LEGISLATIVE ATTITUDES TOWARD JUDICIAL REVIEW AND RECONCEPTUALIZING THE COUNTER-MAJORITARIAN DILEMMA

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ABSTRACT

A main concern raised by scholars is that the use of judicial review is, or has the potential to be, antidemocratic. Previous research has examined if courts behave in this fashion and how the political branches influence, use, and interact with the judiciary. This project takes this research in a different direction by using an original dataset of House and Senate press releases from 2014–2017 to analyze how legislators discuss the judiciary and its use of judicial review. Drawing a distinction between "regular" and "counter-majoritarian" criticisms, this paper asks whether, when discussing the courts, legislators express concerns about the use of judicial review or simply frame their discussion around agreement, or disagreement, with the outcome. In the process, the analysis offers a new version of the counter-majoritarian difficulty. The results suggest that while there is a broad, bipartisan concern about judicial review, the specifics and sources are distinctly partisan.

KEYWORDS: *judicial review, counter-majoritarianism, court curbing, Congress, framing*

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I. INTRODUCTION

Alexander Bickel (1962) introduced the "counter-majoritarian difficulty (or dilemma)" to the debate over judicial review in the early 1960s. Since then scholars have debated whether the Supreme Court behaves in a counter-majoritarian fashion or not (Casper 1976; Dahl 1957; Kastellec 2017); when we can justify judicial review (Fallon 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 political branches has evolved over time (Geyh 2008). However, this research has not examined what legislators, one of those potentially being "countered" by the counter-majoritarian dilemma, think of judicial review. Are they troubled by its use, or do they focus on criticizing the decision in simply political terms? This analysis uses an original dataset of House and Senate press releases from January of 2014 through June of 2017 (n = 172,646) to begin to answer that question.

This project has two related goals. The first is to analyze the language used by legislators when discussing the judiciary, specifically focusing on negative reactions and how elected officials respond when they disapprove of the courts and/or their decisions. Second, based on that language, what can be said about legislators' attitudes toward the courts and, more specifically, 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 democracy are bipartisan in the broadest sense and distinctly partisan in the specifics. Based on these findings, I propose a new conception of the counter-majoritarian difficulty, one that reflects both the new judicial and political environments.

Contrary to what some in the current political climate may say, a key assumption of the analysis is that language matters. By focusing on the language used by elected officials to praise or criticize a decision we can start to sketch out their attitudes. While it is easy to determine if they are pleased or displeased with an outcome, what is of more interest is what they say in their criticisms. A careful analysis of the language facilitates an exploration of the nature of their disapproval. There is a difference between being displeased with a decision because one thinks the judge arrived at the wrong outcome versus being displeased with that outcome because one believes the court should not be deciding that issue in the first place. This focus on the "why" behind criticisms allows for an exploration of some age-old questions about judicial review and revisits some of those debates in light of evolving politics.

II. LITERATURE

The relationship between Congress and the judiciary has produced volumes of scholarly research. Specifically, there are several areas of that literature that are important for framing this project and situating it within the larger discussion.

Often the discussion of the relationship between Congress and the judiciary focuses on conflict and subsequent court-curbing legislation. For example, Geyh (2008) traces the history of this tension and shows that when Congress and the courts drift ideologically apart, there is a rise in the hostility between the branches. Clark (2009, 2010) provides quantitative evidence supporting that conclusion. Specifically, he finds that when the Supreme Court's decisions drift away from the preferences of Congress and voters, there is a subsequent rise in proposed court-curbing legislation. Going further, Clark also finds that the Court is attentive to proposed curbing legislation, limiting its use of judicial review, and deferring more to Congress.[2]

Court curbing is a common and useful metric for when judicial and legislative relations have deteriorated, but this is a high bar to cross.[3] Generally, things must have deteriorated substantially to lead to threats of court curbing. This focus, on court curbing, can therefore miss the buildup prior to that point and obscure more subtle means of criticism. Geyh (2011) outlines different levels of tools available to Congress in its relationship to the judiciary.[4] The most serious is outright actions of court curbing such as impeachment, disestablishment of lower courts, court packing, or limiting jurisdiction. Congress can also engage in equally important actions that fall short of that, such as critical commentary and threats of court packing. Focusing on these lower levels of conflict serves several potential purposes. Beyond sending a signal to the judiciary that it is stepping out of line (Clark 2009, 2010; Geyh 2011; Mark and Zilis 2018), they can be a form of position signaling by legislators (Krewson et al. 2018; Mayhew 1974) and may enable elected officials to shape how constituents think about the issue (Grimmer et al. 2014). Freed from various constraints, these lower levels of conflict may be a better tool for understanding legislative attitudes compared with court-curbing bills.[5] In addition, the

2. But see Clark and Kastellec (2015), who, to an extent, call into question this conclusion.

3. Also, there are institutional constraints on the ability of a legislator to meaningfully advance court-curbing legislation.

4. Geyh also mentions that court-curbing legislation is often saber rattling, rather than a serious threat.

5. Also see Mark and Zilis (2018), who also analyze more subtle "microlevel" mechanisms within court-curbing proposals.

choices made in the language used says something about how a legislator views the issue and what that legislator believes is important to communicate about that issue, be it for political, strategic, or normative reasons.

Rather than looking at how Congress uses court curbing to respond to the courts or how the judiciary responds to potential court-curbing legislation, this project examines how elected officials discuss the judiciary. As in previous work, the focus is on congressional disagreement with the courts, but this project looks deeper and asks if disagreement simply reflects disappointment with specific decisions or a deeper concern about the power of judicial review.

This invites the question of why Congress tolerates the Court's use of judicial review if it poses a threat to the goals of elected officials. 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 like to avoid, or they can use the courts to resolve issues or ambiguities that arose while crafting the legislation. Whittington builds on this, arguing that when legislators are confronted with a hostile or unproductive legislative environment, they can turn to the judiciary to advance stalled policy.[6]

Beyond strategic motivations related to policy, the judiciary can also serve as an effective foil for elected officials. Mayhew (1974) famously said that members of Congress are "single minded seekers of reelection"; to this end they primarily engage in three different behaviors: advertising, credit claiming, and position taking. Peabody and Morgan (2013) show that the judiciary, and particularly the Supreme Court, offers ample opportunities for legislators to engage in those behaviors. In the process of commenting, legislators are communicating something about what elements of a decision are important and how their constituents and/or peers should think about the issue. Krewson et al. (2018) show that members of Congress are more likely to use Twitter to criticize the Supreme Court when it hands down salient decisions and especially those that have easy-to-frame partisan elements.

