Increasingly Antidemocratic? An Empirical Examination of the Supreme Court Nomination and Confirmation Process

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The countermajoritarian difficulty represents a central puzzle of the federal judicial system.[1] There is no well-established, one-size-fits-all answer to why an unelected branch of government can interpret, stymie, and even overturn the actions of the other, democratically-elected branches of government.[2] One of the more notable attempts to "solve" the countermajoritarian difficulty has been to argue that the judicial branch is not meaningfully, or truly, countermajoritarian at all.[3] This argument comes in two basic shapes.

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1. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 NYU L. REV. 333, 334 (1998) ("The countermajoritarian difficulty has been the central obsession of modern constitutional scholarship.") (internal quotation marks omitted); Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 61 (1989) (describing countermajoritarian difficulty as "part of the dominant paradigm of constitutional law and scholarship, a paradigm that emphasizes the democratic roots of the American polity and that characterizes judicial review as at odds with American democracy.").

2. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016 (1984) ("Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble.").

3. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586 (1993) ("[C]ourts do not trump majority will, or remain unaccountable to majority sentiment, nearly to the extent usually depicted. Measured by a realistic baseline of majoritarianism, courts are relatively majoritarian."). There have also been other efforts to answer the countermajoritarian difficulty. Some have asserted that the Court must act in a countermajoritarian manner in order to safeguard moral rights, *see* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996), or to remedy errors in the political process, *see* JOHN HART ELY, DEMOCRACY AND DISTRUST 75–76 (1980).

The first version posits that the Judiciary more often than not effectuates majority preferences, either initially or after sufficient backlash.[4] According to this argument, "the policy views on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[5] To support this theory, scholars have cited contemporaneous polling data showing that a majority of Americans supported the Supreme Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954), and that "six months before *Roe* was decided," "64% of the public supported abortion as a matter of personal choice."[6] In short, the Supreme Court's substantive opinions are essentially consistent with what the public wants—they are *substantively majoritarian*.[7]

The second version asserts that, even though the Court is unelected, each Justice is nevertheless appointed by a popularly-elected official (the President) and confirmed by a popularly-elected legislative body (the Senate).[8] These powers—the power to appoint and the power to advise and consent—provide a valence of democratic legitimacy to the federal judiciary. Even though American citizens do not "vote" for a Supreme Court justice, they do "vote" for a President and a Senate. In contrast to *substantive majoritarianism*, this second defense of Supreme Court review is inherently *procedural*: i.e., the Supreme Court is not truly countermajoritarian because democratic, majoritarian mechanisms undergird the appointment and nomination process.

After the death of Justice Antonin Scalia, Senator Mitch McConnell invoked a version of these procedural arguments to deny hearings and a floor vote to Merrick Garland, President Barack Obama's Supreme Court nominee. According to Senator McConnell's reasoning, the power to appoint and confirm should rest not with President Obama, who was seven years into his eight-year tenure, but with the next President and Senate after the 2016 election.[9]

Although Senator McConnell almost certainly marshaled these procedural arguments as cover for his political objectives,[10] his reasoning nevertheless has some facial purchase.[11] Even before Senator McConnell took his stand, legal

4. *Friedman, supra* note 3 at 586–609.

5. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

6. Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 122, 135 (2012).

7. THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 192–93 (1989) ("Overall, the evidence suggests that the modern Court has been an essentially majoritarian institution.").

8. *See* Or Bassok & Yoav Dotan, *Solving the Countermajoritarian Difficulty?*, 11 INT'L J. OF CONST. L. 13, 17 (2003).

9. Jeffrey Toobin, *Why Mitch McConnell Outmaneuvers Democrats at Filling the Supreme Court*, THE NEW YORKER (June 1, 2019).

10. *Id.*

11. In fact, as chair of the Judiciary Committee, then-Senator Joe Biden argued in 1992 that "President George Bush should delay filling a Supreme Court vacancy, should one arise [in an election year], until the presidential election was over, and that it was 'essential' that the Senate refuse to confirm a nominee to the court until then." Julie Hirschfield Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016).

academics asserted that "[j]udicial appointments often mirror the popular will" because, "[a]lthough federal judges are not elected, they are appointed by Presidents who stand for popular election" and must be "approv[ed] [by] the majority of a popularly elected Senate."[12] Accordingly, "[t]he appointment process [] pushes the Court back into line" if and when "the Court as a whole strays too often and too widely from the desires of the dominant factors in national politics."[13] Waiting to appoint a Supreme Court justice until after an election is just another way to tie the Court's makeup to majoritarian and democratic processes.

But is this sentiment right—is the Court, in fact, procedurally majoritarian? To answer this question, I explored the appointment and confirmation process behind each of the nine sitting Justices. I began by examining the Senate votes surrounding each Justice's confirmation.[14] Because each state has two Senators, I treated each Senator as representing one-half of their state's population. Accordingly, if both Senators voted to confirm a nominee, that nominee was credited with the support of the full population of the state. If both Senators voted to oppose a nominee, that nominee received no support from the state. If the Senators split, the nominee was accorded support from exactly one-half of the state's population.

