

The Counter-Majoritarian Difficulty of a Minoritarian Judiciary

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Do federal judges represent We the People? Scholars have long debated both whether judges should be responsive to popular opinion and whether, in practice, they are. The Constitution gives the People indirect influence over judicial selection by requiring presidential nomination and senatorial consent—but to what extent is this influence reflected in reality?

Canonically, the Article III judiciary has been theorized as operating at arm's length from popular input, even serving as a necessary check on majoritarianism through its power of judicial review. Alexander Bickel famously called the problem of legitimizing such a check the “counter-majoritarian difficulty.”

There have been three broad responses to the Article III judiciary's perceived counter-majoritarianism. The first response has been the justification of judicial counter-majoritarianism through a theory of justice, usually on the grounds of democracy and “representation reinforcement.” The second, opposing response has been a criticism of judicial counter-majoritarianism on grounds of democratic legitimacy and the democratic deficit inherent in judicial review. A third response has been to deny the problem altogether based on empirical work showing that, in general, judicial decision-making tracks public opinion. On this view, the courts should be understood as popularly responsive in effect, if not by design.

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President Trump has now confirmed his third Supreme Court Justice. With Trump and Senate Republicans relying on appeals to their popular mandate to justify both the failure to hear the nomination of Merrick Garland and the rush to confirm Justice Amy Coney Barrett, the stakes of this debate are more important than ever. Instead of inquiring into the ways that judicial decision-making does or does not track popular opinion, this Essay asks whether recent judicial nominations and selections actually reflect even an indirect democratic mandate, as political leaders have repeatedly suggested they should.

Our conclusion is that in a large and growing numbers of cases, they do not. For 3,341 successful federal district, appellate, and Supreme Court judicial nominations since 1919 (when the Senate became fully directly elected), we construct two metrics to assess popular representativeness. Implied Popular Vote (IPV) is constructed by assigning each senator the number of votes they received in their most recent election and summing the votes represented by senators voting for and against a given judicial nominee. Implied Population Representation (IPR) is constructed with the same approach but substituting half of the population of the state each senator represents for votes cast. If the sum of votes or population represented by senators voting against a successful judicial nominee exceeds the sum of those voting for the nominee, we deem the judge a “minoritarian judge” for that metric. If that judge was also nominated by a president who failed to win the popular vote, we deem them a “super-minoritarian judge.”

These metrics allow us to empirically assess the extent of the democratic mandate for judicial appointments across the last century. This Essay reveals that as of September 2020, the federal judiciary had sixty-three sitting minoritarian judges, including four on the Supreme Court, measured by IPV, and forty-five measured by IPR, including three on the Supreme Court. Most of that group are super-minoritarian judges—fifty-nine by IPV and forty-four by IPR, including two Supreme Court Justices by either metric. Justice Amy Coney Barrett’s recent confirmation as a replacement for the late Justice Ginsburg, and her status as a super-minoritarian justice, means that a majority of the justices on the Supreme Court are IPV minoritarian judges.

These findings require revisiting the counter-majoritarian difficulty. Particularly in a highly polarized political environment, and reflecting the increased influence of partisan interest groups and ideological screening in the judicial nomination and selection process, there is no reason to think that minoritarian judges will, over time, make decisions that conform to popular preferences. Nor is there reason to suppose they will be democracy-reinforcing by working against the failures of representation that brought them to the bench in the first place. Instead, a judiciary composed of increasing numbers of minoritarian and super-minoritarian judges will begin to resemble the “juristocracy” that critics of judicial review have long alleged, rather than a branch of government that serves We the People.

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INTRODUCTION

Who speaks for “We the People?” From *Marbury v. Madison*¹ to *Cooper v. Aaron*,² the Supreme Court has jealously guarded the judiciary’s role as the authoritative interpreter of the People’s Charter, the Constitution. This authority has always been in tension with the democratic foundations of our government. Once Article III judges are seated, the Constitution insulates them from the political process by guaranteeing life tenure “during good behavior.”³ In the words of Martin Redish, “[a]mong the three distinct branches of the federal

1. 5 U.S. (1 Cranch) 137, 177-78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. . . . This is of the very essence of judicial duty.”).

2. 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

3. U.S. Const. art. III, § 1.

government, the judiciary is of course unique, because of its consciously chosen, carefully protected unrepresentativeness.”⁴

The independence and unrepresentativeness of the judiciary have spawned a tremendous volume of commentary. This literature runs the gamut, from scholars struggling to reconcile these counter-majoritarian features with the notion of self-government to those who argue the problem is minimal because the judiciary is representative in practice, if not by design, to those who laud the judiciary’s counter-majoritarian authority to protect minority rights, within limits.⁵

The political sphere is a world apart. Today, judicial nominations and the grounds on which the judicial power is exercised are deeply enmeshed in electoral politics. In 2018, Supreme Court appointments topped the list of issues voters deemed “Very Important,” displacing the economy.⁶ According to one poll, in 2016, Supreme Court nominations were the most important factor in the votes of twenty-six percent of Trump voters.⁷

Elected officials, too, have explicitly tied judicial appointments to the democratic process. In defending his decision not to consider the nomination of Chief Judge Merrick Garland, Senate Majority Leader Mitch McConnell openly appealed to the popular, representative nature of judicial appointments: “The American people are perfectly capable of having their say on this issue, so let’s give them a voice. Let’s let the American people decide.”⁸ Whatever his internal beliefs, McConnell’s choice of external message is instructive. In a similar vein, during his 2016 presidential campaign, President Trump published a list of

4. Martin H. Redish, *Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of Morrison and Mistretta*, 39 DE PAUL L. REV. 299, 302 (1989).

5. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (expounding upon the “counter-majoritarian problem”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (proposing a representation reinforcement model to overcome the counter-majoritarian problem); BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009) (arguing the Supreme Court’s constitutional decisions often track public opinion); Erwin Chemerinsky, *In Defense of Judicial Supremacy*, 58 WM. & MARY L. REV. 1459, 1462-75 (2017) (advocating for the judiciary’s supremacy precisely because “in deciding who should be the authoritative interpreter of the Constitution, the answer is the branch of government that can best enforce the Constitution’s limits against the desires of political majorities”); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 265-71 (2010) (summarizing the literature on the Supreme Court and public opinion).

6. See Grace Sparks, *Supreme Court is Voters’ Most ‘Very Important’ Issue*, CNN (Sept. 26, 2018), <https://www.cnn.com/2018/09/26/politics/important-issue-vote-pew-supreme-court/index.html> [<https://perma.cc/C8H6-UWRF>].

7. Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks—and It Paid Off*, WASH. POST (June 26, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off> [<https://perma.cc/C8X4-59SZ>].

8. Amita Kelly, *McConnell: Blocking Supreme Court Nomination ‘About A Principle, Not A Person’*, NPR (Mar. 16, 2016), <https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person> [<https://perma.cc/5BHK-ZWMJ>].

potential Supreme Court nominees in order to persuade voters of his conservative judicial bona fides.⁹ Senator Ted Cruz later called the 2016 election “essentially . . . a referendum on the kind of justice that should replace Justice Scalia.”¹⁰ And just this month, numerous Republican senators have argued that they should be able to move forward on Amy Coney Barrett’s nomination because the 2016 and 2018 elections gave them a popular mandate to do so.¹¹ These statements evince a belief that judicial selection should reflect majority preferences.