Given the complexities of the relationship between legislators and the judiciary, a focus on court-curbing legislation may miss the buildup of disapproval that eventually manifests in court curbing or underlying tensions that never lead to court-curbing proposals. Examining the less dramatic aspects of this relationship is important. A great deal is happening under the surface, and this sheds important light on the attitudes of elected officials toward the judiciary that may be obscured or go unrecognized when focusing on court-curbing legislation in isolation.

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6. Also see Keck (2014).

III. METHODOLOGY AND DATA

To begin to answer these questions, I collected, coded, and analyzed an original dataset of publicly available press releases dated from January 1, 2014, through June 30, 2017, from members of the House of Representatives and the Senate. The data contained the press releases of those who were in office through that entire time frame. Including 79 senators and 293 members of Congress,[7] the sample compares well with the current distribution in both chambers, with a partisan breakdown in the Senate of 40 Democrats, 37 Republicans, and 2 Independents,[8] and in the House of 144 Democrats and 149 Republicans.[9] Some officials who otherwise met this criteria were nonetheless excluded as their websites could not be scraped or press releases were otherwise unavailable, see Appendix 2 for the specifics of those excluded and why.

This time frame benefits from including the end of the Obama administration and the beginning of the Trump administration. This also means the time frame includes the death of Justice Scalia, Obama's nomination and subsequent Republican stonewalling of Merrick Garland, the 2016 election, President Trump's nomination of Neil Gorsuch, and finally the use of the "nuclear option" by Senate Republicans to confirm Gorsuch. Given this series of events, the Supreme Court and by extension the rest of the judiciary were more salient in national politics than they may otherwise have been.

This period also includes several landmark decisions by the Supreme Court on a range of politically charged topics, further raising the salience of the judiciary. For example, in 2014 the Court legalized same-sex marriage nationally in *Obergefell v. Hodges* and upheld tax credits provided by the Affordable Care Act in *King v. Burwell*, in 2015 the Court struck down a Texas anti-abortion law in *Whole Woman's Health v. Hellerstedt*, and in 2016 the Court heard preliminary challenges to President Trump's Muslim ban. These cases, and others, provided both Democrats and Republicans with plenty to praise and condemn.

Three reasons drove the decision to focus the analysis on press releases instead of other forms of communication. First, press releases are official communications from elected officials, which can reflect broader shifts in the political landscape.

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7. I find no statistically significant differences, in terms of the DW-NOMINATE scores, between the legislators who were included and those excluded.

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

9. 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.

For example, Grimmer et al. (2014) issue press releases to document the spread of budget and spending concerns during the rise of the Tea Party movement. Their analysis also showed a dynamic two-way relationship between the language used in press releases and shifts in public opinion.

Second, press releases allow for analysis of the framing of individual legislators' criticisms. For court-curbing legislation, isolating the specific reasoning behind the proposal may be difficult; furthermore, in crafting the bill, language may be altered to reflect the opinions of different authors or interests. Therefore, while a legislator may sign on or vote for legislation, it can be difficult to connect the legislators to specific language in the final bill. By looking at the language used at the individual level, however, the focus on press releases allows for a more granular analysis.

Finally, framing and language matter.[10] Legislators' choice in language says something about their preferences and what specifically they want to communicate. In selecting one frame over another, we can begin to read into a legislator's attitudes. The language chosen in these statements is not random; when legislators have multiple ways to characterize their criticisms, as they do with court decisions, the choice of one frame over another says something to which we should be attentive.

Press releases are therefore a novel way to analyze attitudes toward the judiciary. However, this does not mean there are no drawbacks. On the one hand, the instant nature of press releases provides an official statement that is free of constraints or barriers that may be associated with other means of communications. On the other hand, some legislators publish multiple press releases each day, occasionally recycling language from previous releases. Therefore, while press releases are a unique way to analyze legislative attitudes, they are not the only method and like all approaches have strengths and weaknesses.

IV. DATA COLLECTION

A web-scraping Google Chrome Extension conveniently called "Web Scraper" was used to collect the data.[11] Using each legislator's official government webpage,[12] a unique script was created for each website to collect press releases published

10. See Chong and Druckman (2007).

11. http://webscraper.io.

12. Note that the official webpage is denoted by a ".gov" domain extension in the web address. Webpages 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.

between January 1, 2014, and June 30, 2017. For each press release, the software collected the URL, the press release's title, the date published, and the full text of the release. This generated an original dataset of 172,646 press releases.

These 172,646 press releases were narrowed down to only those that concerned the judiciary by using an identification script and coding scheme to flag all press releases that mentioned "court," "Supreme Court," "judge," or "Justice."[13] This captured the various ways that one could refer to the judiciary, from the highest levels to the lowest. The final dataset contained a total of 11,500 press releases concerning the courts, with 5,576 from the House and 5,924 from the Senate.

The next step was to code the "tone" of each press release. Releases were coded as either positive, negative, mixed, neutral, or other/unclear. While the focus of this analysis is on counter-majoritarianism, and particularly the use of counter-majoritarian criticisms, it was important to first identify the negative reactions before exploring the details within those criticisms, because the coding of criticisms included multiple categories, as discussed shortly.

To clarify, I was interested in the tone toward the court, rather than the overall tone of the press release itself. For example, Congresswoman Clark (D-NY) released a statement after a 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" (Clarke 2017). While Representative Clark clearly expressed her negative opinion toward President Trump's policy, at the same time she praised the court's decision. Since the focus is on attitudes toward the judiciary, this release was coded as positive.

I defined "positive" reactions to be those that included language such as "pleased," "welcome(s/d)," "approves of," and/or "supports." Press releases that praised the outcome of a decision were coded as "positive." Also, in the positive category were those that discussed creating new courts, such as drug courts or veterans' courts, and those that supported greater access to the courts. In these instances, the desire to expand the role or scope of the judiciary implies a positive opinion of the judiciary. Finally, releases that discussed submitting an amicus brief were coded as positive. By signing onto, or authoring, an amicus brief the legislator is expressing an implicit support of the judicial process. In a similar vein, "wish

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

casting," where a legislator "wishes" or otherwise encourages a court to decide one way, was coded as positive (Morgan and Peabody 2014). Signing onto an amicus brief or "wish casting" shows support for the judicial process playing out, rather than saying that the courts should not be involved, as some legislators did.

On the negative side I looked for words such as "disappointed," "disapproves," "outraged," "upset with[by]," and "angered with[by]." Press releases that highlighted the negative results of a decision were coded as negative. For example, when Senator 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), he was clearly expressing disapproval of those decisions. In discussing *Roe v. Wade*, Representative Hensarling (R-TX) says, "[R]emember the millions of unique and precious human lives ended by the unspeakable tragedy of abortion" (Hensarling 2014). In both examples the tone is undeniably negative. Finally, press releases critical of a case being appealed or heard were coded as negative, as these comments expressed an opposition to the judicial process taking its course.

