

## POLITICAL JUSTICE? PERCEPTIONS OF POLITICIZATION AND PUBLIC PREFERENCES TOWARD THE SUPREME COURT APPOINTMENT PROCESS

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**Abstract** To what extent should Supreme Court justices be appointed on the basis of ideology and politics as opposed to qualifications and experience only? We examine how Americans' preferences regarding this question are influenced by their perceptions of the Court as politicized in how it goes about its work. From a "backlash" perspective, such perceptions should diminish preferences for a political appointment process, whereas a "political reinforcement" perspective suggests an enhancement effect. National survey data show that a large segment of the public perceives of the Court in political terms and prefers that justices be chosen on political and ideological bases. Empirical evidence refutes the backlash hypothesis and supports the political reinforcement hypothesis; the more individuals perceive the Court in politicized terms, the greater their preferences for a political appointment process. Those who view the Court as highly politicized do not differentiate the Court from the explicitly political branches and therefore prefer that justices be chosen on political and ideological grounds. The results have implications for the public's perceptions and expectations of the Court as a "political" institution.

An often-cited normative ideal for the U.S. Supreme Court is that justices should be impartial, objective, and legalistic when making decisions. They should simply follow the law and set aside their personal ideological preferences. To achieve these goals, justices should be nominated and confirmed solely on the basis of "objective" factors, such as legal qualifications and prior

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experience, instead of “political” factors like partisanship, ideology, and how they may vote on issues in the future. The president, U.S. senators, and Supreme Court justices themselves frequently offer broad platitudes about how they strive for such a process. However, empirical research tells us that (1) ideological, strategic, and political considerations often influence justices’ decisions (e.g., Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Segal and Spaeth 2002); and (2) the Supreme Court appointment process is highly political (Maltese 1995; Epstein and Segal 2005; Epstein et al. 2006).

Why does the Supreme Court appointment process continue to deviate from the normative ideals discussed above? Active participants in the process—the president, senators, interest groups, the media—understand that justices’ decisions often turn on political and ideological considerations. Who is on the Court at any given time will have a significant impact on policy outcomes involving some of the most salient issues in American politics. Because of the Supreme Court’s important policymaking role and because justices have lifetime contracts, appointments are high-stakes political battles that have long-term policy consequences. Active participants in the process care so much about Supreme Court appointments *because they want someone on the Court who shares their ideological viewpoints on legal issues*.

To what extent does this reasoning extend to ordinary Americans? The notion that some citizens may actually *prefer* a political appointment process is antithetical to the traditional descriptors associated with the Court and its justices: objectivity and legalism which places the Court above the political and ideological fray (Casey 1974; Caldeira and Gibson 1992; Scheb and Lyons 2000, 2001; Gibson, Caldeira, and Spence 2003; Baird and Gangl 2006; Gibson and Caldeira 2009a, 2009b). Impartiality and law-driven decision-making undergird perceptions of institutional legitimacy and facilitate beliefs that the Court is an authoritative institution deserving of compliance. If citizens actually prefer that justices be chosen on the basis of ideology and politics, the implication is that they prefer justices who share their ideological viewpoints, meaning that they do not expect impartiality from justices; they actually prefer “political justice.”

The normative ideal regarding how justices actually should make decisions is related to the “myth of legality”—the perception that justices simply follow the law and are not influenced by their own political or ideological preferences (e.g., Casey 1974; Baird and Gangl 2006; Gibson and Caldeira 2009a, 2009b, 2009c). We refer to *perceptions of politicization* as the extent to which people perceive the Court as political and ideological, as opposed to impartial and legalistic. Although much of the public maintains relatively high regard for the Supreme Court, research—this study included—suggests that a large share of the American public views the Court in political and ideological terms (e.g., Scheb and Lyons 2000; Gibson and Caldeira 2009c). This article examines the consequences of these perceptions of politicization for people’s preferences regarding how Supreme Court justices should be selected.

## Competing Expectations

An intuitive expectation, which we call the “backlash hypothesis,” is that perceptions of Court politicization leave individuals disgusted with the state of judicial appointment politics, leading people to prefer an apolitical appointment process emphasizing experience and qualifications only. In other words, the perception of justices as political and ideological in their decision-making produces a backlash against an appointment process rooted in ideology and politics. This hypothesis bears a resemblance to Hibbing and Theiss-Morse’s (1995, 2002) perspective on how individuals’ perceptions of the political process—characterized largely by a dislike of overprofessionalization, disproportionate interest-group influence, and excessive bargaining and compromise—lead them to prefer “stealth democracy,” i.e., a preference for democratic procedures not on display for public viewing. People’s negative perceptions of the process lead them to prefer a correction to the status quo. Applying this logic to the Court, perceptions of Court politicization should lead individuals to prefer a restoration of the normative ideal discussed above: an apolitical appointment process based on qualifications and experience, not on ideology and politics.