For decades, the Republican Party and conservative legal groups like the Federalist Society have worked to elevate the electoral salience of judicial nominations through political organizing around interpretive methodologies like originalism and textualism.¹² On their account, the nexus between electoral democracy and judicial appointments—and, by extension, the decisions of judges on the bench—is a tight one. This position draws support from the Constitution itself, which provides an electoral gauntlet through which life-tenured judges must first run. The Appointments Clause ensures no one can exercise the Article III Judicial Power without nomination by the elected President and, after the Seventeenth Amendment, confirmation by elected senators.¹³ The Constitution strikes a delicate balance between judicial independence and democratic mandate that gives the rule of law (enforced by judges) popular legitimacy.¹⁴

More deeply, as one of us has argued elsewhere, the very idea of constitutional government is predicated on a fundamental commitment to self-governance on an ongoing basis.¹⁵ A Constitution conceived as the exclusive interpretive province of legal elites fails on this count.¹⁶ Popular selection of judges offers a partial answer to the charge that the judiciary has usurped the role of the People in constitutional governance. Particularly in today’s intensely polarized environment, whether judges are selected through a process that

9. Nick Gass, *Trump Unveils 11 Potential Supreme Court Nominees*, POLITICO (May 18, 2016), <https://www.politico.com/story/2016/05/trumps-supreme-court-nominees-223331>. [<https://perma.cc/2TZH-NY2N>].

10. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 32 (2017) (statement of Sen. Ted Cruz).

11. See Amber Phillips, *Why Mitch McConnell Intends to Confirm a New Supreme Court Justice Now, When He Wouldn't in 2016*, WASH. POST (Sept. 19, 2020), <https://www.washingtonpost.com/politics/2020/09/18/why-mitch-mcconnell-intends-confirm-new-supreme-court-justice-now-when-he-wouldnt-2016/> [<https://perma.cc/W96Y-FPWA>].

12. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 554 (2006) (“[O]riginalism has primarily served as an ideology that inspires political mobilization and engagement. Its success and influence is due chiefly to its uncanny capacity to facilitate passionate political participation.”).

13. U.S. Const. art. II, § 2, cl. 2.

14. See Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 *YALE L.J. F.* 38, 39 (2006).

15. See David Singh Grewal & Jedediah Purdy, Book Review, *The Original Theory of Constitutionalism*, 127 *YALE L.J.* 664 (2018).

16. *Id.* at 667.

actually reflects popular preferences is thus of critical importance to the democratic legitimacy of the constitutional order.

The judicial appointments process is meant to provide a stamp of popular approval by vesting key decisions concerning the nomination and confirmation of judges in the hands of elected representatives (the President and the senate, respectively). This Essay seeks to assess empirically the representativeness of the thousands of Article III judges confirmed since 1919 (when, following the Seventeenth Amendment, the Senate became composed of entirely directly elected senators). By combining data on popular votes in Senate elections and state populations with roll call votes in judicial confirmations, we are able to discern the popular representativeness of the judiciary over the last century.

For 3,341 confirmations for Article III judges between March 1, 1919 and September 22, 2020, we construct two metrics of popular representation: Implied Popular Vote (IPV) and Implied Population Representation (IPR). To consider voting first: for each judicial confirmation, we impute the popular votes in favor and against the nominee by looking at the actual votes each senator deciding on a confirmation received in their most recent senate election. If the total votes received by senators voting in favor of the judicial nominee are greater than the total votes of senators voting against them, the judge has a positive IPV. That is, the approximation of popular democracy through the elected representatives overseeing the nomination process has succeeded.

If, on the other hand, the sum of votes received by senators voting against the nomination is greater, and the nomination is successful, we deem the judge a “minoritarian judge.”¹⁷ For judges that meet this condition *and* were nominated by a president who failed to win the national popular vote, we label them a “super-minoritarian judge.” In these cases, the judge has been appointed to the bench without any popular approval, even of the indirect kind intended in the confirmation process.¹⁸

The constituents who voted for a senator (or president) are not, of course, the only people that elected official is supposed to represent. Whether or not a citizen voted for a particular senator, that senator represents them. Accordingly, we construct a second, alternative metric of popular representation, following

17. We borrow Kevin McMahon’s term “minority justice” for Supreme Court justices with fewer popular yea votes than nay votes and amend it to “minoritarian” (i.e., rule by a minority) to avoid confusion with “minority” in the sense of ethnic, racial, or religious minorities. Thanks to Daniela Cammack and Emily Caputo for the suggestion. For McMahon’s analysis, see Kevin J. McMahon, *Will the Supreme Court Still “Seldom Stray Very Far”? Regime Politics in a Polarized America*, 93 CHL-KENT L. REV. 343, 344 (2018). We used McMahon’s calculations for five Supreme Court justices as a check on our own. We identified several small discrepancies due to data collection and aggregation issues, though none that change the results of this analysis.

18. We do not treat the converse equally, where a judge is confirmed with an implied majority vote in the Senate by a President who lost the popular vote. As we argue below, the primary link between the People and judicial nominees is the Senate. Cases of popular representation in the Senate but not the White House present somewhat less of a constitutional problem. To the extent such cases are problematic, the issue lies squarely at the feet of the Electoral College.

earlier work adopting a similar methodology.¹⁹ The IPR substitutes population data for actual votes received by each elected senator (with half the state's population assigned to each of its senators). Though necessarily an imprecise measure of representation, IPR enables an analogous, confirmatory analysis of the representative qualities of these judicial confirmations.

This analysis reveals that, as of September 2020, the federal judiciary had sixty-three sitting minoritarian judges, including four on the Supreme Court, measured by IPV, and forty-five measured by IPR, including three on the Supreme Court.²⁰ Most of that group are super-minoritarian judges: fifty-nine by IPV and forty-four by IPR, including two Supreme Court Justices by either metric. Justice Amy Coney Barrett, President Trump's replacement for the late Justice Ginsburg, is also a super-minoritarian justice, meaning that (as measured by the IPV), a majority of the justices on the Supreme Court are, for the first time, minoritarian (and, in three cases, super-minoritarian).

The growing presence of minoritarian judges in our federal judiciary has many sources, from polarization in the Senate to changes in procedural rules (especially the filibuster) to demographic and population trends to the changing characteristics of judicial nominees (especially under President Trump). But the malapportionment of the Senate lies at the heart of this phenomenon and is matched, in the analysis of super-minoritarian judges, by equivalent distortions of the Electoral College.²¹

The malapportionment problem deserves the attention and broader framing it has already received elsewhere.²² It allows, in effect, both the executive and legislative branches to be occupied by officials who have, cumulatively, failed the test of a popular mandate. The decisions those officials make on new judicial appointments then carry over the democratic deficit to the judiciary. However, the problem of a minoritarian judicial branch is yet more serious because life tenure constitutionally ensures the persistence of this form of minoritarian rule. Thus, while it is arguable that any measure that passes through Congress with negative IPV/IPR and is signed by a president who lost the national popular vote

19. See, e.g., Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 995-97 (2013) (measuring the counter-majoritarian nature of Senate filibusters using population data). A recent, short piece employs this methodology only for the current members of the Supreme Court. See Xiao Wang, *Increasingly Antidemocratic? An Empirical Examination of the Supreme Court Nomination and Confirmation Process*, 11 CALIF. L. REV. ONLINE 242 (2020), <http://www.californialawreview.org/empirical-examination-scotus-confirmation-process/>. [<https://perma.cc/TQF7-HTZA>].

20. Justice Alito is a minoritarian judge according to IPV, but not IPR. Author Judicial Confirmation Data (on file with author) [hereinafter Author Data]. Calculations in this Article exclude judges confirmed after September 22, including Justice Barrett.

21. See Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 1984-87 (2019).

22. See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 49-61 (2006); Orts, *supra* note 21, at 1984-87.

lacks democratic legitimacy, the fact of periodic elections and the possibility of legislative repeal offer at least some corrective. Once on the bench, however, minoritarian judges and their rulings cannot be straightforwardly removed through the ordinary political process.

Daniel Epps and Ganesh Sitaraman have recently written that “the Supreme Court is facing an unprecedented legitimacy crisis.”²³ That crisis stems, in part, from the Court’s growing unrepresentativeness.²⁴ This Essay reveals that the legitimacy crisis is not unique to the Supreme Court; rather, it extends deep into the Article III judiciary.