Mixed statements were those that offered both praise and criticism in the same release. Frequently this took the form of conflicting decisions between lower courts or criticizing a lower court decision while encouraging the Supreme Court to hear, and overturn, the decision. For example, Senator Tester (D-MT) released the following statement regarding campaign finance cases: "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 US Supreme Court" (Tester 2014). Since this release included criticism of the Supreme Court and praise for the Montana Supreme Court, it was coded as mixed.

Some press releases were either neutral or unclear in their tone. Neutral releases included mentions of the court without any clear position. Generally, these were statements of fact that simply provide information. For example, Senator Bennet (D-CO) said in discussing President Trump's decision to shrink Bear Ears National Monument, "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). Since neutral or unclear releases such as this do not provide an opinion, they were not included in the subsequent analysis. Thankfully, while the stereotype of politicians often includes the use of frustratingly opaque and noncommittal language, when discussing the judiciary legislators were frequently clear in their tone.

Finally, I turn to the comments on Scalia, Garland, and Gorsuch. These press releases were coded for tone but subsequently removed from the analysis. In these

releases, legislators engaged in a different type of conversation. These releases focused on the nomination but were often simply a vehicle to launch into a tirade about how the other party is causing dysfunction. While nominations are critical to understanding attitudes toward the judiciary, including this confirmation fight would push this discussion and analysis in a different direction. See Table 1 below for descriptive data regarding the coding of the press releases.

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 press releases on the judiciary	11,300	
Total critical press releases on the judiciary	2,963	26%
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, two graduate students checked for inter-coder reliability. After receiving training on the project and methodology, both coders were given samples of the data and asked to code the tone of those press releases. Overall, the results were positive. coder 1 had a 76 percent match with the original coding of the press releases' tone. The agreement increases to 88 percent when including only significant differences, such as disagreement over positive/negative tone or disagreements that would affect the subsequent coding. Similarly, for coder 2 there was a 64 percent match on the tone of the press releases, which increased to 74 percent when looking only at significant differences.[14] Although

14. The coders and I agreed completely on 60 percent of the press releases, and on 80 percent I agreed with at least one coder. Looking at significant differences only, the level of agreement between me and at least one coder rises to 94 percent.

some of these results may be lower than desired, the levels of agreement meet the standards in the literature (Lavrakas 2008).[15]

The crux of this analysis looks beyond simple positive or negative reactions and focuses on how criticisms were framed. Building off Friedman's history of the counter-majoritarian dilemma (1998, 2000, 2001, 2002), negative and mixed press releases were coded for the type(s) of criticism present. Specifically, looking for the presence of three different frames; "regular," "counter-majoritarian," or "democratic process criticisms." These democratic process criticisms are explained in more detail later, but preliminarily 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 criticism frames, but they often contained only one.

According to Friedman (1998, 354), "Countermajoritarian 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." Using this definition, I looked for language in the press releases that highlighted courts going against "public opinion," "the will of people [voters]," or "the people's elected representatives" or otherwise interfering with the preferences of the majority. For example, Representative Chabot (R-OH) published the following:

> 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. . . . We need a President who will appoint judges. . . . 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*. (Chabot 2016; emphasis added)

15. In terms of coding these mentions, coder 1 and coder 2, respectively, agreed with the original coding of regular 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. In cases where there was disagreement between me and/or the coders, I deferred to where there was agreement between two of the three coding and adjusted the coding to reflect this agreement.

This press release has a clear counter-majoritarian overtone. Representative Chabot criticizes the Court for "substituting its will for the will of the American people." He disagrees with the decision, but more important is how he frames his disagreement. Rather than just saying that the decision is bad or that the Court read the Constitution wrong, he criticizes the Court for being counter-majoritarian.[16]

Building further on Friedman, "regular criticisms"[17] act as a catchall for criticisms that among other things, attack the decision on its merits, are purely partisan, evoke "states' rights," or are institutionalist/separation of powers in nature (Friedman 1998, 348, 354–55). For example, Representative Olson (R-TX) criticized the decision in *Obergefell* but 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. (Olson 2015)

In this example the criticism was on the merits and on the interpretation of the Constitution, but Representative Olson does not use language suggesting that counter-majoritarianism was at the root of that criticism. In addition, this example 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 Representative Olson uses it to suggest that the Court has overstepped its constitutional and institutional boundaries, rather than claiming that the Court is acting against the public's will.

The institutionalist idea needs further explanation, since concerns about courts stepping on the toes of the elected branches could be counter-majoritarian. I draw a distinction between purely separation-of-powers criticisms and those that reference the elected branches as the people's representatives. The first type is coded as a regular criticism. In these criticisms, the legislator is saying that the court is overstepping its constitutional boundaries and infringing on the duties of Congress.

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16. Also see Mark and Zilis (2018), who suggest that federal judges may also be more concerned and attentive to this type of language.

17. Friedman refers to these criticisms as "political"; however, for clarity's sake here they are called "regular."

Therefore, since this criticism at its core is that the court is exceeding its constitutionally defined powers, institutional criticisms of this nature are considered "regular criticisms." Kastellec (2017) draws a similar distinction between the Court striking down a law passed by legislatures and the public opinion regarding the law or its subject matter. The analysis of this paper focuses on the public side of this distinction more so than the institutional side.

Yet, there are some institutional criticisms that include an element of the will of the people (i.e., voters). Here the legislators criticizes the court for overstepping its bounds, but part of the reason they claim this is a problem is because these issues should be decided by the people's elected representatives in the legislature. By specifically invoking the will of the people, these criticisms move from regular criticisms into the realm of a counter-majoritarian criticism.

For example, in response to the decision in *King v. Burwell*, Representative Bucshon (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. (Bucshon 2015)

Compare the language there to this release from Representative 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. . . . 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. (Scalise 2015)

Both representatives were responding to the same decision and used institutional language in their criticisms. However, Representative Bucshon rooted part of his criticisms in the "American people" and that the people have entrusted Congress, not judges, with this authority. Representative Scalise criticizes the Court for overstepping its boundaries into what he believes should be the constitutionally delegated realm of Congress. This quote also highlights another important element of the coding—specifically, that the coding was based on the language used by the

legislator rather than by the underlying reality of the case on which the legislators were commenting. In *Burwell*, the Court acted in a restrained way; however, what is important here is the framing used by Representative Scalise. Future research may explore the extent to which legislators' criticisms of decisions as counter-majoritarian, or as interfering with the democratic process, reflect the reality of the Court's behavior. This distinction is slight, of course; however, using language that invokes the will of the people comes closer to the spirit of the counter-majoritarian difficulty.[18] A similar logic was applied to states' rights criticisms: a release focused on the rights of voters in a state would be coded as counter-majoritarian.