A competing perspective, which we call the “political reinforcement hypothesis,” posits that individuals who perceive the justices as politicized and ideological in their decision-making do not differentiate the Court from the political rough-and-tumble that characterizes Congress and the presidency (e.g., Gibson and Caldeira 2009a, 2009b). Because they see the Court as “just another political institution,” they will prefer that Supreme Court justices be chosen on the basis of political and ideological factors—akin to members of Congress and the president. Supreme Court appointments, like congressional and presidential elections, are high-stakes political battles that have consequences for policy outcomes. Such individuals, then, resemble active participants in the actual appointment process. Because they embrace a portrait of justices as driven by political and ideological goals, they want justices who share their ideological viewpoints, *not* justices who are impartial and legalistic. Therefore, they prefer that justices be selected on the basis of political and ideological factors. Individuals who do differentiate the Court from the explicitly political branches and who believe that justices are impartial, law-driven decision-makers will prefer a more neutral appointment process emphasizing qualifications and experience instead of ideology and partisanship.

## Analysis

To test these competing expectations, we analyze data from the 2005 Annenberg Supreme Court Survey, sponsored by the Annenberg Foundation Trust and directed by the Annenberg Public Policy Center at the University of Pennsylvania and Princeton Survey Research Associates International (PSRAI). Interviews were conducted by Princeton Data Source, LLC (a PSRAI

associate). The survey interviewed a national, random sample of 1,504 adults between March 17 and April 18, 2005. RDD telephone interviews were conducted. The response rate was 41 percent.<sup>1</sup>

#### MEASUREMENT

To measure the dependent variable, *preferences for a political Supreme Court appointment process*, we rely on four survey items. Details on question wording for all variables are included in the appendix. The first three items measure preferences for revealing nominees' policy positions on important policy issues. The first item asks whether nominees "should be required to state their personal views on controversial issues" (=1) or whether they should "be allowed to refuse to state their views" (=0). The second item measures whether the president, when considering whom to nominate, should "only consider that person's legal qualifications and background" (=0) or "also consider how that nominee might vote on controversial issues" (=1). The third item is analogous to the second, except that it asks about the Senate's consideration of the nominee. The fourth item measures how important it is that President Bush's nominees agree with the respondent's position on abortion. This four-category ordinal variable (recoded from 0 to 1) ranges from "not at all important" to "very important." We build a summative scale that combines these four items. The scale was recoded from 0 to 1; Cronbach's  $\alpha = 0.66$ .<sup>2</sup> The scale represents a continuum of appointment preferences, ranging from a process that does not place an emphasis on a nominee's policy views (apolitical) to a process that heavily emphasizes those views (political).<sup>3</sup>

We measure our key independent variable, *perceptions of Court politicization*, using three survey items. The first two items ask respondents the degree to which they think the Supreme Court is "too mixed up in politics" and "favors some groups more than others." Each item includes four response categories, ranging from "strongly disagree" to "strongly agree." The third item asks whether one thinks the Court is "sometimes politically motivated" (=1) or

1. PSRAI's disposition codes are in line with AAPOR standards. PSRAI's response rate is the product of three rates: the contact rate (proportion of working numbers where an interview request was made), the cooperation rate (proportion of contacted numbers who did not refuse an interview), and the completion rate (proportion of initially cooperating interviews that were completed). The data are available at [www.annenbergpublicpolicycenter.org](http://www.annenbergpublicpolicycenter.org).

2. We additionally conducted a confirmatory factor analysis for these items utilizing logit (items 1–3) and ordered logit link functions (item 4). The CFI, TLI, and RMSEA for this analysis were .992, .984, and .085, respectively, indicating a good fit of the model to the data.

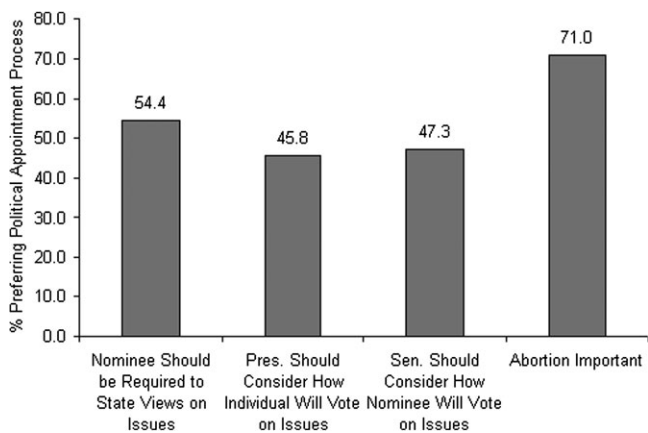
3. Our measure does not necessarily imply that respondents prefer a process based on either qualification *or* politics. Even those who prefer a political appointment process likely possess some reasonable threshold regarding qualifications. Indeed, two of our items ask whether the president or Senate should consider a nominee's policy views on controversial issues *in addition to* considering legal qualifications and background.