This Essay proceeds in three parts. Part I briefly summarizes the constitutional provisions linking judicial selection to electoral democracy. Part II explains the IPV and IPR methodology and reports the findings of our analysis of minoritarian judges. Part III explores the implications of these findings, noting that a minoritarian judiciary poses a more intractable version of the problem that Alexander Bickel famously termed the “counter-majoritarian difficulty.”

I.

THE JUDICIARY’S DEMOCRATIC FOUNDATIONS

The Constitution is not silent on the issue of the judiciary’s relationship to the democratic process. Its provisions evince an intention, perhaps even expectation, of popular representativeness for Article III judges given their selection by elected representatives. The relevant provisions are the Appointments Clause and the Seventeenth Amendment.

A. The Appointments Clause

The Appointments Clause provides, in relevant part, that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”²⁵ In order to ascend to the bench, Article III judges must be nominated by an elected President and confirmed by the Senate, a political body. Thus, from the Founding, our constitutional plan has contemplated some role for popular accountability in judicial selection.

From a textual and descriptive perspective, presidential appointment makes popular political input into judicial selection unavoidable. Presidents are elected; they can be held accountable for their judicial nominations by the electorate. Unsurprisingly, the historical record indicates the Framers were well aware that the President’s judicial appointments would be political. At the Constitutional

23. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 153 (2019).

24. *Id.* at 156.

25. U.S. Const. art. II, § 2, cl. 2.

Convention, the delegates spent significant time debating who should hold the power to appoint judges—the President, the Senate, or both—with an eye toward mitigating the unseemly elements of politics.²⁶

Nathaniel Gorham, the Massachusetts delegate who ultimately proposed the “advice and consent” provision, appealed directly to political accountability as the reason to vest appointment power with the President alone. “The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone,” and he would be answerable only to the penalty of “public censure.”²⁷ Virginia delegate Edmund Randolph, too, supported presidential appointment because “the responsibility of the Executive” was “a security fit for appointments.”²⁸ When the final version of what would become the Appointments Clause was debated, Gouverneur Morris repeated the argument that “as the President was to nominate, there would be responsibility.”²⁹

Even Alexander Hamilton, who wanted “complete independence of the courts of justice” and thought guaranteed life tenure during good behavior was an “excellent barrier to the encroachments and oppressions of the representative body,” admitted that judicial nominations were political.³⁰ In Federalist No. 76, he argued that presidential nomination “will naturally beget a livelier sense of duty and a more exact regard to reputation.”³¹ He defended the requirement of advice and consent on even more overtly political grounds: “The possibility of rejection [by the Senate] would be a strong motive to care in proposing. The danger to his own reputation, and . . . to *his political existence* . . . could not fail to operate as a barrier.”³²

By design, then, the Constitution supports the notion that the judicial appointments process—both nomination and advice and consent—serves the function of popular accountability.

B. *The Seventeenth Amendment and Confirmation Hearings*

The history of the Seventeenth Amendment reinforces the democratic foundations of the judiciary. Before 1913, senators were appointed by state legislatures.³³ The Seventeenth Amendment changed that by requiring direct election of senators by “the people” of each state.³⁴ This amendment arose, in

26. See James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 343-45 (1989).

27. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 43 (Max Farrand ed. 1911).

28. *Id.* at 81.

29. *Id.* at 539.

30. THE FEDERALIST NO. 78 (Alexander Hamilton).

31. THE FEDERALIST NO. 76 (Alexander Hamilton).

32. *Id.* (emphasis added).

33. U.S. Const. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years.”).

34. U.S. Const. amend. XVII, cl. 1.

part, out of Progressive attacks on the judiciary and claims that federal judges were unaccountable to the People.

The Seventeenth amendment was one component of a progressive era program for political change that began during the late nineteenth century.³⁵ Progressives chafed at the Constitution's limits on popular self-rule and decried the outsized influence of business interests and the wealthy.³⁶ Although their ambitions were sprawling, courts were a particular focus of their ire.³⁷ Progressives viewed the federal judiciary as captured by the corporate bar, irredeemably pro-business and anti-labor, and fundamentally antidemocratic. Between 1890 and 1912, anti-court sentiment led progressives to propose the election and recall of judges (both the judges themselves and specific decisions), removal of life tenure, and substantial alterations to federal jurisdiction.³⁸ The 1912 Progressive Party platform itself included a proposal for popular overrides of court decisions invalidating legislative acts on constitutional grounds.³⁹

The Seventeenth Amendment shares this anti-court lineage. In addition to augmenting popular rule more broadly, progressives hoped it would lead to the appointment of judges with greater connection to and concern for the People. As Senator Joseph Bristow, a Kansan and key player in many Progressive causes, argued on the Senate floor, “[t]rusts and combinations representing great transportation and industrial companies . . . are exceedingly anxious, *first, to control the appointment of Federal judges.*”⁴⁰ Bristow was clear that wealthy interests’ ability “to secure the appointment of judges who are more devoted to their interests than to public welfare” was a cause of “the rapid growth of the sentiment for a change in the method of electing Senators.”⁴¹

Similarly, Senator William Bradley of Kentucky supported both judicial recall and direct election of senators because he thought it “unwise to have a judiciary entirely independent of Congress and of the great public opinion of the United States.”⁴² Although judicial recall was never passed, the direct election of senators offered a mechanism by which to make would-be judges accountable to the elected representatives of the People. Thus understood, the Seventeenth

35. See C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 1-19* (1995).

36. See William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 975-76 (2006).

37. See EDWARD A. PURCELL JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 14-18* (2000); William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 400 (2002).

38. See Elizabeth Sanders, *Recovering the Progressive Era*, 72 OHIO ST. L.J. 1281, 1285 (2011).

39. See *Progressive Party, 1912*, in NATIONAL PARTY PLATFORMS 337 (Kirk H. Porter ed., 1924).

40. 57 CONG. REC. 2,180 (1911) (statement of Sen. Bristow) (emphasis added).

41. S. REP. NO. 65-666, at 5 (1912).

42. 57 CONG. REC. 1,919 (1911) (statement of Sen. Bradley).

Amendment consolidated the view—and codified it in constitutional text—that federal judges ought to achieve their positions through a political process that gives voice to popular will.

Moreover, passage of the Seventeenth Amendment arguably consolidated the popular mandate implicit in the Appointments Clause. The “advice” requirement—from which the process of confirmation hearings and senatorial scrutiny arises—deepens the constitutional connection between would-be judges and the popular will with the direct election of senators.⁴³ The confirmation of judicial nominees (“consent”), along with their scrutiny (“advice”) added an element of popular legitimacy when undertaken by a directly-elected Senate.

On this view, the Appointments Clause and Seventeenth Amendment together suggest a constitutional imperative that judicial appointments reflect at least an indirect popular consent.⁴⁴ The public elects senators and the president; the president nominates, and the senators carry out their constitutional obligation to scrutinize judicial nominees and to consent, if they deem the nominee qualified to serve and exercise the judicial power. Popular will, albeit expressed through elected officials, is now a crucial element in the constitutional machinery that legitimizes the judiciary’s role in government.

II.

METHODOLOGY AND FINDINGS

Does the judicial appointments process reflect such popular legitimation? In this part, we empirically assess that question by calculating the Implied Popular Vote (IPV) and Implied Population Representation (IPR) of all successful federal district, appellate, and Supreme Court nominees since 1919. The development of the IPV is indebted to Kevin McMahon’s analysis of four sitting Supreme Court justices; the development of the IPR adapts a method that Ben Eidelson used to study the majoritarian implications of the Senate filibuster.⁴⁵ Under either the IPV or the IPR, we observe the growth of a “minoritarian” judiciary, in which it is difficult to discern even indirect popular legitimation in the selection of judges.