Some releases used multiple frames in their criticisms. Elected officials sometimes criticized a decision on the merits and used counter-majoritarian language. For example, Representative Culberson (R-TX) responded to *Obergefell v. Hodges* with the following:

> 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 Tenth 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 states."[19] Therefore,

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18. This distinction is based on the conception of the counter-majoritarian difficulty I use here that focuses on the will of the people. An argument could, of course, be made that these checks and balances or separation of powers criticisms are also counter-majoritarian in nature.

19. Criticisms of *Obergefell* also show the important point that the coding of statements relied on the language used rather than the underlying accuracy of the frame. As Kastellec (2017) discusses, *Obergefell* invalidated state-level bans on same-sex marriage, and some of those bans had popular support whereas others existed in states where voters supported marriage equality. A future project may explore in greater detail the accuracy of these statements, but the important part for the project at hand is that they used this language, not whether it was an accurate representation of the situation.

this press release was coded as including both a regular and a counter-majoritarian criticism. It is worth noting that most of the overlap between criticisms, unsurprisingly, came when using a regular criticism with one of the other two.

Finally, after an initial examination of the data, it became clear that a new conception of counter-majoritarianism was required. Legislators were invoking the will of the people, but doing so in a way distinct from the previous examples. What emerged was a line of criticism that focused less on outright countering the will of the people and more with preventing the will of the people from being expressed, heard, or acted upon.

If, at its heart, the counter-majoritarian dilemma is about representation, accountability, and the will of the voters (Kastellec 2017), how should we understand criticisms that focus on the damage the courts have done to those ideals? For example, many Democrats in the wake of *Citizens United* and *McCutcheon* attacked these decisions, citing their harm to democracy and how they limited the power of voters. Senator Brown (D-OH) responded to *McCutcheon v. F.E.C* using first a regular criticism and then what I call 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 criticisms get at the spirit of the counter-majoritarian difficulty but are not exactly what Bickel or Friedman had in mind. Instead, these criticisms draw heavily on Ely's (1980) defense of judicial review. They frame the courts as acting counter to the role of judicial review Ely advocates, where the judiciary should protect democratic access and participation, using judicial review to thwart blockages to these fundamental rights. Here the court is not so much overturning the will of the majority as allowing a "powerful special interest" to diminish the ability of the people to express their will in the first place.

Another way to conceive of this is as preemptive counter-majoritarianism. If the classic conception of the counter-majoritarian difficulty is the court is retroactively undoing or overriding the will of the people, this new conception focuses

on the court hindering the ability of the people to express their will through the democratic process.

Like the response to campaign finance decisions, some criticized the Court for weakening voting rights. In this statement from Representative Butterfield (D-NC), there is a message that gets at the spirit of the counter-majoritarian difficulty but is different in keyways:

> Following the Supreme Court's 2013 Shelby v. Holder decision . . . 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 statements, the connection to the counter-majoritarian difficulty was in shifting the balance of power away from voters and toward unelected special interests. In the voting rights examples, the argument is that the Court, by not protecting voting rights, is enabling voter disenfranchisement. The Court isn't invalidating the will of the people; instead, it is enabling others to make it more difficult for voters to express their will through voting.

I argue that these criticisms are something unique. They embrace themes of the counter-majoritarian difficulty—such as the idea that power should lie with voters in a democracy—but are not attacking the courts for directly invalidating voters' preferences. Instead, they criticize courts for handing power over to unelected interests or for diminishing the power of voters to have their voices heard. This "democratic process" form of counter-majoritarianism blends old and new issues, such as voting rights and campaign finance, to offer a new conception of the counter-majoritarian difficulty that reflects a changing nation, judiciary, and political landscape.

V. ANALYSIS

The analysis starts with the descriptive statistics, as they serve as a proof of concept, and provides hypotheses to test in the subsequent quantitative analyses. Following the descriptive results are the quantitative analyses. First I explore the extent to

which the Supreme Court's docket[20] potentially explains the criticisms used, and then I explore the extent to which we can attribute the types of criticisms used to differences between individual legislators. Finally, I conclude by connecting the analyses and situating the results within the larger argument.

As seen in Table 2, there is an overwhelming preference for both Republicans and Democrats, in both chambers, to use regular criticisms, with approximately 72 percent of all press releases including a regular criticism. This shouldn't be surprising, since this category functioned as a catchall for many different types of criticism that were neither counter-majoritarian nor democratic process. Beyond this similarity, important differences emerge when looking at the distributions of the other two frames by party and chamber.

Table 2. Distribution of criticism across party and chamber

	Counter-Majoritarian Criticisms	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[21]

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

Concerns about the courts behaving antidemocratically (counter-majoritarian and democratic process criticisms combined) were present in 27 percent of the critical releases. Thus, concerns about the compatibility of the judiciary and the democratic system were a part of the discussion. However, stark difference exists between the parties in how they view this dilemma.

20. The reason for focusing specifically on the Supreme Court here is that these decisions have a salience that most lower court decisions do not have, they are generally applicable across the nation, and previous work has found that most of the discussion by elected officials at the federal level concerns the decisions of the Supreme Court (Morgan and Peabody 2014; Peabody and Morgan 2013).

21. 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 dramatic is the distribution of democratic process criticisms, with the House and Senate Democrats providing more than 95 percent. These differences also hold up when accounting for the size differences between the parties and the chambers. For example, Senate Republicans and Democrats may have released roughly the same number of counter-majoritarian criticisms, but when considering that as a percentage of all their press releases, Republicans use counter-majoritarian language at a higher rate (11.8 percent versus 5.8 percent). At first glance this shows a broad concern about the compatibility of democracy and judicial review, but there are important differences in the details.

Overall, Republicans are more likely to use counter-majoritarian language compared with their Democratic colleagues. This may have to do with the Court's 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, as it struck down bans on gay marriage enacted by legislation and some bans enacted by ballot initiatives. Yet, other (arguably) counter-majoritarian decisions,[22] such as *Whole Woman's Health v. Hellerstedt*, which struck down a Texas law that placed restrictions on facilities that provided abortion, were often criticized on the merits. Take, for example, the reaction from Senator 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). However, some legislators used counter-majoritarian language to discuss the same decision, such as Representative Chabot (R-OH), who said, "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. . . . I fear the Court will continue . . . substituting its will for the will of the American people" (Chabot 2016). This difference in rhetoric is explored in more detail later in this paper.