“objective and fair in its rulings” (=0). These three items were combined into a summative scale ( $\alpha = 0.73$ ).<sup>4</sup> The scale was recoded from 0 to 1, where higher values indicate stronger perceptions of politicization.

We include several political and demographic control variables, including ideology, party identification, religiosity, Court awareness, age, race, sex, and presidential approval. We discuss measurement of these variables in the appendix.

DESCRIPTIVE STATISTICS

Figure 1 displays the percentage of respondents answering the “political” option for each appointment preferences item. First, on whether a nominee should be required to state their views on legal issues, the mass public is fairly supportive overall—54.4 percent in agreement. Thus, on arguably the most stringent possibility examined herein, namely whether or not a potential nominee should be *required* to reveal preferences when under consideration, the public shows majority support. For the second item, on whether the president should consider how a potential nominee will vote on legal issues, 45.8 percent believe that the president should consider how a potential nominee might vote on controversial issues. Half (49.9 percent) believe that the president should consider only an individual’s legal qualifications and



**Figure 1. The Mass Public’s Preferences for a Political Supreme Court Appointment Process.**

4. Before creating the scale, the first two items were recoded from 0 to 1, where higher values indicate greater politicization.

background. Regarding whether the Senate should consider how a nominee might vote on controversial issues, 47.3 percent believe that it should, while 48.3 percent believe that the Senate should consider only a nominee's legal qualifications and background. As to the importance of abortion in Supreme Court appointments, 71 percent of the public stated that it was either very important or somewhat important that President Bush's nominees reflect their position on abortion. The mean of the summative scale combining these four items is 0.55. On the whole, these descriptive results suggest that a sizable share of the mass public holds preferences for a political appointment process.

Regarding perceptions of Court politicization, a substantial majority of the public perceives of the Court in politicized terms. Roughly 70 percent of the mass public either agrees or strongly agrees that the Supreme Court is "too mixed up in politics" and "favors some groups more than others." Moreover, about 64 percent of the public believes the Court is "sometimes politically motivated in its rulings." These results suggest support for more recent findings regarding a decline in the "myth of legality" among the public (e.g., Scheb and Lyons 2000; Gibson and Caldeira 2009c). Importantly, a large share of the public views the Court in political terms.

#### REGRESSION RESULTS

The OLS regression model presented in table 1 tests the competing expectations discussed earlier. The *F*-statistic is statistically significant, and the model explains about 9 percent of the variance in appointment preferences. Results from table 1 refute the backlash hypothesis and strongly support the political reinforcement hypothesis. The coefficient for perceptions of politicization is positive, statistically significant, and potent: The more individuals perceive the Court in politicized terms, the greater their degree of support for an appointment process that emphasizes political and ideological factors. A change from the lowest to the highest value of perceptions of politicization produces a change of one-fifth of the entire scale of appointment preferences, *ceteris paribus*.

Thus, it is not the case that perceptions of Court politicization produce a backlash against an appointment process rooted in ideology and politics. Instead, such perceptions serve to reinforce preferences for a political appointment process. This supports the reasoning that those who see the Court as politicized do not differentiate the Court from Congress and the presidency and thus prefer that justices be chosen on the same political and ideological bases used for these other institutions. Perceiving the Court as politicized, as opposed to impartial and legalistic, leads one to prefer "political justice."

Turning briefly to control variables, results show that Court awareness leads one to prefer a more apolitical process (a marginally significant effect,  $p < .07$ ),

**Table 1. The Impact of Perceptions of Court Politicization on Preferences for a Political Supreme Court Appointment Process** (standard errors in parentheses)

Dependent Variable: Preferences for a Political Supreme Court Appointment Process	
Independent Variables	Coef.
Perceptions of Court Politicization	0.21** (0.03)
Court Awareness	-0.08 (0.04)
Ideology	-0.33* (0.13)
Ideology Squared	0.33** (0.12)
Party Identification (omitted category: Independent)	
Republican	0.03 (0.02)
Democrat	0.00 (0.02)
Religiosity	0.07* (0.03)
Political Trust	0.08* (0.04)
Age	0.08 (0.04)
Hispanic	0.00 (0.04)
Black	0.04 (0.03)
Female	0.07** (0.02)
Education	0.00 (0.03)
Presidential Approval	-0.05 (0.03)
Intercept	0.37** (0.06)

OLS estimates;  $N = 1341$ ;  $F = 9.31$ ,  $p < .001$ ;  $R^2 = 0.09$ .