43. See generally Post & Siegel, *supra* note 14 (describing the role of judicial confirmations in judicial accountability).

44. More ambitiously, as Robert Post and Reva Siegel argue, “Senate hearings must also reassure the American people that new appointees to the Supreme Court will interpret the Constitution in ways that are responsive to the democratic will of the people.” Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 376 (2007).

45. McMahon conducted a similar analysis for four recent Supreme Court nominees (Thomas, Alito, Kagan, and Gorsuch). See McMahon, *supra* note 17. Eidelson used the IPR to argue that the filibuster, while allowing a minority of senators an effective veto, could nevertheless be majoritarian where the minority of senators filibustering represented a majority of the population by the IPR. See Eidelson, *supra* note 19.

A. Conceptual Overview

Both IPV and IPR measure the implied representativeness of federal judges based on their senate confirmation votes. IPV does so by using actual votes received by senators and IPR by using the populations of the states those senators represent. IPV compares the total votes senators voting for a judicial nominee received in their most recent elections with the total votes received by those voting against the nominee. IPR involves the same comparison, but with the (half) population of each senator's state in the year the vote was conducted.⁴⁶ Before turning to the details of those metrics, a few words on the rationales for each.

IPV's chief advantage lies in its approximation of *actual* support, rather than formal representation. As many have pointed out—including critics of the Electoral College, gerrymandering of congressional districts, voter suppression, and Senate malapportionment—our political institutions have attenuated the democratic relationship between formal and actual representation. IPV avoids the weak inference of support based on mere geography, instead crediting elected representatives with only the level of support they have actually received.

Though IPR cannot avoid this particular pitfall, we use it both as a confirmatory metric and because it measures representation on the Senate's own terms.⁴⁷ Even if a citizen has not voted for their senator—or even voted against them—in a formal sense, they are still represented. To accommodate the cases in which the votes of a state's two senators diverge, we assign half of a state's population to each of its senators.⁴⁸

B. Methodology

1. Data sources

The construction of the IPV and IPR metrics derive from four distinct data sets, which we merged to conduct our analysis. First, we downloaded a dataset of all federal judges appointed from March 1919 to the present from the Federal Judicial Center (FJC).⁴⁹ We begin our analysis from March 1919 because the 66th Congress—seated in March 1919 after the 1918 election—was the first with a Senate composed entirely of senators selected by direct election. For the reasons discussed *supra* in Part I, we treat direct election of senators as a critical turning point in the popular representativeness expected of the judiciary.⁵⁰ We

46. Except for 2020, where 2019 population was used because 2020 data was not yet available.

47. For discussion of this approach, see Eidelson, *supra* note 19, at 996.

48. For example, Wisconsin's split senate delegation—Republican Ron Johnson and Democrat Tammy Baldwin—frequently voted differently during the 115th and 116th sessions of Congress.

49. See BIOGRAPHICAL DIRECTORY OF ARTICLE III FEDERAL JUDGES, 1789-PRESENT, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges> [<https://perma.cc/LML7-U6TZ>] (last visited September 22, 2020) [hereinafter Federal Judicial Center Data].

50. See *supra* Section II.B.2.

then eliminated Article I judges, Court of International Trade judges, and Article III judges who were recess appointees and not subsequently confirmed.⁵¹ That is, we limited the analysis to only federal district court, federal appeals court, and Supreme Court judges confirmed by the Senate.

For nearly all entries, the FJC dataset includes data on whether judges were confirmed by voice vote or roll call. For entries lacking such data, we verified the type of vote by consulting the Congressional Record and removed judges whose vote type we could not confirm.⁵² We then separated judges with multiple confirmations (e.g., elevation from the district court to the appeals court) into distinct data entries and removed simultaneous confirmations of the same judge to multiple seats via the same vote.⁵³

Second, we gathered data on election returns in Senate elections from the CQ Voting and Elections Collection.⁵⁴ This database provides vote returns by candidate in Senate elections dating back to 1789. We then merged the CQ data into cohorts for each session of Congress. That is, each Congressional cohort represents three sets of election results to create a complete set of sitting senators for each legislative session.

Third, we gathered population data for 1919-2019 from the Federal Reserve Bank of St. Louis's Federal Reserve Economic Data (FRED) database, which aggregates data from the U.S. Census Bureau's "Annual Estimates of the Population for the U.S. and States, and for Puerto Rico."⁵⁵

Fourth, we downloaded roll call data from the Voteview database for each successful Article III judicial confirmation vote taken from the 66th Congress to the present.⁵⁶ For each confirmation vote, Voteview offers data on how each senator included in the roll call voted (yea, nay, present, or non-voting). This left us with a database of 3,341 confirmation votes—2,651 voice votes and 690 roll call votes.

51. We focused on these judges due to their powers and political salience. Article I judges lack life tenure, and both Article I and Court of International Trade judges are less high-profile and politicized than the rest of the Article III judiciary.

52. For a period of months, the 1921 Congressional Record does not reflect the nature of votes on judicial confirmations. As a result, we removed entries for the confirmations of Judge Claude Luse on April 27, 1921; Judge William Eli Baker on May 3, 1921; Judge John William Ross on May 31, 1921; Judge Edmund Waddill on June 2, 1921; Judge Duncan Groner on June 2, 1921; Judge Adolph Hoehling on June 13, 1921; Justice William Howard Taft on June 30, 1921; Judge George McLintic on July 25, 1921; Judge Thomas Blake Kennedy on Oct. 25, 1921; Judge George Franklin Morris on Oct. 25, 1921; and Judge John Andrew Peters on Nov. 14, 1921.

53. For example, Judge Jennifer Coffman was confirmed on September 30, 1993 to seats on both the Eastern and Western Districts of Kentucky. 139 CONG. REC. 23,325 (1993).

54. CQ VOTING AND ELECTIONS COLLECTION, <https://library.cqpress.com/elections> [<https://perma.cc/828Z-63D6>] (last visited Nov. 30, 2019).

55. *Annual Estimates of the Population for the U.S. and States, and for Puerto Rico*, FED. RESERVE ECON. DATA, <https://fred.stlouisfed.org/release?rid=118> [<https://perma.cc/E4C7-7TH6>] (last visited June 28, 2020).

56. VOTEVIEW, www.voteview.com [<https://perma.cc/M5MR-FFUE>] (last visited June 23, 2020).

2. Construction of IPV and IPR

With these datasets in-hand, we constructed the IPV for each judge by pulling CQ data on the votes each senator received in their most recent election at the time of each roll call confirmation vote. Following McMahon's methodology, the votes assigned to each senator are the *actual* number of votes a senator received,⁵⁷ rather than the total number of votes cast.

However, using the CQ data to provide the number of popular votes for each senator left gaps in the roll call data for senators elected off-cycle (e.g., through special elections) or appointed following the departure of an elected senator. For special and off-cycle elections, we manually pulled popular vote tallies from public online sources. We attempted to use official data sources as often as possible, especially, the House Clerk's election statistics,⁵⁸ Federal Election Commission data,⁵⁹ and data reported by state governments. Where such data was not available, we supplemented it with data from news media and online election databases like Our Campaigns.⁶⁰

For appointed senators, our procedure was slightly more complicated. We assigned appointees the number of votes most recently cast for their party's candidate in the most recent election for the seat to which they were appointed. In most cases, this resulted in assigning appointees the number of votes received by the Senator they were replacing. If, however, the appointee was from a different party (e.g., because the state's governor represented a different party than the departing senator and chose to appoint a replacement from their own party), we assigned the appointee the number of votes cast for the candidate of the appointee's party—the *losing* candidate.⁶¹

For each roll call vote, the complete dataset we constructed includes a record of how each sitting senator voted and a popular vote total attached to that senator at that point in time. IPV is calculated by summing the total popular votes of senators voting yea and the votes of those voting nay on the confirmation. If the implied popular nay vote outweighs the implied popular yea vote, we code the judge as an "IPV minoritarian judge."