Democrats were not totally without counter-majoritarian language in their critiques. In a true blast from the past, Representative Nadler (D-NC) had the

22. 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 or public opinion side, see Kastellec (2017).

following to say in a 2016 press release: "In the year 2000, Vice President Al Gore won the popular vote by 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). Democrats more frequently used counter-majoritarian language in conjunction with the issues of voting rights and campaign finance, as seen here from Senator 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 US 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)

Sen. Tester used counter-majoritarian language, criticizing a ruling against campaign finance restrictions passed by "Montana voters" while also using democratic process language highlighting how these decisions necessitate that we put "the people ... back in charge of our elections". This was emblematic of how Democrats reacted to the courts. While they used some counter-majoritarian language, many of their criticisms focused on how the courts and their decisions have weakened the ability of voters to have a say in elections and the democratic process. Interestingly, 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.

There are two broad possible explanations for these differences. First, it may simply reflect the cases to which legislators are responding, specifically Supreme Court decisions. Second, it may be a function of factors related to individual legislators.

The analysis first tests the extent to which the cases mentioned shape the language used by legislators by specifically looking at the influence Supreme Court decisions have on the language used.[23] Each press release was analyzed to identify and count the mentions of key cases. For example, identifying the occurrences of the words "Obergefell", "Hodges", and "Obergefell v Hodges" to generate a list of press releases that mentioned the 2015 decision. This was done for more than sixty other Supreme Court decisions over the terms covered by the data collection, and some high-profile decisions that happened prior to the data collection.[24] This was then used to produce a set of dummy variables of subject matter mentioned in a press release. For example, combining mentions of "Obergefell v. Hodges", "United States v. Windsor"[25], and "Hollingsworth v. Perry" into a variable on gay rights.[26] Similar groupings were done for other issues such as reproductive rights,[27] campaign finance,[28] and the Affordable Care Act.[29, 30]

This ultimately produced seven dichotomous variables for the decision areas of same-sex marriage, the Affordable Care Act, campaign finance, voting rights, unions, reproductive rights, and criminal rights, which were used in the models below, see Table 3. 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 (Krewson et al. 2018; Morgan and Peabody 2014).

The analysis 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 for three dichotomous dependent variables based on the presence of the three criticism types: regular, counter-majoritarian, and democratic process. In the results below, see Table 3, the unit of analysis involves the individual

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23. Supreme Court decisions were the most frequently mentioned by legislators.

24. E.g., every year both pro-life and pro-choice legislators mark the anniversary of *Roe v. Wade* with press releases condemning or praising the decision.

25. For cases where a named party was a state, as in *Whole Woman's Health v. Texas* or *United States v. Windsor*, the search did not include "United States" as an independent search because doing so would generate too many false positives; instead the search included "Windsor" and "United States v. Windsor."

26. While these were not the only decisions concerning gay marriage during these terms, many of the other cases were grouped with these three decisions, which were the focus of the media and elected officials.

27. *Roe v. Wade*, *Burwell v. Hobby Lobby*, *Whole Woman's Health v. Texas*, and *Zubick v. Burwell*.

28. *Citizens United v. FEC* and *McCutcheon v. FEC*.

29. *NFIB v. Sebelius*, *Burwell v. Hobby Lobby*, and *King v. Burwell*.

30. See Appendix 1 for the distribution of these and other variables used in the analysis.

Table 3. Logistic Regression of Criticism Type

	Model 1		Model 2		Model 3	
	Regular Criticisms		Counter-majoritarian Criticisms		Democratic Process Criticisms	
		Marginal Effects (dydx)		Marginal Effects (dydx)		Marginal Effects (dydx)
Gay Marriage	-1.206 (.285) **	-.166 (.039)	2.267 (.241) **	.152 (.016)	-.533 (.542)	
ACA Decisions	.51 (.105) **	.070 (.014)	-.606 (.150) **	-.040 (.010)	-.292 (.117) *	-.033 (.013)
Campaign Finance	-1.094 (.103) **	-.151 (.013)	.278 (.153)		1.427 (.114) **	.160 (.011)
Voting Rights	-1.546 (.122) **	-.216 (.014)	-.314 (.243)		1.912 (.134) **	.216 (.012)
Unions	1.167 (.634)		-1.081 (.794)		-1.13 (.754)	
Reproductive Rights	1.582 (.245) **	.219 (.033)	.401 (.193) *	.027 (.013)	-1.844 (.296) **	-.127 (.033)
Criminal Justice	.028 (.144)		.148 (.219)		.135 (.154)	
House	-.590 (.105) **	-.081 (.014)	-.186 (.149)		.538 (.116) **	-.061 (.012)
Party ID	1.55 (.139) **	.214 (.014)	.907 (.148) **	-.061 (.010)	-2.906 (.235) **	-.329 (.024)
Model Fit						
Pearson's x2 (df =9)	685.23		173.91		941.42	
Prob. > x2	.000		.000		.000	
Pseudo R2	.214		.105		.312	
n=2,925						

** significant in a two tailed test at the p ≤ .01 * significant in a two tailed test at the p≤ .05
Standard errors in parentheses.
Note, for Party ID higher values signify Republicans.

press releases, and the three different models use the same independent variables. Also included were dummy variables indicating whether or not the author was a member of the House of Representatives, as House members from both parties there were particularly vocal, and a variable for their party to control the influence of the author's partisanship.

These results, shown in Table 3, demonstrate that subject matter is a significant factor in determining the types of criticism legislators use. Press releases mentioning the Affordable Care Act, for example, increased the presence of regular criticisms while decreasing the probability of counter-majoritarian and democratic process criticisms. In addition, press releases concerning gay marriage resulted in a significant increase in the probability of a counter-majoritarian frame being present, and releases concerning voting rights or campaign finance significantly increased the probability of democratic process criticisms.

The takeaway from the logit analysis is the subject matter, matters. The decisions from the Supreme Court influenced how legislators frame their criticisms. The marginal effects for the significant variables show how important cases are. For example, the presence of voting rights or campaign finance cases in a press release increased the likelihood of a democratic process criticism by 21 percent and 16 percent, respectively. Similarly, if a press release mentioned one of the marriage equality decisions, this increased the likelihood of a counter-majoritarian criticism by 15 percent.

It is interesting to note that the presence of reproductive rights decisions in the press releases increased the probability of regular criticisms by around 21 percent and 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 and may have to do with the specifics of the cases being mentioned. While *Roe* was frequently criticized using regular criticisms, *Hellerstedt* received both counter-majoritarian and regular criticisms.[31]

The party of the press release's author mattered as well. Democratic authorship increased the probability of a democratic process criticism, whereas Republican authorship increased the probability of counter-majoritarian criticisms. This supports the earlier claim that both parties express concerns about the Court in relation to democracy, but they arrive at those concerns through different paths.