If a Senator did not vote affirmatively for a nominee (e.g., by voting "Present"), I counted that Senator as voting against the nominee because a majority of the Senate must affirmatively consent to a particular nomination in order for the individual to receive his or her appointment. For purposes of this exercise, I employed population estimates through the U.S. Census Bureau's website with the population indexed to the year of a nominee's confirmation vote.[15]

Finally, I examined whether the nominating President received the largest share of popular votes in the preceding national election. My decision to use the popular vote rests on the fact that the Supreme Court's decisions apply nationally. By interpreting or overturning laws, regulations, and rules on a nationwide basis, state-by-state distinctions (and thus the Electoral College) are irrelevant for nearly all Supreme Court decisions.

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12. Bassok & Dotan, *supra* note 8 at 17; Friedman*, supra* note 3 at 612.

13. Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State,* 75 FORDHAM L. REV. 489, 490, 495 (2006).

14. I compiled the Senate votes using the Voteview database, available at www.voteview.com.

15. *See* U.S. CENSUS BUREAU, http://www.census.gov/popest/data/historical/index.html (for data from 2010 to 2019); https://www2.census.gov/programs-surveys/popest/tables/2000-2009/state/totals/ (for data from 2000 to 2009); and https://www2.census.gov/programs-surveys/popest/tables/1990-2000/state/totals/st-99-02.txt (for data from 1990 to 1999); *see also* Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 995–97 (2013) (employing similar methodology to evaluate the filibuster).

The results of my review are set forth below:

		President		*Senate*	
Justice	**Year**	**Nominating President**	**Largest Share of Popular Votes?**	**Senate Vote (Favor/Against)**	**Mean Share of Population Represented (Favor/Against)**
Brett Kavanaugh	2018	Donald Trump	No	50-50	44.2% / 55.8%
Neil Gorsuch	2017	Donald Trump	No	54-46	44.8% / 55.2%
Elena Kagan	2010	Barack Obama	Yes	63-37	65.1% / 34.9%
Sonia Sotomayor	2009	Barack Obama	Yes	68-32	72.4% / 27.6%
Samuel Alito	2005	George W. Bush	Yes	58-42	59.3% / 40.7%
John Roberts	2005	George W. Bush	Yes	78-22	63.7% / 36.3%
Stephen Breyer	1994	Bill Clinton	Yes	87-9	89.6% / 10.4%
Ruth Bader Ginsburg	1993	Bill Clinton	Yes	96-3	96.0% / 4.0%
Clarence Thomas	1991	George H.W. Bush	Yes	52-48	48.8% / 51.2%

This analysis provides several conclusions worth highlighting.

First, Justices Kavanaugh and Gorsuch are the only sitting members to have been nominated by a President who received fewer popular votes than his opponent in the immediately preceding national election.[16] That unique distinction is compounded when viewed through a wider historical lens. Over the past 130 years, there have been no other Justices appointed by a President who received fewer popular votes than his opponent in the preceding election. Not since Presidents Benjamin Harrison (four appointments) and Rutherford B. Hayes (two appointments) has there been examples of an analogous case. Four of those six Justices were confirmed by a voice vote, and the remaining two were confirmed by the Senate in an overwhelmingly comfortable margin.[17]

Second, Justices Kavanaugh, Gorsuch, and Thomas are the only members of the Court to have been confirmed by a Senate majority representing less than majority support from the U.S. population. There is a facially straightforward explanation behind how this happened: Senators from less populous states voted in favor of Kavanaugh, Gorsuch, and Thomas, while Senators from more

16. President Trump received three million fewer votes than Hillary Clinton. Sam Brasch, *After Stinging Presidential Loss, Popular Vote Movement Gains Momentum in States*, NPR (Feb. 24, 2019), https://www.npr.org/2019/02/24/696827778/after-stinging-presidential-loss-popular-vote-movement-gains-momentum-in-states. Although George W. Bush received fewer votes than Al Gore in 2000, he did not appoint any Supreme Court justices during his first term. He received a larger share of the popular vote than John Kerry in 2004, prior to his decision to appoint Justices Roberts and Alito.

17. Supreme Court Nominations (Present—1789), U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm

populous states voted against them. That result is yet another indictment of the disproportionate and unequal way that power is wielded in the Senate. As others have noted, in the context of the filibuster and other Senate-specific institutions, the Senate's "unequal allotment of power to voters from different states is among the most criticized aspects of the Constitution today," and "[t]he apportionment of the Senate plainly breaks with th[e] conception of political equality."[18]