For IPR, we conducted similar analysis with respect to roll call votes but substituted half the population of each senator's state in the year the vote was

57. See McMahon, *supra* note 17, at 343–44.

58. ELECTION STATISTICS, 1920-PRESENT, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <https://history.house.gov/Institution/Election-Statistics> [<https://perma.cc/ZR7C-5EVA>] (last visited Dec. 1, 2019).

59. ELECTION AND VOTING INFORMATION, FEDERAL ELECTION COMMISSION, <https://www.fec.gov/introduction-campaign-finance/election-and-voting-information> (last visited Oct. 5, 2020).

60. See OUR CAMPAIGNS, www.ourcampaigns.com [<https://perma.cc/XH9A-FX56>] (last visited Nov. 26, 2019).

61. This procedure is intended to approximate the amount of popular support for the specific senator voting in each confirmation on the assumption that there is a greater correlation between support for an appointee and the prior losing candidate of the same party than a winning candidate of the opposite party. This was a rare event, occurring nine times in our data set.

taken for their popular vote totals. A vote in favor of a nominee thus credits the nominee with half the state’s population in that year, and a vote against counts half the state’s population against them. Where the population total counted against the nominee is greater than the total for them, we code the judge as an “IPR minoritarian judge.”

C. Background Observations

The presentation of our analysis of the data on minoritarian judges requires a few preliminary clarifications. First, confirmations by roll call were exceedingly rare prior to the Clinton presidency. Prior to the 1990s, if the Senate decided to confirm a judge, it almost always did it by consensus-based voice vote.⁶²

Table 1. Successful Roll Call Confirmations by President⁶³

President (years)	Judicial Roll Call Votes
Harding (2)	1
Coolidge (6)	1
Hoover (4)	3
Roosevelt (12)	5
Truman (8)	3
Eisenhower (8)	3
Kennedy (2)	1
Johnson (6)	2
Nixon (8)	4
Ford (3)	2
Carter (4)	5
Reagan (8)	10
Bush I (4)	3
Clinton (8)	50
Bush II (8)	192
Obama (8)	224
Trump (3.75)	181

Without roll call votes, of course, there can be no observed minoritarian judges. It is impossible to ascertain implied popular vote or population representation otherwise. But confirmation by voice vote is also not equivalent to “null” on the question of implied popular support. At a minimum, it means that less than one-fifth of present senators—the minimum threshold necessary to

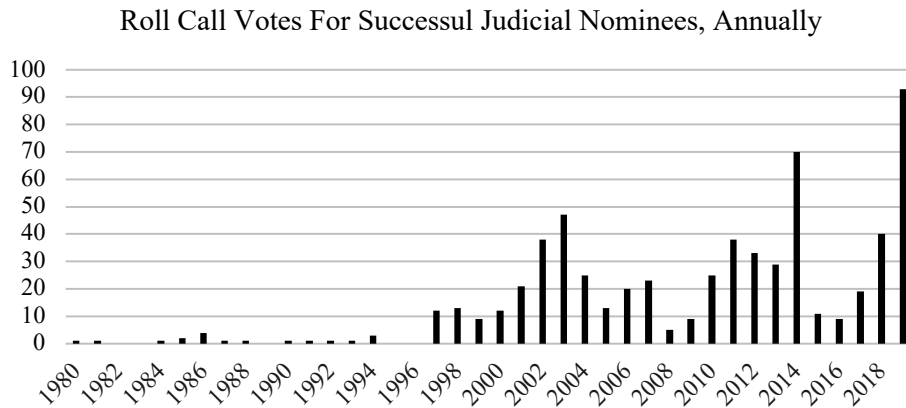
62. See Author Data. A voice vote is taken by asking all senators in favor to say “yea” and those against to say “nay;” senators’ individual votes are not recorded. By contrast, a roll call vote requires the senate’s clerk to call out each senator by name and record their vote.

63. As of September 22, 2020.

force a voice vote under the Journal Clause—cared strongly enough to do so.⁶⁴ If not a positive indication of high *consensus*, it is at least a signal of low *dissensus*.⁶⁵ Following McMahon, in subsequent analyses we treat voice votes as the equivalent of unanimous roll call votes.⁶⁶ While this assumption is far from bulletproof—it treats absence of evidence as evidence of absence—the Journal Clause issue and congressional practice render it at least defensible.

Relatedly, the dramatic rise in roll call votes suggests that judicial confirmations have become more contentious over time. From 1919 to 1994, the year of Newt Gingrich’s “Republican Revolution,” the Senate averaged less than one roll call judicial confirmation per year. From 1995 to 2000, the number shot up to 7.67 per year, while from 2001 to 2019, the Senate averaged almost 30 each year.⁶⁷

Chart 1.



The same pattern emerges from the average number of “yea” votes received by successful judicial nominees. Treating voice votes as unanimous “yea” votes, the average number of “yeas” declined from nearly one hundred for most of the twentieth century to just sixty-nine in 2019.⁶⁸ Moreover, the number of appointees receiving fewer than sixty votes has skyrocketed, from three under President Clinton to twenty-eight under President Obama and an unprecedented eighty-one during President Trump’s term as of September.⁶⁹

64. U.S. Const. art. I, § 5, cl. 3 (“[T]he Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).

65. See Saikrishna Bangalore Prakash, *Of Synchronicity and Supreme Law*, 132 HARV. L. REV. 1220, 1232 n. 47 (2019) (“[V]oice voting is a standard parliamentary practice, primarily because many votes are relatively uncontroversial. It is the default rule in most assemblies, with roll call votes only used when necessary or where members ask for such a vote.”).

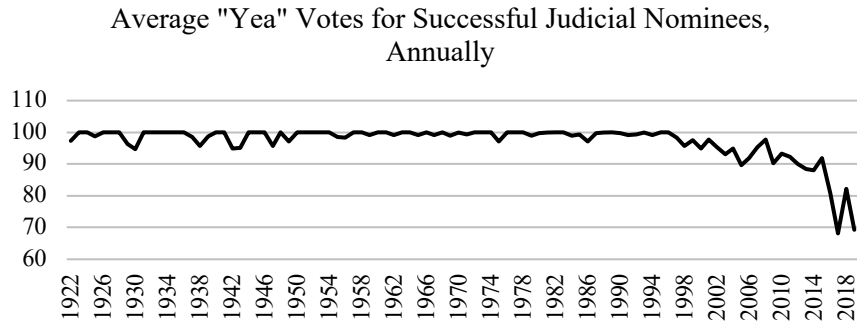
66. See McMahon, *supra* note 17, at 352 n.33.

67. Author Data.

68. *Id.*

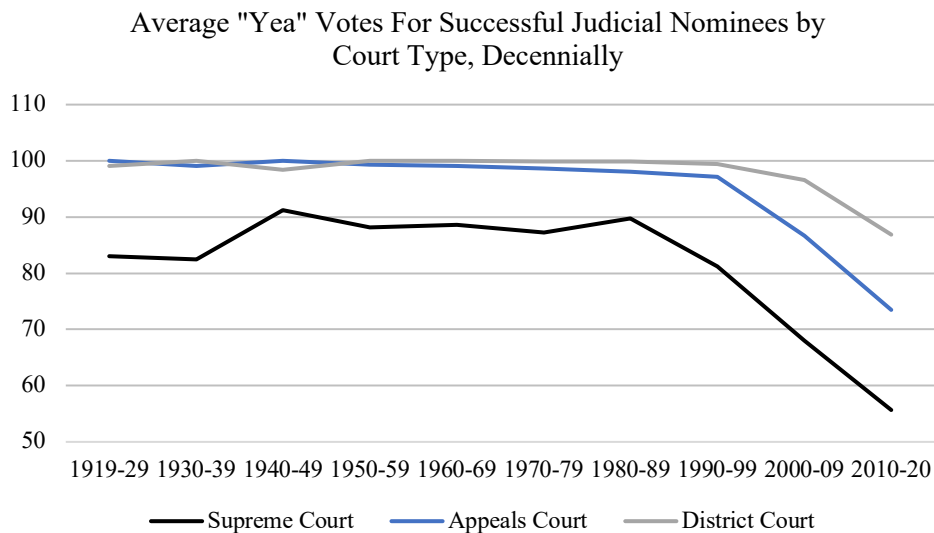
69. *Id.*

Chart 2.