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31. Just as *Obergefell* was arguably "counter-majoritarian," there is room to debate the extent to which the decision in *Hellerstedt*, which struck down a Texas abortion restriction, was counter-majoritarian depending on how counter-majoritarianism is defined.

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 partisan.

These results show that subject matter is a significant factor in how criticisms are framed; however, there is also evidence that the chamber and partisanship of the author matters as well. It is necessary, then, to consider the factors related to individual legislators that may affect their choice of criticisms.

Ideology, chamber, party identification, membership on the judiciary committees, and other factors may affect legislators' choice of criticisms. It may be that as both parties' wings have begun to embrace a more populist message, as seen in the campaigns of former president Trump and Senator Sanders (I-VT), those at the wings of the party may be more likely to attack the judiciary for its harm in damaging the voice of "the people," or voters, figuring that this concern about the will of voters is something that will resonate with more populist-leaning politicians and voters.

Many legislators have a JD[32]—this and/or their status as a member of either the House or Senate Judiciary Committee may be important to consider. As Bartels et al. (2015) show, lawyers who have a substantive relationship with the judiciary, while well aware of the political and ideological elements of the judiciary, are also more trusting and supportive of it. Therefore, both factors—the legal education and close working experience with the judiciary—may affect the choices made in criticizing the courts. On the one hand, the counter-majoritarian difficulty is quintessentially an academic topic, and therefore those trained in the legal academy may be more likely to raise these concerns; on the other hand, legislators who have intimate knowledge of the legal process develop a trust and support for it and therefore may be less likely to use language that calls into question the judiciary's legitimacy.

In the next analysis, the focus shifts from individual press releases to individual legislators. For each official, a count of their total number of press releases containing each of the three frames was compiled, and these serve as the dependent variables in this analysis. In addition, dummy variables were created for membership on either the House or Senate Judiciary Committee and whether or not members have a law degree. Also included were individual DW-NOMINATE scores (Lewis et al. 2018), the legislator's chamber, the length of time served in the current office, the total number of press releases they published, and the person's party identification.

32. Also include here the few legislators with a Bachelor of Law (LLB) or Masters of Laws (LLM) degree.

I first propose a proximity hypothesis, testing whether those who work more closely or have more experience with the legal system will be more likely to use regular criticisms over counter-majoritarian or democratic process ones than individuals who are farther removed from or have less experience with the legal system. Obviously, those in the Senate have a closer "working" relationship with the judiciary, since they vet and vote on judicial nominees. Similarly, compared with their newer colleagues, legislators who have spent more time in office may have developed more deferential attitudes toward the judiciary. Finally, those socialized into the legal profession may have a different attitude toward the judiciary. This proximity hypothesis builds off the work of Gibson and Nelson (2015), who have found that "to know the Court is to love it" (Gibson and Nelson 2015) and on Bartels et al. (2015) regarding lawyers' views of the judiciary. Through socialization and/or contact, these legislators may be more deferential to the judiciary, preferring to use language that while critical does not challenge the courts' legitimacy.

The second hypothesis is related to ideology and tests if will be more likely to use counter-majoritarian and/or democratic process criticisms as they become more ideological. Since almost 30 percent of all counter-majoritarian criticisms came from the fifty most conservative Republicans and 33 percent of all democratic process criticisms came from the fifty most liberal Democrats, it makes sense to evaluate the influence of ideology in more detail. This distribution and the divide between the parties discussed in the descriptive statistics show the need to account for both partisanship and ideology in the analysis.

This analysis presents three models for the total count of each criticism used by an elected official. Each model showed significant evidence of overdispersion: regular 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 (NBR) model was used. Table 4 shows the results of the NBR models for the three criticism types.

Being in the Senate increases the probability of regular criticisms but has no significant effect on the other frames. Furthermore, none of the models show any significant effect of years in office, being a member of a Judiciary Committee, or having a law degree. Therefore, aside from membership in the Senate, proximity does not influence the rhetorical choices made by legislators when discussing the judiciary. However, the results for party ID and ideology need more unpacking.

Table 4. Negative Binomial Regression Model of Criticism Type

	Model 1	Model 2	Model 3
	Regular Criticisms	Counter-majoritarian Criticisms	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 x2 (df =7)	399.2	125.52	259.88
Prob. > x^2	.000	.000	.000
Pseudo R^2	.188	.163	.228
n=369			

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

> Confirming the initial analysis, Democrats are more likely to criticize the judiciary on democratic process terms, whereas 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 attention. The models were rerun, first including only party ID as a predictor and then adding in the DW-NOMINATE scores. Results of the rerun are shown in Table 5.[33]

For counter-majoritarian criticisms, the results show that both ideology and partisanship matter. Being a Republican is initially a statistically significant

33. See Appendix 4, which shows that ideology was not a significant influence on the predicted number of regular criticisms, as elected officials of both parties and across the ideological spectrum made frequent use of regular criticisms.

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

	Model 1	**Model 2**
	w/ Party ID	**+ 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.

factor in predicting the language used; however, when ideology is included in the model, ideology is the main driving force in the predicted number of counter-majoritarian criticisms. This change is illustrated more clearly in Figure 1, where the expected number of press releases with counter-majoritarian language increases as Republicans become more conservative. Note that the solid black line represents the predicted number of criticisms while the light grey lines represent upper-level and lower-level predictions. For Republicans, ideology matters more than party alone for understanding the language used when criticizing the courts.

While the Republican analysis focused on counter-majoritarian language, the Democratic analysis focused on democratic process language, since the descriptives suggested a strong association with Democrats and this type of criticism. As was done for the counter-majoritarian criticisms, the NBR model was rerun on the democratic process dependent variable, with party ID in the first model and then adding ideology in the second (see Table 6).

In this version of the model, we see that being a Democrat is the significant factor on the predicted number of democratic process criticisms used, rather than ideology.