NOTE.—*Perceptions of Court Politicization* is a summative scale (recoded to range from 0 to 1) based on respondents' answers to three survey items: (1) whether the Court gets "too mixed up in politics"; (2) whether the Court "favors some groups more than others"; and (3) whether the Court is "fair and objective in its rulings" or "sometimes politically motivated in its rulings." See the text and appendix for more details.

\*  $p < .05$ .

\*\*  $p < .01$ .

which is in line with the “to know the Court is to love it” effect (e.g., Caldeira and Gibson 1992; Gibson, Caldeira, and Baird 1998).<sup>5</sup> Vis-à-vis a quadratic operationalization, ideology exhibits a nonlinear “ideological strength” effect. Strong liberals and conservatives possess the most intense preferences for a political appointment process, whereas moderates possess the strongest preference for an apolitical process.<sup>6</sup> Party identification exhibits no significant impact, once controlling for and separating out the effects of ideological strength.<sup>7</sup> Religious Americans possess a high degree of support for a political appointment process, arguably because they want justices on the Court who share their political views on salient religious issues that come before the Court. Somewhat counterintuitively, political trust leads individuals to defer to the actions of people in these institutions in how they conduct their business, which includes conducting a political appointment process. Among demographic variables, women have significantly stronger preferences for a political appointment process than do men.

## Conclusion

Our study reveals two key findings. First, a significant share of the American public perceives of the Court in politicized terms and prefers that justices be chosen on political grounds. Descriptive statistics reveal that a supermajority of the public views the Court in a political light. Many in the public do not associate the Court with pure impartiality and objectivity but instead see the Court as a “political” institution. Moreover, much of the mass public actually *prefers* that justices be chosen on the basis of political factors.

Second, perceptions of Court politicization enhance preferences for a political appointment process. Empirical evidence refutes the backlash hypothesis—bearing resemblance to a “stealth democracy” perspective (Hibbing and Theiss-Morse 2002)—that citizens who perceive the Court as politicized will prefer to restore its legalism and objectivity through a more apolitical appointment process emphasizing qualifications and experience only. We instead find strong evidence for the political reinforcement hypothesis. Individuals who perceive the Court as politicized do not differentiate the Court from the politics characterizing the other branches (e.g., Gibson and Caldeira 2009a). Therefore, they prefer that justices be chosen on political and ideological grounds. Because

5. In a separate model, we interacted Court awareness with perceptions of politicization. The interaction was not statistically significant ( $p = .16$ ), but the results showed that awareness enhanced the impact of perceptions of politicization on appointment preferences.

6. The predicted values ( $\hat{y}$ ) of appointment preferences for associated values of ideology—ranging from “very liberal” to “very conservative”—are .61, .55, .53, .55, and .61.

7. Table 1 shows that the Republican and Democrat dummies, which are effects relative to Independents, are statistically insignificant. When changing the baseline group to Democrat, the coefficient for the Republican dummy (.03), which compares Republicans and Democrats, is statistically insignificant ( $p = .27$ ).



these individuals view the Court as another political battleground where important policy decisions are made, they want justices on the Court who share their views on these key policy issues.

A great share of research devoted to understanding the public's views of the U.S. Supreme Court has generated an optimistic picture: The public differentiates the Court from the other institutions of American government, providing a foundation for the enduring legitimacy critical to the Court's ability to function effectively. Our work challenges this view to an extent. A large share of the public fails to differentiate the Court from politics. The more citizens see the Court in political terms, the more they prefer that the processes by which justices are appointed be political and ideological in nature. This is a particularly important finding because, over time, perceptions, process, and legitimacy are all intertwined. If large segments of the public *prefer* a political appointment process, then their representatives in government will be less bound to norms of objectivity in the appointment process. To the degree that the process then becomes more visibly politicized, we should expect citizens' differentiation of the Court from the explicitly political branches to decrease, leading to even further politicization, and so on. It is important to continue examining the extent to which the public identifies the Court with politics and ideology and, importantly, how these perceptions have consequences for preferences and expectations regarding the Court that extend beyond preferences for how justices are appointed.

## Appendix: Question Wording and Measurement

### 2005 Annenberg Supreme Court Survey

NOTE.—Numbers in parentheses represent the percentage of respondents giving the particular response.