Though contentiousness has increased across the board, the data suggests it has been particularly elevated for confirmations to the Supreme Court and federal appellate courts. It is well documented that confirmation margins for Supreme Court nominees have narrowed from near unanimity to the razor-thin margins of the present. But these high-profile events are just part of the story. On an annual basis, the average "yea" votes received by successful nominees for appellate courts never dipped below 85 until 2003.⁷⁰ It hovered around that level during the remainder of President Bush's term and during President Obama's, finishing at 82 votes in 2016. During President Trump's first year, that number fell to just 57.6. The three appeals court judges confirmed in 2020 have received just 51.7 votes on average.

Chart 3.



70. Author data.

By almost any metric, judicial confirmations have become more contested and more partisan. Gone are the days when nearly all successful nominees receive voice votes and even those who do not regularly garner ninety votes or more.

D. The Rise of Minoritarian Judges

The polarization of the judicial confirmation process has made an aberration into a mainstay of the federal judiciary: minoritarian judges and, under President Trump, super-minoritarian judges are now commonplace. Indeed, with the confirmation of Justice Amy Coney Barrett to the Supreme Court, IPV super-minoritarian judges now make up a majority of the high court. From 1919 to 2001, the Senate confirmed just six IPV minoritarian judges and five IPR minoritarian judges, among them Justice Clarence Thomas.⁷¹ These confirmations tended to be controversial. Judge Thomas Meskill's initial nomination by President Nixon was held up due to allegations of political cronyism and inexperience.⁷² Judge Alex Kozinski was accused of misconduct during his time as special counsel to the Merit Systems Protection Board,⁷³ and Judge Daniel Manion was publicly attacked by the deans of more than thirty law schools for lacking the requisite "scholarship, legal acumen, professional achievement, wisdom, fidelity to the law and commitment to our Constitution."⁷⁴ As is well known, Justice Thomas's confirmation saw vivid testimony alleging past sexual harassment.⁷⁵ None of these nominees were rated more than a tepid "Qualified" by the American Bar Association.⁷⁶

Things began to shift under President George W. Bush. The Senate confirmed seven IPV minoritarian judges and four IPR nominated by him, including three super-minoritarian judges (by either metric) during his first term following his popular vote loss in the 2000 election. Supreme Court Justice

71. These include Judge Thomas Meskill to the Second Circuit in 1975, Judge Lyonel Senter to the Northern District of Mississippi in 1979, Judge Alex Kozinski to the Ninth Circuit in 1985, Judge Sidney Fitzwater to the Northern District of Texas in 1986, Judge Daniel Manion to the Seventh Circuit in 1986, and Justice Clarence Thomas to the Supreme Court in 1991.

72. See *The Meskill Nomination*, N.Y. TIMES, Jan. 27, 1975, at 24.

73. See Robert L. Jackson & Philip Hager, *Senate Narrowly Confirms Kozinski as Appeals Court Judge*, L.A. TIMES (Nov. 8, 1985), <https://www.latimes.com/archives/la-xpm-1985-11-08-mn-2758-story.html> [<https://perma.cc/2QN2-33E3>].

74. Philip Shenon, *Law Deans Oppose Naming of a Judge*, N.Y. TIMES, June 24, 1986, at A1.

75. See generally Kim A. Taylor, *Invisible Woman: Reflections on the Clarence Thomas Confirmation Hearing*, 45 STAN. L. REV. 443 (1993).

76. Federal Judicial Center Data. Meskill did not receive a rating, but his nomination was opposed by the ABA. See N.Y. TIMES, *supra* note 71.

Samuel Alito was among his second-term IPV minoritarian judges.⁷⁷ Many of these judges were political lightning rods, like their minoritarian judge predecessors. Judge Dennis Shedd had been an aide to notorious segregationist Senator Strom Thurmond.⁷⁸ Judge William Pryor squeaked by with a 53-45 vote confirmation as part of a deal to prevent Republicans from abolishing the filibuster for judicial nominees.⁷⁹ His confirmation had been held up over concerns about his comparison of homosexuality to necrophilia, incest, and pedophilia, among other issues.⁸⁰

Under President Trump, however, the minoritarian judiciary arrived in earnest. In just under four years, the Senate has confirmed sixty judicial nominees with a negative IPV and forty-four with a negative IPR, all of them super-minoritarian judges given President Trump's loss of the popular vote.⁸¹ President Trump has appointed the first super-minoritarian Justices: Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.⁸² As of September 2020, of all the Article III judicial nominees President Trump has had confirmed, 28 percent have been IPV minoritarian judges and 20 percent have been IPR minoritarian judges. This figure is even higher for President Trump's most consequential appointees. All three of his Supreme Court appointees, as well as all three of his D.C. Circuit appointees are minoritarian judges under both metrics.⁸³

77. Author Data; *see also* Michael Tomasky, Opinion, *The Supreme Court's Legitimacy Crisis*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html> [<https://perma.cc/8FXB-HCZT>].

78. *See* David Stout, *Parting Gift to Thurmond: Ex-Aide's Senate Confirmation*, N.Y. TIMES (Nov. 20, 2002), <https://www.nytimes.com/2002/11/20/politics/parting-gift-to-thurmond-exaides-senate-confirmation.html> [<https://perma.cc/W8X2-QCBL>].

79. *See* Carl Hulse, *Bipartisan Agreement in Senate Averts a Showdown on Judges*, N.Y. TIMES (May 24, 2005), <https://www.nytimes.com/2005/05/24/politics/bipartisan-agreement-in-senate-averts-a-showdown-on-judges.html> [<https://perma.cc/5R8M-CT7N>].

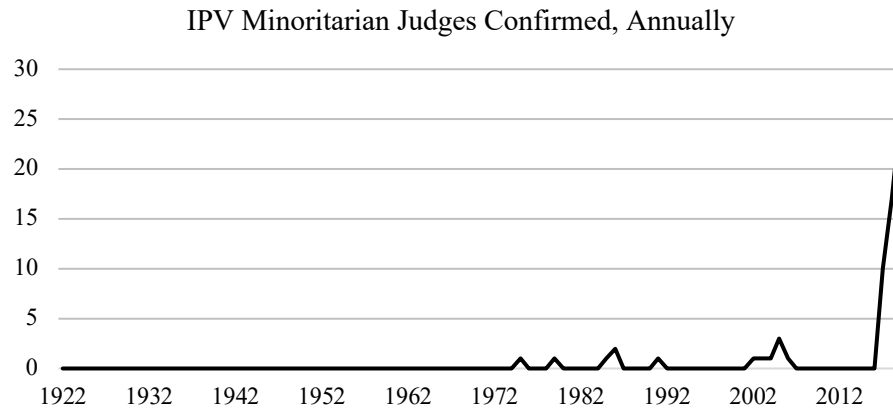
80. *See* Neil A. Lewis, *Conservative Asserts Views Would Stay off the Bench*, N.Y. TIMES (June 12, 2003), <https://www.nytimes.com/2003/06/12/us/conservative-asserts-views-would-stay-off-the-bench.html> [<https://perma.cc/F2YL-SZKR>].

81. Author Data.

82. *See* Tomasky, *supra* note 77.

83. Author Data.

Chart 4.