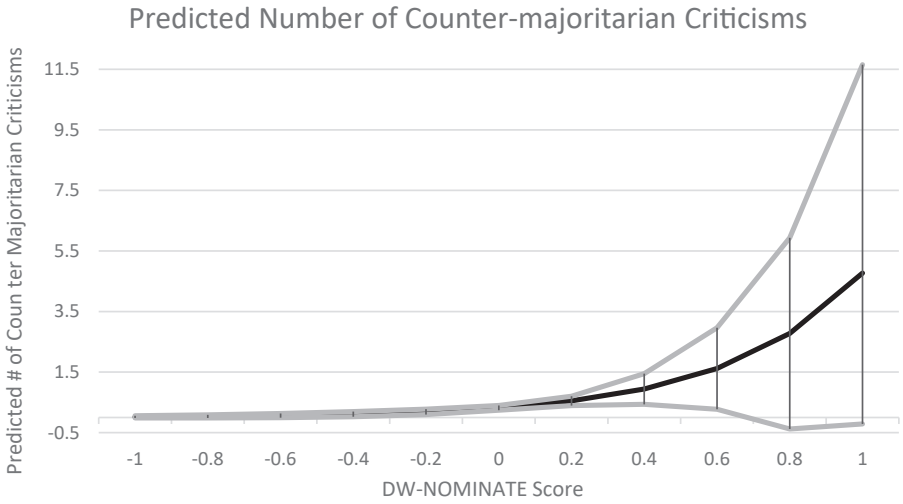

Figure 1.

Table 6. Negative Binomial Regression Model of Democratic Process criticisms

	Model 1	**Model 2**
	w/ Party ID	**+ 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.

Figure 2, a graph of the predicted number of democratic criticisms among Democrats, shows something different from what was seen for Republicans. Specifically, increasing liberalism has only a weak, and not statistically significant, effect on the predicted number of democratic process criticisms.

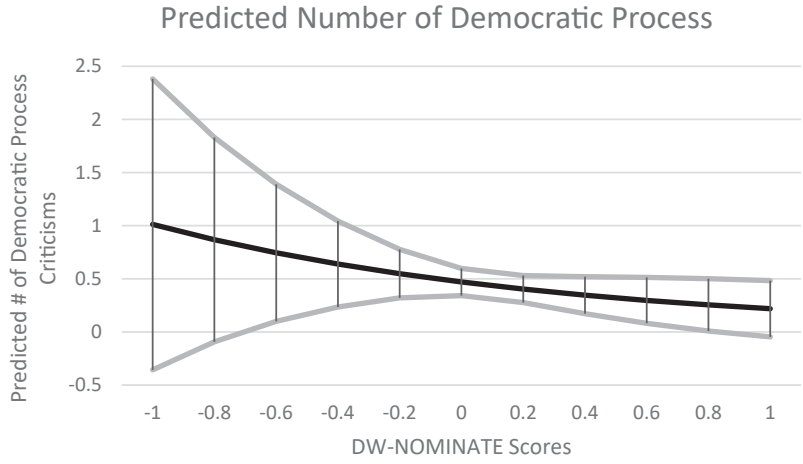

Figure 2.

This analysis reveals that there are broad concerns about the compatibility of the judiciary and democracy. Both Democrats and Republicans approach the judiciary 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 about the judiciary overturning the will of the people via its decisions. Democrats, in contrast, are concerned about the judiciary weakening access to and participation in the democratic process.

VI. DISCUSSION

The analysis of legislative attitudes has three broad takeaways. First, the type of decisions handed down by the Supreme Court influences what criticisms are used. Second, individual factors among legislators, specifically ideology and party ID, influence the language used to criticize the courts. In this regard, concerns about judicial review are a result of both the behavior of the Court and the attitudes in Congress. Finally, the results show that legislators of both parties are concerned about judicial review.

Different cases decided by the Supreme Court were treated differently by legislators who attacked those decisions. Legislators who criticized the Court over its gay marriage decisions were much more likely to use counter-majoritarian language, whereas criticisms 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 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.[34] Similarly, there is a clear connection between cases on campaign finance and participation in the democratic process. This finding makes sense, as the facts of the cases decidedly influenced the language used to criticize the judiciary. While one can disagree with the framing, either ideologically or politically, it is not as if legislators are completely creating these frames out of thin air. Instead, they shape their criticisms in part to reflect the facts, or perceptions of the facts, in the case and the nature of the decision.

The difficult question of how to disentangle the effect of cases from the effect of individual legislators remains. In essence, the question is this: Had the cases been different, might the legislators have used different criticisms? Looking at the cases referenced in the data can begin to disentangle this.

Some of the Supreme Court decisions that received the most ire from Democrats were those concerning campaign finance. These cases were framed overwhelmingly using democratic process language. However, they also had counter-majoritarian elements that were frequently overlooked. There is broad public support for robust campaign finance regulations and a bipartisan consensus that the wealthy have too much influence in our politics.[35] Further, these cases often overturned bipartisan legislation.[36] While this issue had clear counter-majoritarian elements to draw upon, with the exception of Senator Tester (D-MT), these cases were almost exclusively discussed by Democrats using the democratic process frame in conjunction with regular criticisms.

For Republicans, their silence on democratic process concerns is noticeable. While Republicans have benefited most from the post-*Citizens United* world (Olsen-Phillips 2014), it is still surprising that they do not join their Democratic peers in

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34. See Kastellec (2017) and Pew's *Religious Landscape Study* (2014).

35. A 2015 *New York Times* poll, found that 84 percent of respondents believed that money played "too much" of a role in campaigns, and 39 percent supported fundamental changes to the funding of campaigns while 46 percent said that we need to "completely rebuild" the entire system ("Americans' Views on Money in Politics," 2015).

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

criticizing the role of money in our political system, especially considering a majority of Republican voters believe that money plays too much of a role in campaigns and support fundamental changes to, or completely rebuilding, the campaign finance system ("Americans' Views on Money in Politics," 2015).

This suggests that in part it is the judiciary's behavior that leads to the use of specific types of criticisms. The results did not show universal condemnation of the courts but instead showed that elected officials react to specific decisions in specific ways. Therefore, the judiciary is somewhat in control of the criticisms that come its way, and if members of the judiciary are more worried about some criticisms than others (Mark and Zilis 2018), they can act strategically to sidestep these topics. Lower courts can write narrow opinions so as not to raise these issues, while the Supreme Court can also write decisions narrowly or even refuse to grant certiorari in the first place.

The final key takeaway is that while there is bipartisan concern about judicial review, the paths by which elected officials arrive at their concerns, and indeed the very nature of their concern, are deeply partisan. Democrats are more likely to criticize the courts for harm done to the democratic process, whereas Republicans are more likely to criticize the courts for thwarting the will of the people. These partisan differences are not the whole story though, for within the parties are also differences based on ideology.

Those at the ideological extremes of the parties are more likely to use language that calls into question the democratic compatibility of the judiciary. This is especially true among conservatives, who as they became more conservative were more likely to use counter-majoritarian language. As the ideological wings of both parties rise in prominence and power, we may see more of such criticisms in the future; and as voters move to embrace more ideological candidates, these criticisms may resonate with a wider audience.