#### Appointment Preferences (see figure 1 and text for frequencies)

- (1) Some recent Supreme Court nominees have refused to state their personal views on some controversial issues facing the Court. Do you think Supreme Court nominees should be required to state their personal views on controversial issues or do you think that they should be allowed to refuse to state their views?
- (2) The president of the United States is responsible for nominating judges to the Supreme Court, and the Senate is responsible for confirming the nominee. When the president chooses a Supreme Court nominee, should he consider only that person's legal qualifications and background or should he also consider how that nominee might vote on controversial issues?

- (3) When the Senate is reviewing the president's nominee for the Supreme Court, should the Senate consider only that person's legal qualifications and background or should the Senate also consider how that nominee might vote on controversial issues?
- (4) How important is it to you that President Bush's nominees agree with your position on abortion—very important, somewhat important, not very important, or not at all important?

**Perceptions of Court Politicization (see text for frequencies)**

- (1) Thinking about the current Supreme Court, please tell me if you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the following statement—The Supreme Court gets too mixed up in politics.
- (2) Thinking about the current Supreme Court, please tell me if you strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the following statement—The decisions of the Supreme Court favor some groups more than others.
- (3) Which of the following statements comes closer to your beliefs about the Supreme Court? (1) The Court is fair and objective in its rulings; or (2) The Court is sometimes politically motivated in its rulings.

**Awareness of Supreme Court** (numbers for items 1–4 represent percentage correct)

- (1) Do you happen to know who the current Supreme Court Chief Justice is? (27.9)
- (2) There are currently two Supreme Court Justices who are women. Do you know the names of either or both of these Justices? (36.0)
- (3) Can the U.S. Supreme Court declare an act of Congress unconstitutional or not? (57.3)
- (4) If the Supreme Court rules on a decision 5 to 4, does this mean the decision is final, the decision is too close and needs to be sent to Congress, or the decision is too close and needs to be sent back to the lower courts? (51.7)
- (5) How well do you feel that you understand the Supreme Court's rulings—very well (7.0), somewhat well (51.8), somewhat poorly (30.0), or very poorly (9.6)?
- (6) And to what extent do you follow the decisions of the U.S. Supreme Court—a great extent (9.1), a moderate extent (35.2), some extent (42.2), or not at all (12.2)?

We created a summative scale and recoded it from 0 to 1, where higher values reflect greater awareness of the Court ( $\alpha = 0.66$ ).

**Ideology:** In politics today, would you describe your views as very liberal (4.0), liberal (23.9), moderate (34.2), conservative (28.1), or very conservative (9.8)?

We recoded the variable to range from 0 (very liberal) to 1 (very conservative). We specified a quadratic operationalization, which entails including both the ideology variable and ideology squared.

**Party Identification:** In politics today, do you consider yourself a Republican (33.4), Democrat (33.9), or Independent (32.7)?

We include the Democrat and Republican dummy variables in the model, which means that their effects are relative to Independents. The traditional party identification measure, which assesses strength of partisanship and whether Independents are “leaners,” was not asked in the survey.

**Religiosity:** How often do you attend religious services, apart from special events like weddings and funerals—more than once a week (14.6), once a week (28.7), once or twice a month (14.4), a few times a year (24.2), or never (18.2)? [recoded from 0 to 1; higher values = higher religiosity]

**Political Trust:** Generally speaking, how much do you trust the federal government as a whole to operate in the best interests of the American people—a great deal (12.1), a fair amount (50.1), not too much (26.9), or not at all (10.9)? [recoded from 0 to 1; higher values = greater trust]

**Age:** Respondents were asked how old they were. The mean age was 50. When recoded from 0 to 1, the mean age was 0.41. [recoded from 0 to 1; higher values = older]

**Race:** The survey asked respondents’ race or ethnicity: Black (9.6), Hispanic (5.2), or White or Asian (85.2). The *Hispanic* and *Black* dummy variables are included; the effects of these dummies are relative to Whites. The baseline category also includes the very small number of respondents who were Asian American (25 people) and those who responded “other” (51). Results employing alternative operationalizations of race produced substantively and statistically similar findings.

**Sex:** Female: 51.9; male: 48.1.

**Education:** What is the highest degree you completed in school—high school degree or less (36.6), some college (25.1), college graduate (19.0), graduate coursework (8.8), or graduate degree (10.6). [recoded from 0 to 1; higher values = more education]

**Presidential Approval:** How do you feel about the way the president is handling his job? Is he doing a very good (16.0), good (26.2), fair (26.9), or poor job (30.9)? [recoded from 0 to 1; higher values = greater approval]

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