitimacy. Therefore, in addition to the factor

analysis showing the different conceptions of democracy, this finding that a belief one of those conceptions of democracy is actually associated with a diminishing belief in judicial legitimacy is an important take away from this analysis.

Table 33: Full model of with all conceptions of democracy

Variable	
Constant	-.044 (.059)
Civil Liberties	.058 (.047)
Political Tolerance	.243*** (.040)
Order Versus Liberty	.378*** (.063)
Confidence in Elections	-.021 (.067)
Multiparty Democracy	.507*** (.071)
Majoritarian Democracy	-.276*** (.057)
Use Total Votes, not Electoral College	-.094*** (.026)
Delegate Versus Trustee	-.036 (.026)
Majority Rule Versus Minority Rights	.016 (.032)
Limits on Campaign Donations/Spending	.022 (.026)
How Responsive is Congress to Voters?	.026 (.053)
Efficacy of Voters to Influence Congress	-.038 (.050)
Cynicism of the Political Process	.081 (.067)
Support for the Rule of Law	.611*** (.076)
Democrat	-.028 (.032)
Republican	.015 (.034)
Political Knowledge	-.021 (.046)
Black	.016 (.031)
Women	-.065** (.024)
R ²	.509
σ _{est}	.349

Coefficients are unstandardized with standard error in parentheses. Total N = 991

* significant at p<.05

** significant at p<.01

*** significant at p<.001

Appendix 13: Alternative analysis of conceptions of democracy and its impact on evaluations of judicial legitimacy.

In theory, there should be positive correlations between the different conceptions of democracy. While I performed a factor analysis (see Appendix 12) that confirms much of my conceptualizations, it is worth analyzing the correlations within the conceptions as I have proposed them in the chapter. In the table below, I present the simple bivariate correlations between the various items in the survey. For ease of interpretation, I have placed boxes around the items that, in theory, measure the same conceptions of democracy.

I then computed the reliability of different scales of democracy based on the items used above. The scales perform with varying degrees of success. For example, the participatory democracy measures, if we exclude the spending limits question, perform well together creating a scale with a Cronbach's Alpha of .806. The reason for excluding the spending limits question is that while spending limits are implicitly related to a belief in the ability of regular voters to participate in politics, the other three items (responsiveness, efficacy, and trust) are tapping into a different element of participatory democracy.

Alternatively, the liberal democracy scale performed comparatively poorly with a Cronbach's Alpha of .372. However, if we exclude the "least liked group" scale, thereby creating a scale of "support for civil liberties" and preference for "Liberties over order", we increase the reliability of the scale to .589.

Finally, some groupings performed poorly overall and did not present the option to scale together a subset of variables. For example, the majoritarianism questions produced a Cronbach's Alpha of .045, with no combination of variables within that group significantly increasing the reliability of the scale. Similarly, the variables used to measure electoral

democracy; support for multiparty democracy and confidence in elections did not scale well together at all.¹⁹⁶

Therefore, for the next stage of this analysis I have scaled together elements of the participatory and liberal democracy scales. While I kept the elements of the majoritarian and electoral democracy scales as their own items. This reduces the number of items in the model from thirteen to ten, not counting the five controls and the rule of law scale. In the table below, I show both the narrowed down model on the left and the full, original, model on the right. Note, boxes are placed around the different conceptions of democracy. For example, the first box includes the items used to measure “participatory democracy”.

¹⁹⁶ These measures were negatively correlated with each other with a Pearson’s correlation of $-.385$, significant at $p < .001$.