The data confirm the particular contentiousness of Supreme Court and appellate judge confirmations relative to the district courts. Under either metric, approximately 60 percent of Trump's appellate nominees are minoritarian judges. For district courts, by comparison, just 16 percent of his nominees are IPV minoritarian judges, and 7 percent are IPR minoritarian judges.

Table 2. Trump Judicial Nominee Minoritarian Judge Shares

Trump Judicial Nominee Type (total)	% IPV Minoritarian Judge	% IPR Minoritarian Judge
All (214)	28.0%	20.5%
Supreme Court (2)	100%	100%
D.C. Circuit Court of appeals (3)	100%	100%
All Courts of Appeals (53)	62.2%	58.5%
All District Courts (159)	15.7%	6.9%

Three observations on the minoritarian judiciary warrant additional comment. First, minoritarian judges are almost entirely Republican. There has only ever been one Democrat-appointed minoritarian judge (Lyonel Senter, appointed by President Carter), and there has never been a Democrat-appointed super-minoritarian judge. (Even Senter's confirmation is not reflective of typical minoritarian judge dynamics: It was a 43-25 vote, with thirty-two senators not voting).

The extremely skewed incidence of Republican minoritarian judges reflects the over-representation of small states in the Senate.⁸⁴ Democratic voters tend to

84. See SANFORD LEVINSON, *supra* note 22, at 50-62; William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENT. 159, 159-61 (1995); Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENT. 213, 213-14 (1995).

be concentrated in urban areas,⁸⁵ in large states.⁸⁶ As a result, the Senate's equal apportionment requirement all but ensures Republican senators from smaller, rural states will represent fewer actual votes than Democratic senators on average.⁸⁷ We are not the first to point out that this matters for the health of our democracy, or even for the legitimacy of Supreme Court nominations.⁸⁸

This same pattern holds true of super-minoritarian judges as well, reflecting the imbalance in the distribution of Electoral College votes favoring Republicans under present party coalitions.⁸⁹ As Geruso et al. find, "Republicans should be expected to win 65% of Presidential contests in which they narrowly lose the popular vote."⁹⁰ The low likelihood of Democrats' ever winning the presidency without the popular vote insulates them from the risk of creating super-minoritarian judges.

Second, the dramatic rise in minoritarian judges during the Trump administration is a direct consequence of the demise of the filibuster for judicial nominees⁹¹ and Supreme Court nominees.⁹² Prior to the exercise of the "nuclear option," highly controversial nominees were unlikely to make it through the Senate without some sort of deal to bypass the filibuster and overcome the opposition to them.⁹³ In the ninety-four years of confirmations preceding the demise of the filibuster for judicial nominees, just nineteen judges were confirmed with more than forty votes in opposition (the number needed for a filibuster). Between November 2013 and September 2020, seventy-eight such judges were confirmed.⁹⁴

85. See JONATHAN A. RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* (2019).

86. See Levinson, *supra* note 22, at 50-61; Ezra Klein, *If You're From California, You Should Hate the Senate*, WASH. POST (Mar. 11, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/03/11/if-youre-from-california-you-should-hate-the-senate/> [https://perma.cc/296B-CMHB].

87. See John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEG. STUD. Q. 405, 406 (2006) ("I find that the citizens of states with less voting weight are today more likely to identify with the Democratic Party."); Orts, *supra* note 21, at 1987.

88. See Epps & Sitaraman, *supra* note 23, at 156 (quoting Tomasky, *supra* note 77); McMahon, *supra* note 17, at 343; Orts, *supra* note 21, at 1986.

89. See Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections, 1836-2016* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 26247, Sept. 2019).

90. *Id.* at 12.

91. See Paul Kane, *Reid, Democrats Trigger "Nuclear" Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/HW8D-GCRU].

92. See Seung Min Kim, Burgess Everett & Elana Schor, *Senate GOP Goes 'Nuclear' on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017), <https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937> [https://perma.cc/99WB-J9PK].

93. Ben Eidelson deserves credit for noting this salutary feature of the filibuster and, in essence, predicting the outcome we have documented. See Eidelson, *supra* note 19, at 1020.

94. Author Data.

Third, the general norm of bipartisan support for highly qualified judicial nominees, irrespective of party, is gone. Throughout the Clinton, Bush II, and Obama administrations, judicial nominees confirmed by roll call vote received more than eighty-five votes on average. Close, party-line votes occurred, but they were generally reserved for the most controversial nominees. By contrast, the average Trump nominee confirmed by roll call has received just sixty-seven votes. Even highly qualified nominees frequently receive only a razor-thin majority. Judge Gregory Katsas—a Harvard Law graduate; former Supreme Court clerk, Assistant Attorney General, Deputy White House Counsel; and law firm partner who was rated “Well Qualified” by the ABA—received only fifty votes in favor of his nomination to the D.C. Circuit, with forty-eight against.⁹⁵ By contrast, the late Justice Ruth Bader Ginsburg was confirmed to the D.C. Circuit by voice vote in 1980 and to the Supreme Court by a 96-3 vote in 1993. The days of bipartisan support for qualified, if politically contentious, nominees appear long gone.

III.

CONCLUSION: THE COUNTER-MAJORITARIAN DIFFICULTY REVISITED

In 1962, Alexander Bickel posed the canonical formulation of the counter-majoritarian difficulty:

“[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercise control, not in behalf of the prevailing majority but against it. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.”⁹⁶

Since then, the counter-majoritarian problem “has been the central obsession of modern constitutional scholarship.”⁹⁷ Stated simply, the problem is how to reconcile our constitutional order’s foundational commitment to self-government with the power of an unelected branch to overrule the representative branches’ expressions of the popular will.

There have been three broad responses to the court’s perceived counter-majoritarianism. The first response has been to justify judicial counter-majoritarianism as check against the worst impulses of simple majorities and a

95. *Id.* Justice Kavanaugh—whose resume at the time of his nomination to the D.C. Circuit was quite similar to Katsas’s—received fifty-seven votes in favor of his nomination in 2006. But Kavanaugh’s nomination was far more controversial at the time, given questions about his involvement in spying and overseas detention and torture. See Editorial, *An Unqualified Judicial Nominee*, N.Y. TIMES (May 3, 2006), <https://www.nytimes.com/2006/05/03/opinion/03wed1.html> [<https://perma.cc/Y4LT-VG3J>]. The ABA also gave him its lower “Qualified” rating. See Author Data. Yet he still garnered more support than Katsas, a sign of the changing nature of judicial confirmations.

96. Bickel, *supra* note 5, at 16-17.

97. Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998).

way of enforcing fundamental democratic values.⁹⁸ Perhaps the most generative of these has been John Hart Ely's theory of "representation reinforcement," which posits a legitimate role for counter-majoritarianism premised on judges' commitment to representativeness and inclusive political processes.⁹⁹

The second, opposing response has been a criticism of judicial counter-majoritarianism on grounds of democratic legitimacy. This response entails an acceptance of Bickel's diagnosis of the counter-majoritarian difficulty but a rejection of his relative cheerfulness (or complacency) about it in favor of a concern about the "democratic deficit" inherent in a system of judicial review. This response reflects longstanding criticisms of the role of judicial counter-majoritarianism in democratic politics from the progressive era reformers discussed in Part I through present-day attacks of growing "juristocracy" and related efforts at court reform.¹⁰⁰

A final response has been mainly empirical, constructed by political scientists working to assess the extent and the effects of judicial counter-majoritarianism. Following the early lead of Robert Dahl, this third response has been neither a justification nor a criticism of judicial counter-majoritarianism but a denial of the counter-majoritarian difficulty altogether. It relies on empirical work to argue that, on the whole, judicial decision-making tracks public opinion and that the courts should be understood as popularly responsive in practice, if not by design.¹⁰¹

This third response sometimes broadens out to include the suggestion that the courts themselves, if not their particular judgments, enjoy broad public support in a counter-majoritarian role.¹⁰² Such "second-order" support for the judiciary as an institution is thought to mitigate the legitimacy problems with judicial counter-majoritarianism.¹⁰³

The counter-majoritarian difficulty of a minoritarian judiciary raises the stakes of this debate, and these responses are accordingly worth revisiting. Defenses of judicial counter-majoritarianism as democracy-promoting obviously become harder to sustain. For example, John Hart Ely's theory of representation reinforcement posits a judicial function premised on judges' commitment to

98. See generally Chemerinsky, *supra* note 5.

99. See generally ELY, *supra* note 5.

100. See, e.g., Juliegrace Brufke, *House Democrat to Introduce Bill Imposing Term Limits on Supreme Court Justices*, THE HILL (Sept. 25, 2020), <https://thehill.com/homenews/house/518195-house-democrat-to-introduce-bill-imposing-term-limits-on-supreme-court> [https://perma.cc/TP4C-PTZ5]; Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy> [https://perma.cc/5FTM-YQY2].