Expanding the conception of counter-majoritarianism to include concerns about the democratic process and assessments of how politics have evolved offers a new way to approach a decades-old debate. While the classic conception of the counter-majoritarian difficulty has value in analyzing the behavior of courts, we also need to consider the preemptive or passive ways in which courts can have an equally troubling influence.

This version of the counter-majoritarian difficulty may in fact be more problematic in considering the compatibility of the judiciary with our democratic system. If the courts behave in a classically counter-majoritarian fashion, there are remedies available 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 reign the courts back in. However, if courts engage in behavior

that harms access to and participation in the democratic process, this weakens or even eliminates those remedies. Further, if the democratic process is weakened, this raises questions about the extent to which voters can influence elected branches and the broader political process. We should thus be attentive to this type of behavior by the courts and to these criticisms as we continue to grapple with the role of the judiciary more than fifty years after Bickel coined this "central obsession."

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APPENDIX 1 DISTRIBUTION OF CRITICISM FRAMES

	# of Regular 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

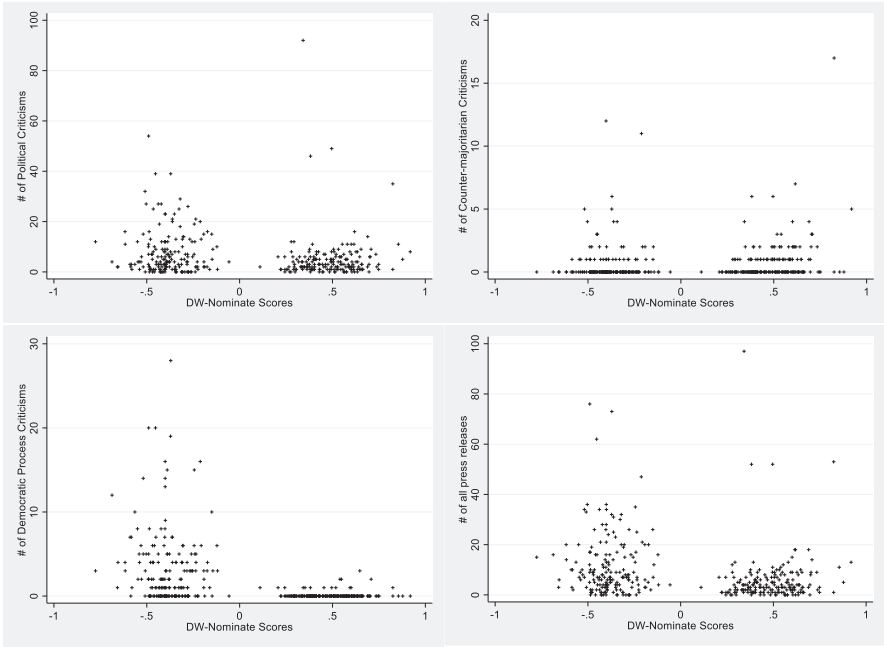

Figure 3. Count of Criticism Frames used by legislators across ideology

APPENDIX 2: EXCLUDED LEGISLATORS

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

Using two one-way ANOVA's, one for Democrats and one for Republicans, there was no statistically significant difference in DW-NOMINATE scores for the included versus excluded Democrats ($p=.891$) nor Republicans ($p=.908$).

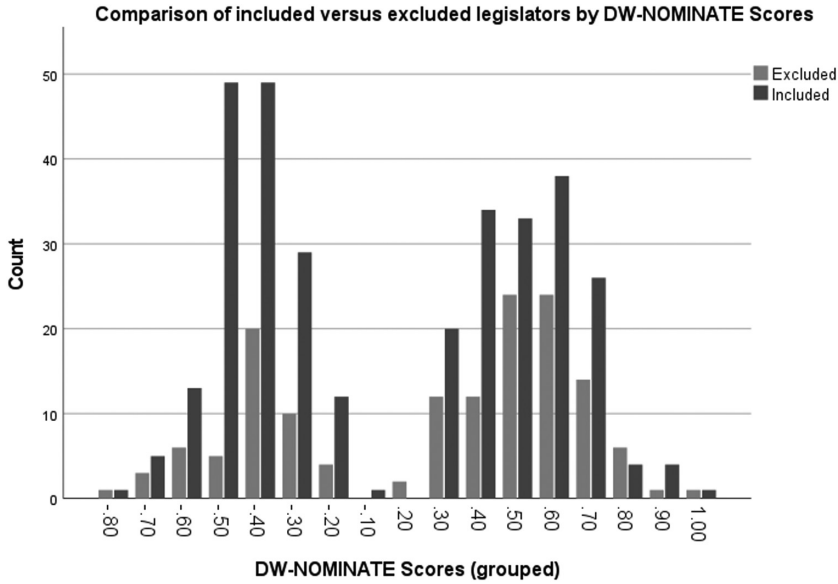
Comparison of included versus excluded legislators by DW-NOMINATE Scores
Excluded
Included
Count
50
40
30
20
10
0
-.80
-.70
-.60
-.50
-.40
-.30
-.20
-.10
.20
.30
.40
.50
.60
.70
.80
.90
1.00
DW-NOMINATE Scores (grouped)

Figure 4.

APPENDIX 3 REGULAR CRITICISMS

In addition to the predicted number of counter-majoritarian and democratic process criticisms, the predicted number of regular criticisms was analyzed. The analysis here shows that elected officials across the ideological spectrum make use of regular criticisms at a relatively equal rate.

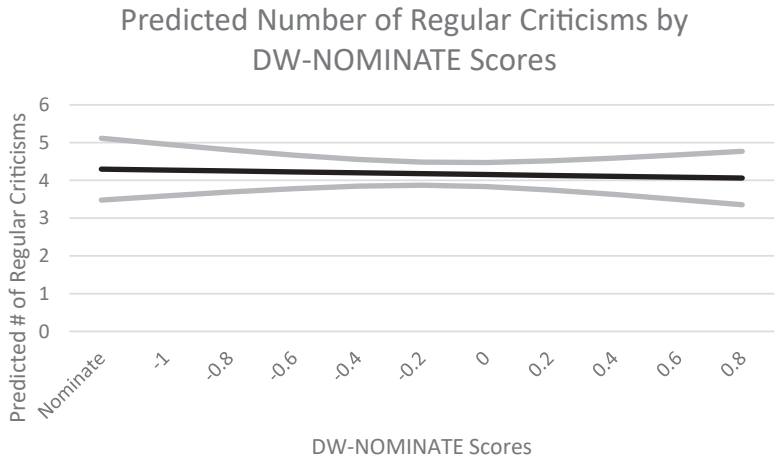

Figure 5