Table 34: Correlation Matrix of Democracy Measures

			Least Liked							Which is more important in a democracy, majority rule of minority rights?	Support for spending limits/campaign finance restrictions	How responsive is Congress to voters?	Are voters able to influence Congress?	How much trust in the political process?	Support for the rule of law
		Liberties/Rights	(tolerance)	versus Order	Confidence in elections	Support for multiparty democracy	Support for majoritarian democracy	Preference for the national popular vote or electoral college	Preference for delegate or trustee model						
Civil Liberties/Rights	Pearson Correlation	1	0.014	.419**	-.345**	.360**	-.182**	.144**	.183**	-.080**	.133**	-.272**	-.196**	-.311**	.209**
	Sig. (2-tailed)		0.648	0.000	0.000	0.000	0.000	0.000	0.000	0.011	0.000	0.000	0.000	0.000	0.000
	N	1001	1001	1000	1001	998	1001	1001	997	999	1001	994	995	1001	999
Least Liked Group (tolerance)	Pearson Correlation		1	.097**	.064**	0.018	-0.007	-.115**	-.169**	-0.012	0.028	.199**	.208**	.145**	0.041
	Sig. (2-tailed)			0.002	0.042	0.573	0.831	0.000	0.000	0.704	0.373	0.000	0.000	0.000	0.197
	N		1005	1003	1002	1002	1005	1004	1001	1003	1004	997	997	1004	1004
Liberty versus Order	Pearson Correlation			1	-.354**	.677**	-.270**	-0.025	.155**	-0.062	.129**	-.273**	-.177**	-.370**	.530**
	Sig. (2-tailed)				0.000	0.000	0.000	0.424	0.000	0.051	0.000	0.000	0.000	0.000	0.000
	N			1003	1000	1001	1003	1003	999	1001	1003	996	997	1003	1002
Confidence in elections	Pearson Correlation				1	-.385**	.185**	-.064**	-.233**	.065**	-.138**	.511**	.422**	.578**	-.295**
	Sig. (2-tailed)					0.000	0.000	0.042	0.000	0.041	0.000	0.000	0.000	0.000	0.000
	N				1002	999	1002	1002	998	1000	1002	995	995	1002	1001
Support for multiparty democracy	Pearson Correlation					1	-.306**	-0.022	.190**	-.087**	.158**	-.326**	-.161**	-.406**	.652**
	Sig. (2-tailed)						0.000	0.486	0.000	0.006	0.000	0.000	0.000	0.000	0.000
	N					1002	1002	1002	998	1000	1002	994	995	1002	1001
Support for majoritarian democracy	Pearson Correlation						1	.141**	-0.032	0.038	0.015	.119**	.134**	.166**	-.202**
	Sig. (2-tailed)							0.000	0.307	0.224	0.641	0.000	0.000	0.000	0.000
	N						1005	1004	1001	1003	1004	997	997	1004	1004
Preference for the national popular vote or electoral college	Pearson Correlation							1	.080**	-.091**	.153**	0.013	0.032	-.085**	-.123**
	Sig. (2-tailed)								0.011	0.004	0.000	0.688	0.312	0.007	0.000
	N								1001	1003	1004	997	997	1004	1003
Preference for delegate or trustee model	Pearson Correlation								1	-0.031	.090**	-.373**	-.332**	-.323**	.184**
	Sig. (2-tailed)									0.328	0.004	0.000	0.000	0.000	0.000
	N								1001	1000	1001	994	994	1001	1000
Which is more important in a democracy, majority rule of minority rights?	Pearson Correlation									1	-.098**	0.061	0.032	.113**	-0.028
	Sig. (2-tailed)										0.002	0.054	0.316	0.000	0.383
	N									1003	1003	996	996	1003	1002
Support for spending limits/campaign finance restrictions	Pearson Correlation										1	-.188**	-.067**	-.196**	.159**
	Sig. (2-tailed)											0.000	0.035	0.000	0.000
	N										1004	997	997	1004	1003
How responsive is Congress to voters?	Pearson Correlation											1	.669**	.583**	-.362**
	Sig. (2-tailed)												0.000	0.000	0.000
	N											997	991	997	996
Are voters able to influence Congress?	Pearson Correlation												1	.510**	-.207**
	Sig. (2-tailed)													0.000	0.000
	N												997	997	996
How much trust in the political process?	Pearson Correlation													1	-.364**
	Sig. (2-tailed)														0.000
	N													1004	1003
Support for the rule of law	Pearson Correlation														1
	Sig. (2-tailed)														
	N														1004

Table 35: OLS Regression Models of democracy measures (narrowed down versus full)

Narrowed Down Model		Full Model	
Variable		Variable	
Constant	-.312	Constant	-.297 (.068)
Participatory Democracy Scale	.041 (.062)	Responsiveness	.026 (.053)
-		Efficacy	-.038 (.050)
-		Trust	.081 (.067)
Limits on campaign finance	.016 (.026)	Limits on campaign finance	.022 (.026)
Liberal Democracy Scale	.359 (.067) **	Civil liberties scale	.058 (.047)
-		Liberty versus order	.378 (.063) **
Least Liked Group Scale	.250 (.040) **	Least Liked Group Scale	.243 (.040) **
Confidence in elections	-.002 (.066)	Confidence in elections	-.021 (.067)
Support for multiparty democracy	.563 (.069) **	Support for multiparty democracy	.507 (.071) **
Majoritarianism Scale	-.282 (.057) **	Majoritarianism Scale	-.276 (.057) **
Majority versus minority rights	.018 (.032)	Majority versus minority rights	.016 (.032)
Prefer national popular vote over electoral college	-.102 (.026) **	Prefer national popular vote over electoral college	-.094 (.026) **
Delegate versus Trustee	-.039 (.025)	Delegate versus Trustee	-.036 (.025)
Support for the rule of law	.645 (.075) **	Support for the rule of law	.611 (.076) **
Democrat	-.026 (.032)	Democrat	-.028 (.032)
Republican	.023 (.034)	Republican	.015 (.034)
Political knowledge	-.024 (.046)	Political knowledge	-.021 (.046)
Black	.007 (.031)	Black	.016 (.031)
Women	-.069 (.025) *	Women	-.065 (.024) *
R2	.501		.509
sest	.352		.349

Coefficients are unstandardized with standard error in parentheses. Total n = 979

* significant at $p < .05$

** significant at $p < .001$

The narrowed down model and the full model both perform equally well overall, with few significant differences. For example, in both models support for liberal democracy, a

multiparty democracy, and the rule of law is associated with increasing evaluations of the Court's legitimacy. However, belief in majoritarianism and that we should switch to the national popular vote from the electoral college are associated with decreasing support for the Court's legitimacy.

This alternative construction of the scales used sheds some new light on the analysis I performed in the body of the dissertation, but overall it confirms the findings there. For example, in both models I find that a belief in liberal democracy is related to increasing confidence in the legitimacy of the Supreme Court, while a belief in the majoritarian conception is associated with decreasing evaluations of the Court's legitimacy. The main finding of the original analysis is that we need to broaden our conceptions of democracy when it comes to evaluating how those beliefs influence attitudes towards the Supreme Court.

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