101. See *supra* note 5 and accompanying text.

102. See generally Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 J. CONST. L. 154 (2013).

103. See Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 184 (2011).

representativeness and inclusive political processes.¹⁰⁴ Cases enforcing voting rights such as *Harper v. Virginia State Board of Elections* and *South Carolina v. Katzenbach* are paradigmatic examples of this approach.¹⁰⁵ But minoritarian judges' very presence on the bench is the result of political process failures, and it is difficult to see why the carefully chosen nominees of a political minority will be committed to reining in the minoritarian structures that brought them to the bench in the first place. Moreover, the ideological screening and hyperpolarization of current confirmation processes calls into question whether new appointees will work to rectify shortcomings in democratic governance. It is worth observing that, in recent years, the Supreme Court has already begun to chip away at the protections of the Voting Rights Act.¹⁰⁶

Similarly, theories which deny the problem of judicial counter-majoritarianism by suggesting that unelected judges tend to track public opinion in practice are likely to become harder to credit. Empirically, the conformity of judicial decision-making with popular preferences, observed by Dahl and others, began to attenuate in the 1980s.¹⁰⁷ The political science literature has identified two main mechanisms by which that conformity was maintained—frequent judicial turnover and the shifting individual preferences of sitting judges—both of which are likely to be weakened in a minoritarian judiciary.¹⁰⁸ Judicial turnover presupposes selection of new judges in a way that is popularly responsive—as minoritarian selection will not be—while judges screened for ideological purposes are more likely to resist rather than follow public opinion beyond the court. While public polling shows 62 percent support for the Affordable Care Act,¹⁰⁹ 66 percent opposition to overturning *Roe v. Wade*,¹¹⁰ and

104. See generally ELY, *supra* note 5.

105. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (striking down Virginia's poll tax as unconstitutional); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding the constitutionality of preclearance rules under the Voting Rights Act of 1965).

106. See *Shelby County v. Holder*, 570 U.S. 529 (2013) (ruling unconstitutional the formula determining coverage of Voting Rights Act preclearance rules).

107. See William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 87 (1993) (arguing that “the reciprocal and positive relationship between long-term trends in public opinion and the Court’s collective decisions” held from 1956-1981, but begins to weaken after 1981); see also Helmut Norpoth, Jeffrey A. Segal, William Mishler & Reginald S. Sheehan, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994) (in which Norpoth and Segal criticize these findings and Mishler and Sheehan offer a defense of their method and conclusions).

108. Michael W. Giles, Bethany Blackstone, & Richard L. Vining Jr., *The Supreme Court in American Democracy*, 70 THE J. OF POL. 293 (2008).

109. Gaby Galvin, *Obamacare Support Hits Record High as Supreme Court Faces Ideological Shift*, MORNING CONSULT (Sept. 29, 2020), <https://morningconsult.com/2020/09/29/obamacare-support-polling-supreme-court/> [https://perma.cc/SZ5N-63UC].

110. Melissa Holzberg & Ben Kamisar, *Poll: Majority of Adults Don't Support Overturning Roe v. Wade*, NBC NEWS (Sept. 29, 2020), <https://www.nbcnews.com/politics/2020-election/poll-majority-adults-don-t-support-overturning-roe-v-wade-n1241269> [https://perma.cc/VY6W-DYV6].

67 percent support for same-sex marriage,¹¹¹ the 2016 Republican platform specifically states that its judicial appointments will “begin to reverse the long line of activist decisions – including *Roe*, *Obergefell*, and the Obamacare cases.”¹¹²

Indeed, there is some reason to believe that the empirical connection that Dahl and others documented in the post-war era depended on a series of contingent appointments by Republican presidents of moderate justices, which is unlikely to be repeated in an era of interest group mobilization around judicial appointments.¹¹³ Recent judicial support for LGBTQ rights and (more narrowly) to uphold the ACA seem to us exceptions that increasingly prove the rule rather than proof that a broad alignment between popular preferences and judicial decision-making continues to hold. Moreover, with Barrett’s confirmation, a Supreme Court acting with a wider 6-3 conservative majority may feel less pressure to rule according to popular will. Relatedly, the “second-order” support for judicial counter-majoritarianism seems unlikely to persist as the confirmation process consolidates minority rule, especially if that minoritarian judiciary systematically and radically diverges from majoritarian political preferences.

We are thus brought back to the heart of the counter-majoritarian difficulty but contemplated in light of a minoritarian judiciary. Justifying judicial counter-majoritarianism now seems to require a theory of interpretation that holds constitutional meaning to be fixed, like originalism, such that minoritarian judges can still speak for the “higher law” of the Constitution (now counterpoised to any current democratic mandate). This ideal depends on a rather simple view of the interpretive task, even on an originalist understanding.¹¹⁴ Moreover, to the extent that constitutional legitimacy rests not just on popular authorship, as originalism recognizes, but on present consent,¹¹⁵ the ideal is unsuited to a constitutional order founded on a theory of democratic legitimacy.¹¹⁶

For those unconvinced by such a theory of interpretation, the counter-majoritarian difficulty is rendered all the more acute by the rise of a minoritarian judiciary. It is thus unsurprising to see charges of “juristocracy” return to public discourse, along with a variety of doubts concerning the legitimacy or

111. Justin McCarthy, *U.S. Support for Same-Sex Marriage Matches Record High*, GALLUP (June 1, 2020), <https://news.gallup.com/poll/311672/support-sex-marriage-matches-record-high.aspx> [<https://perma.cc/Y9Q9-R77E>].

112. *Republican Platform 2016*, REPUBLICAN PLATFORM COMMITTEE 10 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf [<https://perma.cc/G64U-QVDD>].

113. See Jeff Greenfield, *The Justice Who Built the Trump Court*, POLITICO (July 9, 2018), <https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953> [<https://perma.cc/73TS-DVMF>].

114. See JACK M. BALKIN, *LIVING ORIGINALISM* (2011); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

115. See Grewal & Purdy, *supra* note 15, at 681-82.

116. Post & Siegel, *supra* note 44, at 383.

desirability of judicial supremacy—this time from the political left rather than the post-*Brown* right.¹¹⁷ Calls for court reform of various kinds are the predictable result of an unmooring of the judiciary from any popular warrant.¹¹⁸ A minoritarian judiciary can certainly follow Justice Marshall in proclaiming “that it is a *Constitution* we are expounding,”¹¹⁹ but the question of *whose* it is will become increasingly unclear.

117. See, e.g., Moyn, *supra* note 98; Jamelle Bouie, Opinion, *Down With Judicial Supremacy!*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/down-with-judicial-supremacy.html>. [<https://perma.cc/HK5H-79ZW>]. For an analysis of the problem of “juristocracy,” see generally RAN HIRSCHL, TOWARDS JURISTOCRACY (2009).

118. See, e.g., Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021); Epps & Sitaraman, *supra* note 23.

119. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).