Indeed, even the filibuster, a rule purportedly designed to promote bipartisan consensus, has become little more than a tool to promote political ends. Four of the current Justices (Thomas, Alito, Gorsuch, and Kavanaugh) were confirmed by fewer than 60 votes—i.e., below the threshold necessary for a filibuster-proof majority. In the cases of Justices Thomas and Alito, eleven and four Democratic Senators, respectively, crossed the aisle to vote to confirm their appointments.[19] More recently, when it was unclear whether any Democratic Senators would cross the aisle to vote for Justice Gorsuch, Senator McConnell ended the filibuster for Supreme Court nominees, thus paving the way for Justice Gorsuch's (and later Justice Kavanaugh's) confirmation despite considerable opposition.[20] The selective use (and later removal) of such procedural guardrails contributes to why Justices Kavanaugh, Gorsuch, and Thomas appear to be the only Justices in the past 130 years to have been confirmed by Senators representing less than a majority of the U.S. population. Most Supreme Court justices have been confirmed through voice vote or through a near unanimous roll call vote, including Justice Ginsburg and former Justices Kennedy, Scalia, Stevens, and O'Connor. Even recent nominees, such as Justices Roberts, Kagan, and Sotomayor received significant bipartisan support across the Senate. Again, one needs to go back to 1888, with the confirmation of Justice Lucius Lamar by a 32-28 vote, to find a nominee confirmed by Senators representing less than majority support from the U.S. population.[21]

Finally, taking the first two points together, the circumstances behind the Kavanaugh and Gorsuch nominations are truly remarkable. In nearly every case, a Supreme Court appointment has satisfied both prongs of procedural majoritarianism: (1) the nominating President received the largest share of the popular vote in the immediately preceding election, and (2) the Senators who

18. Eidelson, *supra* note 15, at 991, 993.

19. Vote Summary on the Nomination of Clarence Thomas, *Roll Call Vote 102nd Congress*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=102&session=1&vote=00220#name (last visited June 1, 2020); Vote Summary on the Nomination of Samuel Alito, *Roll Call Vote 109th Congress*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00002 (last visited June 1, 2020).

20. *See* Susan Davis, *Senate Pulls 'Nuclear' Trigger to Ease Gorsuch Confirmation*, NPR (Apr. 6, 2017), https://www.npr.org/2017/04/06/522847700/senate-pulls-nuclear-trigger-to-ease-gorsuch-confirmation

21. Supreme Court Nominations (Present—1789), U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm

voted to confirm the nominee represented a majority of the U.S. population. At the very least, until three years ago, *every* Supreme Court Justice satisfied at least one of these two prongs. Justices Kavanaugh and Gorsuch are the *only* Supreme Court Justices to have failed to satisfy both prongs.

Yet it is highly possible that the circumstances behind the Kavanaugh and Gorsuch nominations—i.e., the failure to satisfy either prong of procedural majoritarianism—will become a more frequent occurrence going forward. It is likewise worth investigating whether this phenomenon operates at other levels; specifically, whether more and more lower court judges are also being confirmed without satisfying either prong of procedural majoritarianism. The recent (and highly contentious) confirmations of Judge Justin Walker to the D.C. Circuit and Judge Allison Rushing to the Fourth Circuit stand as two particularly noteworthy examples on this point.[22]

In any event, in the immediate term, the polling data suggests that Democrats will "need to win the popular vote by about two-and-a-half percentage points to win the White House" in 2020.[23] In other words, Donald Trump may win re-election even though, once again, fewer American citizens vote for him than his Democratic opponent. Current projections likewise suggest that the Republican Party will retain its Senate majority.[24]

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Substantive and procedural majoritarianism almost certainly work hand in hand to buttress the Supreme Court's legitimacy. Indeed, although some degree of substantive countermajoritarianism is probably healthy, no one wants the Court to issue opinions that buck Congress and the President on every issue all the time. Similarly, untethering the Supreme Court from procedural majoritarianism may have significant ramifications for the institution's legitimacy.

Regarding the Supreme Court's legitimacy, it is unclear where the trend lines discussed above will go. Further scholarship will be needed to determine whether a significant weakening of procedural majoritarianism will diminish

22. *See, e.g.*, Eli Rosenberg & Deanna Paul, *The Senate Just Confirmed a Judge Who Interned at an Anti-LGBTQ Group. She'll Serve for Life.*, WASH. POST (Mar. 6, 2019), https://www.washingtonpost.com/dc-md-va/2019/03/06/senate-just-confirmed-judge-who-interned-an-anti-lgbtq-group-shell-serve-life/ (noting that Judge Allison Rushing was confirmed "by a vote that split along party lines," where "[a]ll 53 Republicans voted for her, while the rest of the Senate voted against her" except three Senators who were absent); Caroline Brehman, *Senate Confirms McConnell Protégé Justin Walker to D.C. Circuit*, BLOOMBERG LAW (June 18, 2020), https://news.bloomberglaw.com/us-law-week/senate-confirms-mcconnell-protege-justin-walker-to-d-c-circuit (describing Judge Walker as President Trumo's "most contentious judicial nomination this year," confirmed on the support of 51 Senators (all Republicans)).

23. *Who Will Be Donald Trump's Most Forceful Foe?*, THE ECONOMIST (Feb. 1, 2020).

24. 2020 Senate Election Forecast, POLITICO (last updated Apr. 19, 2020), https://www.politico.com/2020-election/race-forecasts-and-predictions/senate/.

public faith in the Supreme Court, by causing disillusionment in the appointment process or by producing decisions that are increasingly substantively countermajoritarian.